

Adarand, Grutter, and Gratz:

Does Affirmative Action in Federal Employment Matter?

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Does affirmative action in federal human resources management (HRM) matter? Responding to the Supreme Court's decision in Adarand v. Peña (1995), the Clinton administration instructed federal agencies not to use racial, ethnic, or gender-based affirmative action classifications in their HRM programs without explicit approval from the Department of Justice. The Court's decisions in Grutter v. Bollinger (2003) and Gratz v. Bollinger (2003) suggest that it may now be constitutionally feasible to strengthen affirmative action in federal HRM. However, analysis of the impact of the Clinton administration's policy change leads to the conclusion that constitutional flexibility to establish racial, ethnic, and gender goals and timetables to promote federal workforce diversity simply may not make much difference, except possibly for the smallest minority groups.

Keywords: affirmative action; minorities; women; equal protection; human resources management

Throughout the spring of 2003, individuals and groups concerned with public-sector human resources policy, civil rights, and social diversity in higher education anxiously awaited the Supreme Court's decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger* (both decided on June 23, 2003). The future of affirmative action by governments throughout the United States was at stake as at no time since the Court's splintered ruling in *Board of Regents v. Bakke* in 1978. Much to the relief of proponents of affirmative action, by a 5-to-4 margin in *Grutter* the Court held that social diversity in higher education could be a compelling governmental interest and that the University of Michigan's law school admissions process was sufficiently narrowly tailored to satisfy the Fourteenth Amendment's Equal Protection Clause. *Grutter's* importance to public personnel administration lies mostly in what did not happen. Had the Court rejected diversity as a compelling governmental interest in the

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context of higher education, the justices probably would be less likely to consider it compelling in most aspects of public sector human resources management (HRM). Post-*Grutter*, there is greater reason to believe that narrowly tailored affirmative action to promote diversity in public employment can survive constitutional challenge. However, narrow tailoring is essential, as six justices made clear in *Gratz* by finding the University's undergraduate admissions program unconstitutionally broad in its treatment of race and ethnicity. Taken together, *Grutter* and *Gratz* suggest that it is constitutionally feasible to strengthen affirmative action in federal employment by reversing some aspects of the Clinton administration's response to the Court's previous decision in *Adarand v. Peña* (1995).

This article examines *Adarand's* impact on affirmative action policy in federal HRM and considers the importance of *Grutter* and *Gratz* to potential policy change. It analyzes pre- and post-*Adarand* federal workforce diversity. The great attention devoted to affirmative action notwithstanding, our analysis reaches the somewhat startling conclusion that the constitutional flexibility to use racial, ethnic, and gender goals and timetables to promote diversity in federal employment simply does not make much difference, except possibly for the smallest minority groups.

ADARAND, GRUTTER, AND GRATZ

The Clinton Administration's Response to *Adarand*

In *Adarand*, a 5-to-4 majority of the Supreme Court held that "All racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests" (*Adarand v. Peña*, 1995, p. 227). The majority wanted to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'" (*Adarand v. Peña*, 1995, p. 237). However, to its credit, the Clinton administration immediately recognized that federal HRM affirmative action for minorities had become constitutionally questionable. Even if diversity in federal employment were a compelling governmental interest (something that remains uncertain), affirmative action processes would have to be narrowly tailored. Under strict scrutiny, traditional narrow tailoring requires the government to show that affirmative action is more efficacious than equal employment opportu-

nity policies that do not employ racial and ethnic classifications. Whether and how this could be done is still uncertain. The Clinton administration assumed that, for the most part, federal agencies' use of goals and timetables for hiring and promoting minorities was not narrowly tailored.

The administration's policy decision to respond to *Adarand* by adjusting federal HRM was significant. Technically, *Adarand's* thin majority spoke only to federal contracting, not employment. The Clinton administration could have "nonacquiesced" (stonewalled) by continuing to use affirmative action in federal HRM until the Court spoke directly to it. Instead, the administration sought to "mend, not end" affirmative action, though it never developed a clear strategy for doing so.¹ Developing post-*Adarand* affirmative action policy was complicated by two aspects of standard Equal Protection analysis. First, gender classifications are subject to weaker judicial scrutiny than those based on race or ethnicity. The government has to be "exceedingly persuasive" in showing that they are substantially related to the achievement of important (rather than compelling) governmental objectives (*U.S. v. Virginia*, 1996, p. 524; *Mississippi University v. Hogan*, 1982, p. 724). Second, when American Indians are considered part of "quasi-sovereign tribal entities," Equal Protection treats them differently from other racial or ethnic groups (*Morton v. Mancari*, 1974, p. 554). Consequently, *Adarand* was legally irrelevant to affirmative action for women and Native Americans, making it possible to have separate diversity policies for them.

The speed with which the Clinton administration responded to *Adarand* was also significant. On June 28, 1995, 16 days after *Adarand* was decided, Assistant Attorney General Walter Dellinger circulated an opinion to the departments and agencies. It made the following points:

"It is clear that strict scrutiny will now be applied by the courts in reviewing the federal government's use of race-based criteria in health, hiring, and other programs as well."

"To the extent that affirmative action is used to foster racial and ethnic diversity, *the government must seek some further objective beyond the achievement of diversity itself* [emphasis added]."²

The federal government "may not predicate race-based remedial measures on generalized, historical societal discrimination."

Unresolved questions include (a) "whether a governmental institution must have sufficient evidence of discrimination to establish a compelling interest in engaging in race-based remedial action before it takes such action" (i.e., can "post-enactment" evidence justify affirmative action?), and (b) whether anything other than remedying past discrimination (under appro-

priate circumstances) can “constitute a compelling interest sufficient to justify race-based measures.”

“*Adarand* does not require strict scrutiny review for programs benefiting Native Americans as members of federally recognized Indian tribes.”

“*Adarand* did not address the appropriate constitutional standard of review for affirmative action programs that use gender classifications as a basis for decisionmaking” (Dellinger, 1995, pp. 2, 7).

The opinion concluded that “*Adarand* makes it necessary to evaluate federal programs that use race or ethnicity as a basis for decisionmaking to determine if they comport with the strict scrutiny standard” (Dellinger, 1995, p. 30).

Following Dellinger’s guidance, on July 19, 1995, President Bill Clinton issued instructions to department and agency heads for Evaluation of Affirmative Action Programs. These made four key points.

First, that the administration remained committed to equal opportunity:

This administration will continue to support affirmative measures that promote opportunities in employment, education and government contracting for Americans subject to discrimination or its continuing effects. In every instance, we will seek reasonable ways to achieve the objectives of inclusion and antidiscrimination *without specific reliance on group membership* [emphasis added].

Second, that any affirmative action programs had to be narrowly tailored:

Where our legitimate objectives cannot be achieved through such means, the Federal Government will continue to support lawful consideration of race, ethnicity, and gender under programs that are flexible, realistic, subject to reevaluation, and fair.

Accordingly, in all programs you administer that use race, ethnicity, or gender as a consideration to expand opportunity or provide benefits to members of groups that have suffered discrimination, I ask you to take steps to ensure adherence to the following policy principles. The policy principles are that any program must be eliminated or reformed if it

- (a) creates a quota;
- (b) creates preferences for unqualified individuals
- (c) creates reverse discrimination; or
- (d) continues even after its equal opportunity purposes have been achieved.

Third, the departments and agencies should not attempt to make independent determinations of whether their affirmative action programs serve compelling governmental interests. Clinton instructed federal department and agency officials “to undertake, in consultation with and pursuant to the overall direction of the Attorney General, an evaluation of programs you administer that use race or ethnicity in decisionmaking.”

Fourth, “Any program that does not meet the constitutional standard must be reformed or eliminated” (Clinton, 1995, p. 1). Programs were to remain intact until an evaluation had been completed (Dellinger, 1995).

The administration’s response was well designed to achieve compliance with *Adarand’s* broad thrust. It established a division of labor for evaluating Equal Protection’s two requirements, narrow tailoring and compelling governmental interest. Narrow tailoring is relatively specific, and something administrators can control. It requires (a) consideration of policy alternatives that are racially and ethnically neutral, (b) waiver provisions in case goals and timetables cannot be met, (c) proportionality between the goals and the relevant affirmative action target populations, (d) a fixed duration or stopping point, and (e) a limited burden on non-target group employees (Dellinger, 1995; *U.S. v. Paradise*, 1987). In addition, narrow tailoring prefers using race or ethnicity as a consideration as opposed to the determinative factor in decision making. The compelling interest test, by contrast, requires complex and difficult analysis of constitutional case law, something better left to the attorney general.

The administration’s seriousness in meeting *Adarand’s* apparent requirements was further indicated by Clinton’s inclusion of gender classifications in his evaluation instructions. As noted above, such classifications face a weaker constitutional test. However, it may be politically untenable to use affirmative action goals and timetables for women, including non-minority women, while terminating them for minorities. The administration also declined to develop a separate affirmative action policy for Native Americans.

Analysis of *Grutter’s* Potential Impact on Post-*Adarand* Equal Protection Policy

Grutter has the potential to modify post-*Adarand* affirmative action policy in two main ways. First, the majority wanted to “dispel” the belief that “the only governmental use of race that can survive strict scrutiny is remedying past discrimination” (*Grutter v. Bollinger*, 2003). It went on to hold that

the University of Michigan Law School “has a compelling interest in attaining a diverse student body” (*Grutter v. Bollinger*, 2003, p. 17).

If diversity in higher legal education can constitute a compelling governmental interest, can it do likewise in other contexts beside remedying past proven violations of the Equal Protection Clause? The question not being before the Court, the majority had no need to answer it. However, *Grutter*'s language is broad enough to make diversity a constitutionally compelling public sector HRM interest: “Effective participation by members of all racial and ethnic groups in the civic life of the nation is essential if the dream of one nation, indivisible, is to be realized” (*Grutter v. Bollinger*, 2003, pp. 19-20). Public employees are surely among the chief participants in the nation's civic life. Many are also leaders to whom the Court's following contention would presumably apply: “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity” (*Grutter v. Bollinger*, 2003, p. 20). In fact, contemporary representative bureaucracy theory and empirical findings lend a good deal of support to the expectation that social diversity in public agencies at the middle, upper, and street levels will promote administrative legitimacy as well as decision making that is more representative of the interests of minorities and women (see Dolan & Rosenbloom, 2003).

Second, the Court claimed to apply strict scrutiny, however if it did so, it was a very weak version. The majority was remarkably deferential to the University's contention that the racial and ethnic classifications were used in a narrowly tailored fashion. In dissent, Justice Kennedy argued that the majority opinion simply “does not apply strict scrutiny”: “It is regrettable the Court's important holding allowing racial minorities to have their special circumstances considered in order to improve their educational opportunities is accompanied by a suspension of the strict scrutiny which was the predicate of allowing race to be considered in the first place” (*Grutter v. Bollinger*, 2003, pp. 1, 9). The Court did not explain whether its lax scrutiny was due to (a) deference to the Law School's expertise in education and admissions, (b) the noninvidious intent of the classifications, and/or (c) other factors. If *Grutter* marks a shift in the application of judicial scrutiny to affirmative action, then it should be significant for federal HRM diversity policy that the Civil Service Reform Act of 1978 calls for a “Federal work force reflective of the Nation's diversity” and a “work force from all segments of society” (Civil Service Reform Act, 1978: sections 3, 2301). Deference to the Congress that passed the act and the president who signed

would presumably match that given to the University of Michigan's Law School.³

Caveat Gratz

In *Grutter*, the Court emphasized that the Law School “engages in a highly individualized, holistic review of each applicant’s file” and did not “insulat[e] [sic] each category of applicants with certain desired qualifications from competition with all other applicants” (*Grutter v. Bollinger*, 2003, pp. 22, 25). At least in the context of undergraduate admissions, *Gratz* adds such an individualized consideration to the requirements of narrow tailoring. The *Gratz* Court found that “the University’s policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents [the University] claim justifies their program” (*Gratz v. Bollinger*, 2003, p. 22). For public administrators who deal with large numbers of applicants for employment and promotion, it is notable that the Court was not swayed by the impracticability of providing individualized consideration of each applicant:

Respondents contend that “[the] volume of applications and the presentation of applicant information make it impractical for [the University] to use the . . . [sic] admissions system’ upheld by the Court today in *Grutter*. . . . But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system. (*Gratz v. Bollinger*, 2003, pp. 26-27)

However, when only a few candidates are being considered for employment or promotion, narrow tailoring should be administratively feasible in public sector HRM.

Whether, in combination, *Grutter* and *Gratz* make coherent constitutional law or public policy is an open question. Only two justices, O’Connor and Breyer, were in the majority in both cases. The other seven members of the Court dissented in either *Grutter* or *Gratz* and, therefore, did not endorse the two decisions as a package. Further litigation will be necessary to clarify the application of *Grutter* and *Gratz*, if any, to public sector HRM. Nevertheless, the decisions suggest that some modification of the Clinton administration’s stance on post-*Adarand* affirmative action is

feasible. *Grutter's* language makes it more likely that diversity in the public service is in itself a compelling governmental interest, a proposition the Clinton administration rejected. *Gratz* modifies narrow tailoring and can be read to require individualized consideration of applicants and employees when using affirmative action in personnel actions. This will be practical in many cases, though impractical in others. Overall, then, *Grutter* and *Gratz* point toward the possibility of modestly strengthening the use of affirmative action in federal personnel. Whether to do so, of course, is a policy question.

ASSESSING WHETHER AFFIRMATIVE ACTION IN FEDERAL HRM MATTERS

The Clinton administration's response to *Adarand* constitutes a natural experiment in which the impact of affirmative action on federal workforce diversity can be assessed. Treating its response as an intervention in federal affirmative action policy enables comparison between change in diversity in the pre- and post-*Adarand* years.

Implementation of the Clinton Policy Change

Tracking the implementation of federal equal employment opportunity (EEO) policy is notoriously difficult (Rosenbloom, 1977). Implementation is highly decentralized across and within agencies. The EEO complaint system yields little generalizable information (Shafritz, Rosenbloom, Riccucci, Naff, & Hyde, 2001). Few cases result in clear findings of prohibited discrimination, and most are closed in ways that reveal little about the implementation of affirmative action per se (Losey, 2003). One can access various EEO plans and reports, however there is no systematic way of knowing what role race, ethnicity, and/or gender play in actual hiring and promotion decisions. Consequently, researchers generally make inferences about implementation based on contextual information and analysis of change in employment patterns consistent with the policy initiative.

Contextually, Naff (2001) suggested that the Clinton administration struggled to promote greater diversity in federal employment while remaining within *Adarand's* constraints. She juxtaposes Clinton's effort to achieve "a government that 'looks like America'" with the admonition by the Office of Civil Rights in the Department of Justice that the agencies should "really

scrutinize each of [their] affirmative action policies and practices to make absolutely sure each is in conformity with the law” (Naff, 2001, pp. 22, 36). The impact of this dual message is unknown, however the *Adarand* component of it definitely was delivered repeatedly by the Department of Justice. A reasonable assumption is that personnel offices throughout the government responded as necessary by modifying policies and instructions to those making HRM decisions. The overwhelming majority of federal managers and supervisors almost certainly complied.⁴

There is a very large literature on aggregate change in the social composition of the federal workforce.⁵ The long-term trend has been toward greater diversity. Researchers have tried to ascertain the impact of civil service reform, presidential administrations, and other factors or developments on employment patterns (Kellough & Rosenbloom, 1992; Lewis, 1992; Naff, 2001; Riccucci, 2002a, 2002b). When change is in the expected direction, the tendency is to assume programs, initiatives, and other measures were implemented. Otherwise, no assumption can be made from an aggregate analysis alone.

MEASURING THE *ADARAND* POLICY CHANGE’S IMPACT: DATA AND METHOD

Our research question is whether the Clinton administration’s response to *Adarand* had an impact on the employment of women and minorities in federal civilian employment. Such an impact, if any, can be assessed by comparing changes in the employment of women and minorities in pre- and post-*Adarand* periods: that is, pre-*Adarand* (1988-1994) and post-*Adarand* (1996-2002), with the intervention (*Adarand* ruling and Clinton administration’s response) occurring in 1995. Pre- and postprogram research designs assume, at least initially, that observed change is due to the intervention rather than to other potential factors. Comparing change or the rate of change during sufficiently long and relatively homogenous pre- and postperiods strengthens this assumption’s plausibility.⁶ The design is particularly useful in assessing the impact of major, large-scale interventions in otherwise constant policy areas.

The first stage of our research design analyzed *Adarand*’s impact on the federal civilian workforce as a whole. The representation of minorities and women in the federal civilian workforce is at parity or greater than their participation in the comparable U.S. workforce as a whole. The second stage focuses on Grades General Schedule/General Management (GS/GM) 14-

15 and the Senior Executive Service (SES), in which women and minorities are underrepresented relative to the comparable general civilian workforce.

The first stage sought to assess overall change. It did not assume that affirmative action was limited to specific occupations and positions or that goals and timetables were disproportionately used in the mid- and upper-grade levels, where women and minorities are least well represented.⁷ Affirmative action goals and timetables in federal HRM were never restricted to those levels. They could be used in any occupation, unit, or level and were not set by grade per se. In a workforce as large and geographically dispersed as the federal government's, women and minorities may be significantly underrepresented in some agency units and occupations regardless of grade. Information on the establishment and achievement of affirmative action goals government-wide for the pre-*Adarand* years is not available. Nor were goals and timetables constant. Agencies were expected to adjust their affirmative action plans on an annual basis. Any effort to connect specific affirmative action plans to workforce change government-wide presents insuperable problems. Focusing on one or another agency, even if the necessary information and data were available, would run the risk of not being generalizable. Analyzing the civilian workforce as a whole in the first stage of pre- and postprogram research design most faithfully captured whatever overall change may have occurred.

To assess pre- and post-*Adarand* change in the federal civilian workforce as a whole, we used a straightforward, readily interpretable measure. The percentage change in female and minority employment was calculated for the two 7-year time periods. The following formula was utilized to calculate percentage change: $(N_2 - N_1 / N_1) \times (100) = \text{percentage change}$ (O'Sullivan & Rassel, 1995). All numbers were rounded up. Comparing percentage changes fully comports with the federal personnel policy objective of eliminating "underrepresentation of minorities" in the federal service (Civil Service Reform Act of 1978, sect. 310). