

Yes, Disparity Studies Are Still Immensely Valuable

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Since the 1960s, government organizations have operated programs to increase the participation of businesses owned by people of color (POCs)—and later, businesses owned by women—in the contracts they award. Over the past 65 years, federal, state, and local organizations have continued to operate such programs in different forms, and with good reason. Decades of research have documented the various barriers POC- and woman-owned businesses face in virtually every region of the country, and a great deal of that work has shown the substantial barriers POC- and woman-owned businesses experience in government contracting in particular.

To help address those issues, many government organizations began using programs in which they set percentage goals for the participation of POC- and woman-owned businesses in the individual contracts they award. That practice reached a pivotal moment in 1989 when a legal challenge against the City of Richmond's use of race-based participation goals made its way to the United States Supreme Court (SCOTUS). In that case, SCOTUS ruled that the City's goals program was unconstitutional, because it didn't meet the requirements of the *strict scrutiny* standard of constitutional review. Essentially, the Court held that a government organization using race-based contracting measures must: 1) have evidence that barriers exist within its marketplace that make it harder for POC-owned businesses to participate in its contracts; 2) make sure its race-based contracting measures are carefully tailored to the barriers that exist; and 3) make sure its use of such measures is flexible and doesn't unduly burden other businesses (for example, no mandatory race-based quotas).¹

Since SCOTUS' ruling in the City of Richmond case, the best tool for government organizations to determine whether and how best to use race- and gender-based contracting measures has been to commission a *disparity study*, which provides statistical assessments of whether differences exist between the contract dollars an organization awards to POC- and woman-owned businesses (*participation*) and the dollars one might expect the organization to award to them based on their *availability* for that work.² *Substantial disparities* between the participation and availability of POC- and woman-owned businesses—as well as evidence of barriers they face in the local marketplace—is usually taken as support for the use of race- and gender-based measures as part of an organization's contracting program. For example, most of the United States Circuit Courts of Appeals (the level of courts just below SCOTUS) that have assessed organizations' race- and gender-based programs have held such programs to be constitutional in large part because of disparity study results.

More recently, SCOTUS considered the constitutionality of race-based preferences as part of college and university admissions. In two separate but closely related cases, the Court ruled that Harvard College's (Harvard's) and the University of North Carolina's (UNC's) race-based admissions programs were

¹ SCOTUS didn't address gender-based measures in this case, but they are technically subject to the less stringent requirements of *intermediate scrutiny*. However, most courts consider race- and gender-based measures together and treat both types of measures as being subject to strict scrutiny. BBC treats both race- and gender-based measures accordingly throughout this writing.

² Disparity studies aren't just used to assess contracting outcomes for POC- and woman-owned businesses. For example, BBC has conducted many disparity studies that included analyses of small businesses, local businesses, businesses owned by veterans, businesses owned by people with disabilities, and businesses owned by people who identify as LGBTQ+.

unconstitutional, because they didn't meet the requirements of strict scrutiny. Although those rulings were unrelated to contracting or business inclusion programs, various groups have since brought legal challenges against several organizations' race- and gender-based business and contracting programs. For example, there have been challenges—most of them successful—against the United States Small Business Administration's (SBA's) 8(a) Program, which provides support to small businesses; the Minority Business Development Agency, which provides support to POC-owned businesses; the Fearless Fund's Striver Grants Program, which provided grants to businesses owned by women of color; and the United States Department of Transportation's (USDOT's) Federal Disadvantaged Business Enterprise (DBE) Program, which encourages the participation of disadvantaged businesses in USDOT-funded contracts. (This last case hasn't yet gone to trial.)³

Considering recent court decisions against race- and gender-based programs, it's fair to ask what the benefits of disparity studies are if race- and gender-based contracting measures become even harder to use in the future or are eliminated altogether. A small number of people in the industry have even suggested that government organizations should “pause” on commissioning disparity studies, because the studies will no longer “protect” organizations that use race- and gender-based measures from legal challenges or help them defend their programs if legal challenges do arise. This might be a reasonable position to take, but it's important to consider two things in deciding whether a disparity study can provide value to your organization: first, disparity studies still help organizations operate legally defensible race- and gender-based programs; and second, disparity studies can serve as the backbone of an effective contracting inclusion program *regardless* of whether the program includes race- and gender-based measures.

Despite the recent flurry of legal challenges against race- and gender-based programs, the constitutional requirements for using such measures haven't changed. In its decisions in both the Harvard and UNC cases, SCOTUS reaffirmed that race-based programs must meet the requirements of strict scrutiny, citing the Court's 1989 ruling in the City of Richmond case in its decision. The Court ruled that neither Harvard's nor UNC's race-based admissions programs met the requirements of strict scrutiny but held that such programs *could be* constitutional if they had. That ruling is critical to the use of race- and gender-based contracting measures, because it indicates that the constitutional requirements that apply to such measures are the same as they have been since SCOTUS' decision in the City of Richmond case, requirements that disparity studies have helped organizations meet since that decision. It's also important to note that nearly all the legal challenges that have been brought against race- and gender-based inclusion programs since—and including—the Harvard and UNC rulings have been brought against programs that *weren't* informed by disparity studies or any other social science research.⁴

But even if the constitutional requirements around race- and gender-based programs haven't changed, what if the rulings over the past few years indicate that no reasonable amount of evidence will be enough for certain courts to consider such programs constitutional? If that happens, how can disparity studies still help organizations develop contracting programs that support POC- and woman-owned businesses? Given the legal uncertainty around the use of race- and gender-based measures, BBC

³ The opposition to inclusion programs hasn't been limited to the courtroom. At the time of this writing, there are two separate bills—one in the United States House of Representatives and one in the United States Senate—aimed to end diversity, equity, and inclusion efforts in government operations and contracting altogether.

