

# Measuring the Nexus: The Relationship Between Minority Ownership and Broadcast Diversity After *Metro Broadcasting*

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## I. INTRODUCTION

In *Metro Broadcasting, Inc. v. FCC*,<sup>1</sup> the Supreme Court found that the federal government had a compelling interest in promoting the diversity of viewpoints via broadcasting. In addition, the Court found that ownership of broadcast stations by minorities promoted the government's compelling interest. The decision of the Court in *Adarand Constructors, Inc. v. Pena*<sup>2</sup>

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1. *Metro Brdcst.*, 497 U.S. 547 (1990).

2. *Adarand*, 515 U.S. 200 (1995).

overruled the *Metro Broadcasting* Court's use of intermediate scrutiny to analyze the constitutionality of the federal government's race-based ownership programs but not *Metro Broadcasting*'s finding of a nexus between minority ownership and diversity of viewpoint.<sup>3</sup> However, the recent *Lutheran Church-Missouri Synod v. FCC*<sup>4</sup> decision dismissed the government's arguments that a nexus exists between minority employment in broadcast stations and greater diversity in broadcast programming, and that the government has an interest in fostering such diversity.<sup>5</sup> The Federal Communications Commission (FCC or Commission) has consistently argued that a nexus exists between minority employment and viewpoint diversity, and that minority employment promotes minority ownership. Similarly, the Commission has argued that a nexus exists between minority ownership and viewpoint diversity.<sup>6</sup> Consequently, it is fair to say that the *Lutheran*

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The . . . propositions undermined by *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments . . . protect persons, not groups. It follows from that principle that all governmental action based on race—a group classification long recognized as “in most circumstances irrelevant and therefore prohibited”—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection . . . has not been infringed. . . . Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. . . . To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.

*Id.* at 227 (citation omitted).

The majority today overrules *Metro Broadcasting* only insofar as it is “inconsistent with [the] holding” that strict scrutiny applies to “benign” racial classifications promulgated by the Federal Government. The proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case—and I do not take the Court's opinion to diminish that aspect of our decision in *Metro Broadcasting*.

*Id.* at 258 (Stevens, J., dissenting) (citation omitted).

4. *Lutheran Church*, 141 F.3d 344 (D.C. Cir. 1998).

5. “The FCC argued that the affirmative action portions of its EEO policies are intended to foster diversity in radio and television programming. . . . [T]he D.C. Circuit rejected the FCC's arguments and ruled that the Commission had failed to explain sufficiently how its rule serves the public interest.” See Frank W. Lloyd & Janell F. Coles, *D.C. Circuit Overturns FCC Broadcast EEO Rules*, CABLE TV & NEW MEDIA L. & FIN., Apr. 1998, at 1, 2.

6. “‘We believe urban radio stations are institutions that are an important part of the fabric in a community,’ Mr. Love said. ‘It's bad for the community when the owner of a media as important as radio loses diversity.’” Andrea Adelson, *Minority Voice Fading for Broadcast Owners*, N.Y. TIMES, May 19, 1997, at D9. “‘The unfortunate reality in our nation today is that race and gender still matter,’ said Bill Kennard, the FCC's first black chairman. ‘We all benefit when broadcasting, our nation's most influential medium, reflects the rich cultural diversity of our country.’” Patricia Rice, *Court Throws Out FCC Minority Hiring Rules*, ST. LOUIS POST-DISPATCH, Apr. 15, 1998, at A1.

*Church* opinion may be read to call into question the nexus between equal employment opportunity and diversity and, by implication, the nexus between ownership and diversity as well.

The empirical data and findings upon which the *Metro Broadcasting* Court relied are found in the FCC-initiated survey and the Congressional Research Service's (CRS) analysis thereof. Subsequent to *Metro Broadcasting*, little research has been conducted to ascertain whether a nexus exists. Thus, at present, the FCC survey data and the CRS findings constitute the primary data and analysis upon which the *Metro Broadcasting* Court's findings rest. However, given the challenge of the *Lutheran Church* opinion and potentially significant changes in the regulation and operation of the broadcast market, sole reliance on *Metro Broadcasting*'s holdings may be ill advised, and a new study documenting the continued existence of the nexus may be warranted. Moreover, a new study could expand upon the issue that the CRS study and the studies that build upon its findings were unable to reach.

## II. THE CASE LAW

### A. Lutheran Church *Opinion*

In its *Lutheran Church* opinion, a unanimous circuit court panel expressed substantial skepticism that a nexus exists between minority employment and viewpoint diversity. The circuit court specifically stated:

The Commission has unequivocally stated that its EEO regulations rest solely on its desire to foster "diverse" programming content. . . . *The Commission never defines exactly what it means by "diverse programming."* . . . *The government's formulation of the interest seems too abstract to be meaningful.*<sup>7</sup>

. . . .

Justice O'Connor's . . . dissent in *Metro Broadcasting*, which described the government's interest as "certainly amorphous," protested: "The FCC and the majority of this Court understandably do not suggest how one would define or measure a particular viewpoint that might be associated with race, or even how one would assess the diversity of broadcast viewpoints."<sup>8</sup>

Regarding the argument that *Metro Broadcasting* retains viability as precedent for the assertion that the government has an interest in fostering diversity, the circuit court stated that:

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7. *Lutheran Church*, 141 F.3d at 354 (emphasis added) (citation omitted).

8. *Id.* at 355 (emphasis added) (quoting *Metro Brcdst.*, 497 U.S. 547 (O'Connor, J., dissenting)).

[A]lthough *Metro Broadcasting's* adoption of intermediate scrutiny was overruled in *Adarand*, its recognition of the government interest in "diverse" programming has not been disturbed by the Court. The government thus argues that we are bound by that determination.

We do not think that proposition at all evident. Even if *Metro Broadcasting* remained good law in that respect, it held only that the diversity interest was "important." We do not think diversity can be elevated to the "compelling" level . . . . *It is true that the Court, denying that the supposed "link between expanded minority ownership and broadcast diversity rest[s] on impermissible stereotyping," thought the Commission and Congress had produced adequate evidence of a nexus between minority ownership and programming that reflects a minority viewpoint. Yet the Court never explained why it was in the government's interest to encourage the notion that minorities have racially based views.*<sup>9</sup>

### B. *The Metro Broadcasting Dissent and the Current Supreme Court*

The dissent in *Metro Broadcasting* found no "credible" nexus between ownership and diversity.<sup>10</sup> It also explicitly challenged the assertion that the FCC or Congress had ever successfully established the existence of a nexus.<sup>11</sup> Finally, the dissent argued that the market controls expression by ownership even if a minority owner might prefer to program differently.<sup>12</sup>

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9. *Id.* at 354-55 (emphasis added) (citation omitted) (quoting *Metro Brdct.*, 497 U.S. at 579).

10. *Metro Brdct.*, 497 U.S. at 626.

The FCC's policies assume, and rely upon, the existence of a tightly bound "nexus" between the owners' race and the resulting programming. . . . For argument's sake, we can grant that the Court's review of congressional hearings and social science studies establishes the existence of some rational nexus. But even assuming that to be true, the Court's discussion does not begin to establish that the programs are directly and substantially related to the interest in diverse programming. That equal protection issue turns on the degree owners' race is related to programming, rather than whether any relation exists.

*Id.*

*To the extent that the FCC cannot show the nexus to be nearly complete, that failure confirms that the chosen means do not directly advance the asserted interest, that the policies rest instead upon illegitimate stereotypes, and that individualized determinations must replace the FCC's use of race as a proxy for the desired programming.*

*Id.* (O'Connor, J., dissenting) (emphasis added).

11. *Id.* at 627.

[T]he FCC had absolutely no factual basis for the nexus when it adopted the policies and has since established none to support its existence. Until the mid-1970's, the FCC believed that its public interest mandate and *1965 Policy Statement* precluded it from awarding preference based on race and ethnicity, and instead required applicants to demonstrate particular entitlement to an advantage in a comparative hearing.

Regardless of whether the current majority would view an FCC initiative to create a revised minority ownership policy as exclusively raising Fifth Amendment due process concerns or both due process and First Amendment concerns, the establishment of a demonstrable, quantifiable nexus is critical to FCC and/or congressional efforts to justify the policies. First, the members of the *Metro Broadcasting* dissent are now part of the majority of the Court. Second, reliance on the prior studies leaves the policies' advocates with little empirical evidence addressing the actual impact of market and regulatory changes on minority broadcasters.

### III. BROADCASTING MARKET CHANGES

There have been significant changes in the broadcast market since *Metro Broadcasting* was decided based on, *inter alia*, the CRS study in the

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*Id.* (citation omitted). The *TV 9* court, "based on nothing other than its conception of the public interest, . . . required that an applicant's membership in a minority group be presumed to lead to greater diversity of programming." *Id.* (citing *TV 9, Inc. v. FCC*, 495 F.2d 929 (1973)).

Principally relying on the panel's presumed nexus between race and programming, the FCC in its *1978 Policy Statement* acquiesced and established the policies challenged in these cases. In the mid-1980's, the FCC, prompted by this Court's decisions indicating that a factual predicate must be established to support use of race classifications, unanimously sought to examine whether, and to what extent, any nexus existed between an owner's race and programming. As the Chairman of the FCC explained to Congress:

To the extent that heightened scrutiny requires certain factual predicates, we discovered that notwithstanding our statements in the past regarding the assumed nexus between minority or female ownership and program diversity, a factual predicate has never been established.

For example, the Commission has at no time examined whether there is a nexus between a broadcast owner's race or gender and program diversity, either on a case-by-case basis or generically. We had no reason to, because the court in *TV 9* told us we could, indeed must, assume such a nexus.

*Id.* at 628 (citation omitted) (quoting *Minority-Owned Broadcast Stations: Hearing on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong. 16 (1986) (statement of Mark Fowler, Chairman of the FCC)). "Through the appropriations measures, Congress barred the FCC's attempt to initiate that examination." *Id.*

12. *Id.* at 619 (O'Connor, J., dissenting).

[T]he FCC's focus on ownership to improve programming assumes that preferences linked to race are so strong that they will dictate the owner's behavior in operating the station, overcoming the owner's personal inclinations and regard for the market. This strong link between race and behavior, especially when mediated by market forces, is the assumption that Justice Powell rejected in . . . *Bakke*. . . Justice Powell . . . conclud[ed] that the assumption was unsupported and that such individual choices could not be presumed from ethnicity or race.

*Id.* (citation omitted). "[T]he market shapes programming to a tremendous extent. Members of minority groups who own licenses might be thought, like other owners, to seek to broadcast programs that will attract and retain audiences, rather than programs that reflect the owner's tastes and preferences." *Id.* at 626 (citation omitted).

late 1980s. It has been forcefully asserted that the FCC authored deregulatory policies,<sup>13</sup> including relaxation of the multiple ownership<sup>14</sup> and the duopoly rules, as well as creation of the Local Market Agreements (LMA) policy<sup>15</sup> have affected the ability of minority and majority broadcasters to compete.<sup>16</sup> These changed circumstances are problematic in that it is not

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13. "The sparse ranks of minority radio and television station owners are growing thinner, a result of the consolidation frenzy in the radio industry compounded by the elimination of a Federal tax credit that favored minority groups." Adelson, *supra* note 6.

14.

The Telecommunications Act of 1996 set off a torrent of mergers in the radio industry by relaxing the limits on radio ownership to as many as eight stations in a single market [and by eliminating national ownership limits]. Radio giants quickly emerged, such as Westinghouse's combination of CBS Radio with Infinity Broadcasting.

While small by comparison, two of the largest minority-owned radio groups, U S Radio Inc. of Philadelphia and Lombard/Nogales Partners of San Francisco, which together had 35 radio stations, were also sold. Those two deals whittled to 300 the number of broadcast properties controlled by minority owners. That number represents just 3 percent of the nation's 11,400 stations.

*Id.*

[I]f this sort of deregulation goes to the extent that the legislators are talking about, I think it will dramatically change the complexion of the local television industry forever. If these kind of changes go through and the large companies that emerge from it are allowed to vertically integrate to the extent that I believe they will, the uniqueness of broadcasting—and local broadcasting—and the serving of the public interest will go by the wayside. Those emerging companies aren't even going to be interested in what those words mean, for the most part. They're going to be much more interested in driving subscription rates, usage fees, advertising and a bunch of niche services than in serving the local community.

Kim McAvoy & Don West, *Going It Alone with Post-Newsweek's Bill Ryan: The Battle over Bigness: Broadcasting's Fatal Attraction*, BRDCST. & CABLE, May 22, 1995, at 50.

15.

[Duopoly and LMAs] get you to the same place as allowing the [ownership] caps to grow almost unfettered. There are several companies out there that are positioning themselves as entrepreneurs. They are very big companies, hundred-million-dollar profit companies, by the way, that are saying: "Well, we're just little entrepreneurs and we're trying to grow this." They're also companies that, for the most part, are not in it for the long haul. They're probably going to build these things up as best they can and flip them. . . . [T]o disguise duopolies as LMAs, as is being done right now, is a farce. That gets you to the same place as allowing the networks or others to own 50% of the country or whatever. It's going to be fewer voices and less diversity.

McAvoy & West, *supra* note 14, at 51.

16.

The Telecommunications Act of 1996 has "driven a nail into a coffin of ownership (prospects) for minorities". . . . [P]olicy makers [are] misguided in their belief that "true diversity will come with more competition and broader distribution channels." The Telecom Act, which has opened the door to media concentration, has shown a different outcome. Squeezing out minority owners of small telecom businesses—a group that is already disproportionately under-represented.

known how they may have affected programming decisions and the diversity of available programming choices.<sup>17</sup> However, it is known that there is concern that service to minority communities may have suffered as a result.<sup>18</sup>

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Matt Pottinger, *BET President Says Telecom Act Damaging Minority Ownership Prospects*, STATES NEWS SERVICE, Jan. 16, 1997 (quoting Debra Lee, President and Chief Operating Officer of BET Holdings, Inc.). "Minority owners are expected to continue to sell their broadcasting holdings because their buying power is dwindling without the edge that the tax credit gave them as station prices escalated. Congress eliminated the tax credit in 1995." Adelson, *supra* note 6.

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[I]t is unclear how either minority ownership or employment influences programming. "There is very little research yet determining how their presence in the programming and news-making process affects decisions on news coverage and entertainment. . . . The assumption has been that it would. But others feel that the medium and career pressures mold the individuals."

Geraldine Fabrikant, *Slow Gains by Minority Broadcasters*, N.Y. TIMES, May 31, 1994, at D1 (quoting Dr. David M. Rubin, Dean of the S.I. Newhouse School of Public Communications at Syracuse University).

18. Matthew S. Scott, *Can Black Radio Survive an Industry Shakeout?*, BLACK ENTER., June 1993, at 254.

From talk to gospel to plugs for dollar-a-plate church dinners, black radio has done more than entertain us—it's been the only place on the dial we could call our own.

. . . .  
 . . . To help the industry rebound, the FCC last fall approved a strategy for "consolidation." The three-pronged approach centers around "duopoly," which allows one company to own up to two AM and two FM stations in the same market. Another key peg is the newly sanctioned LMAs (local market agreements), which encourage stations to forge partnerships. Their appeal seems clear enough: Under duopoly, four stations owned by one company could woo advertisers with a bigger share of the market *and* with deeply discounted ads. Under an LMA, two independent stations could save costs by combining their sales forces or having one general manager oversee more than one station.

The FCC has pitched the new rules as a win-win proposition, betting that consolidation will help the industry recoup the chunk of ad dollars it is losing to the cable and TV markets. But FCC Commissioner Andrew C. Barrett—the only black among five commissioners—has strongly opposed the rules change. The lone dissenter, he argues that "Consolidation hurts black station owners because it can be used to establish regional pockets of concentration. . . . These regional networks could be very attractive to advertisers, having a negative impact on black radio stations." Consolidation, he says, makes small independent black-owned stations a harder sell to advertisers.

Take KJLH, for example. Despite its strong identity as Los Angeles' black community station, its weak FM signal limits its area coverage to just 2% of audience share. If duopolies catch on in Slade's market with the resulting stations using black formats, they stand to offer advertisers an irresistible package: cheap ads and a new crop of black listeners. This could slice into KJLH's revenue base.

Says Slade: "If the big boys can own two or more FM outlets in the same market, they can corner a [black] format and put local properties out of business." Once that happens, she and others argue, the fallout will be painful. Untested black artists won't have an outlet, black listeners won't have a voice and

This lack of currency on the part of the CRS would be one of the first vulnerabilities exploited by opponents of any reformulated minority ownership policies.

#### IV. THE STUDIES

##### A. *The FCC/CRS Study*

While the CRS study was a very good effort, it is limited as a survey results document. For instance, it did not survey broadcasters for any demographic data about their communities of license.<sup>19</sup> The FCC questionnaire contains some potentially open-ended questions—such as what those broadcasters surveyed defined as minority programming.<sup>20</sup> The study also relies heavily on broadcast entertainment program format data. In this regard, sole reliance on the CRS study may unwittingly favor the “marketplace control” model of diversity espoused by the dissenters in *Metro Broadcasting*.<sup>21</sup> It also misses a critical opportunity to document the distinction between entertainment and informational (news, public affairs, and community service) programming that some minority owners and others assert is at the heart of service to communities.<sup>22</sup>

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majority stations can hoard profits without any incentive to serve the minority community.

*Id.* at 256, 258.

19. Jeff Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. CAL. L. REV. 841, 848 (1995).

20. *Id.* at 872. It may be argued, however, that the queries in question asked whether the subjects broadcast programming that targeted minority audiences.

21. “Most listeners would be hard pressed to detect on-air changes stemming from the decline in broadcast ownership among minority groups, which slipped by 10 percent last year by most estimates. Programs that cater to African-American and Spanish-speaking listeners are among the most popular formats.” Adelson, *supra* note 6.

22. “We believe urban radio stations are institutions that are an important part of the fabric in a community. . . . It’s bad for the community when the owner of a media as important as radio loses diversity.” *Id.* (quoting Ross Love, financial backer of Blue Chip Broadcasting, Ltd.).

I feel it’s imperative that minorities own and operate media, so that we can have input. Not necessarily to control the information we receive, but to ensure the information, specifically news, is pertinent and relevant to our audience. . . . This is not to say that “majority media” doesn’t do an adequate job. But I don’t think they’re as sensitive to minority needs as our listeners want and deserve.

Our listeners hold us accountable . . . for everything we do or don’t do. . . . We are very accountable, and we’ve paid a high price for that.

Karen Slade, *A Voice—and Ear—to the Community*, L.A. TIMES, Mar. 21, 1993, City Times (Magazine), at 22.

[T]here’s a whole bunch of broadcasters out there who take their job very, very seriously—serving the public interest and serving their communities. Radio and television guys who are well known and well thought of in their communities,



### B. *The Dubin/Spitzer Study*

The Dubin/Spitzer study builds upon the CRS study and supports conclusions that a nexus exists; however, the data upon which both CRS and Dubin/Spitzer rest is over a decade old. The data predates two increases in the multiple ownership limits; deregulation of duopoly regulations; the development of LMAs; the development of new networks such as UPN and WB with their minority-oriented programming; and the increase in majority-owned, minority-oriented radio formatted stations at a time of decreasing minority ownership.<sup>23</sup> The latter format-related developments directly underscore the need to determine whether minority ownership (and employment) makes a difference in format, particularly in news, public affairs, and community service programming. All of these developments must be acknowledged and accounted for if new minority ownership policies are to find support. For these reasons, a new study is urgently needed.

### C. *The New Survey*<sup>24</sup>

Through a telephone survey administered to news directors at radio and television stations around the country, the researchers seek to identify differences in news and public affairs programming that may exist between minority-owned and majority-owned broadcast stations. Because there are only 205 news directors (or persons with an equivalent position) employed at minority-owned stations, the researchers are attempting to interview all of them. Given the difficulties that attend the administration of questionnaires,

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people who have a high profile and who care. And I absolutely believe that 10 years from now they will be practically nonexistent. Sooner rather than later.

McAvoy & West, *supra* note 14, at 52.

It is too early to tell whether the duopoly trend will be good or bad in the long run. But fans and foes are turning up the volume on the debate as large companies continue to buy radio stations[.] . . . Critics fear the airwaves will be controlled by a few big companies and that will push out minority and mom-and-pop owners, limit the diversity of ideas and reduce employment and public service programming.

Already, big broadcast companies are buying more stations from mom-and-pop owners.

Laura Castaneda, *Turning Up the Volume: Radio Duopolies Spark a Boom, but Draw Criticism*, DALLAS MORNING NEWS, Jan. 7, 1995, at 1F.

23. For instance, Heftel, a non-minority-owned company, is the largest owner of radio stations broadcasting the "Spanish Language" format. Similarly, either the Evergreen or Clear Channel broadcast groups is the largest owner of "black/urban" formatted radio stations.

24. The survey is being conducted by Professors Christine Bachen, Laurie Mason, and Allen Hammond of Santa Clara University and Stephanie Craft of Stanford University.

it is anticipated that at least 150 interviews will be completed.<sup>25</sup> The researchers will also survey a sample of the population of news directors at majority-owned stations to obtain a number of cases corresponding to a sample obtained for the minority population. The researchers are seeking to achieve a final minimum sample size of 300 (150 minority and 150 non-minority).

The new survey seeks to ascertain, *inter alia*: what news and public affairs programming the broadcasters provide; what issues they believe are important; what audiences they see themselves as serving; what programming stories broadcasters believe their audiences want; what distinctions broadcasters make in news and public affairs programming provided by themselves and other comparable stations; the ethnicity of the broadcast ownership and decision-making staff; and broadcast station revenues. It is anticipated that the survey will uncover differences in the presentation of programming by minority and majority-owned broadcasters to minority and majority audiences.

The survey will focus on the two values (minority ownership and majority ownership) manifested by the independent variable of ownership. Statistical analysis will center on the use of the chi-square for discrete dependent data<sup>26</sup> and the paired-comparison t-test for occasions where dependent data are continuous.<sup>27</sup> It is believed that these statistics are most useful when analyzing data from equally sized groups.

## V. CONCLUSION

The data has been collected and is in the process of being analyzed. At present, it is too early to know with any certainty what will ultimately be uncovered by the survey. It is probable that many minority broadcasters and federal officials anticipate that the new study will bear out their assertions that a strong nexus exists between minority broadcast ownership and diversity. Given the express skepticism of some members of the Supreme Court

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25. To date, the survey firm has made at least 140 phone calls to minority-owned stations to inquire about their willingness to participate in the study and to set up a schedule for completing the interviews at the most convenient time for the news director respondents. Because only five respondents refused to participate, a very high response rate for minority-owned firms is projected. It is not clear that this same response rate can be generalized to non-minority owners.

26. For chi-square, the researchers are looking at the difference between what they expect from the data given no effect of the independent variable and what they obtained from their samples. The statistic generated in each test, evaluated alongside the number of cases used in the test, will result in an expression of probability such as the  $p < .05$  generally accepted to suggest a difference strong enough to challenge the null hypothesis.

27. In the case of the t-test, the researchers will rely on three factors: size of sample, difference between population means, and variance of the data within each population.

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and the D.C. Circuit, a study documenting such a result would be a welcome addition.