⁴ The one exception at the time of this writing is a legal challenge that's been brought against the City of Houston's contracting inclusion program that hasn't been decided yet.

believes it has become increasingly important for organizations to take a “yes and” approach to operating contracting programs. If good evidence indicates that using race- and gender-based measures is warranted, then organizations should consider using them as part of their programs (in a legally appropriate way, of course). However, they shouldn’t treat such measures as a cure-all for all the barriers POC- and woman-owned businesses face as part of their contracting practices. They should also be developing new, innovative ways to help address those barriers, beyond the run-of-the-mill “*race- and gender-neutral*” measures many organizations use today as alternatives to race- and gender-based efforts. The best tool available to design such an expansive program continues to be a disparity study.

As part of assessing whether disparities exist between businesses’ participation in and availability for an organization’s contracts, a well-conducted disparity study also provides detailed information about the specific characteristics of the businesses that participate in the organization’s work and the businesses in the marketplace available for it. Those characteristics include the industries in which those businesses work, their sizes, how long they have been in business, where they are located, the sizes of contracts for which they can compete, and several others. Experienced researchers can use various statistical techniques to understand what *combinations* of those characteristics best represent the businesses in the organization’s marketplace and which business groups face the most substantial barriers as part of its contracting practices. The organization can then use those results to develop effective, targeted measures to help those businesses in its marketplace that need the most support.

Using an approach like the one described above will require organizations and disparity study firms to think about contracting programs a bit differently than they often have in the past. For example, many government organizations operate small business programs to encourage the participation of economically disadvantaged businesses in their contracting work, including many POC- and woman-owned businesses. Most of those organizations design their small business programs based on revenue criteria the SBA has established. The problem is that the SBA allows small businesses to earn maximum revenues ranging between \$9 million and \$40 million in the types of work most relevant to government contracting. That means if an organization sets aside a certain contract for competition only among small businesses, a business earning \$750,000 in revenue could still be competing against a business earning \$10 million, which isn’t a very effective way to support the business making only \$750,000.

BBC recently analyzed hundreds of thousands of data records from all the disparity studies we conducted between 2014 and 2023 and found that more than 90 percent of POC-owned businesses available for government contracts across the country earn less than \$5 million in annual revenue, and the overwhelming majority of those businesses earn less than \$1 million. Given the mismatch between the characteristics of the vast majority of POC-owned businesses and the remarkably broad small business criteria most organizations adopt, it’s not surprising that owners of POC-owned businesses we’ve interviewed as part of disparity studies regularly report that small business programs are generally ineffective in addressing the unique economic barriers they face.

Instead of using a “one-size-fits-all” approach to operating a small business program, imagine if an organization worked with researchers to analyze the entire spectrum of sizes that represents the businesses available for its work and used that information to design a small business program with multiple, fine-grained size standards tailored to economic disadvantage in its marketplace. Now imagine the organization went even further. What if it took a similar approach to analyze business locations, business ages, business work types, and yes, the race and gender of business owners? The organization

could then use a combination of those characteristics to develop a contracting program targeted toward the needs of the businesses that needed the most support. Now, the organization wouldn't just be operating a POC- and woman-owned business program or a small business program or a local business program in isolation. Instead, it would be operating a targeted, multidimensional program that defines "disadvantage" in a tailored, data-driven way.

Perhaps such a program would be less effective for POC- and woman-owned businesses if it didn't include race- and gender-based classifications, but maybe not as much as one might think. There are strong correlations between the race and gender of business owners and the characteristics mentioned above, so by capturing those other characteristics as part of a contracting program in a thoughtful way, the program can still provide immense value to POC- and woman-owned businesses trying to participate in an organization's contracts, substantially more so than "race- and gender-neutral" programs as they usually exist today. As a result, if the laws around race- and gender-based measures do actually change, the organization isn't left with an ineffectual, "one-size-fits-all" program, but instead, a program that still makes a meaningful difference for the disadvantaged businesses in its marketplace, including many POC- and woman-owned businesses.

This isn't just pipe dream—all the research an organization would need to pull this off can come from a well-conducted disparity study. BBC has spent the last year exploring a more integrated framework for conducting disparity studies, one that goes beyond examining outcomes in government contracting based solely on the race and gender of business owners—which is still a critical undertaking—to also examine the intersections among the race and gender of business owners and other business characteristics like business size, business age, and business location. We are proactively using that information to understand the degree to which different business characteristics correlate with the race and gender of business owners and working with our clients to develop data-driven measures that maximize the impact of their programs for those businesses.

No matter the political rhetoric or what the courts ultimately decide on race- and gender-based contracting measures, we remain fully committed to helping government organizations work within the law to sustainably improve outcomes for POC- and woman-owned businesses and other disadvantaged businesses trying to participate in their contracts. But we certainly can't do it alone. We wholeheartedly welcome the opportunity to share information and innovative ideas with government organizations, trade associations, decisionmakers, practitioners, researchers, or other stakeholders interested in helping us lead the way into the next phase of contracting inclusion and disparity studies. If you'd like to talk to us to explore new ideas, please reach out—we'd be happy to hear from you and get to work.



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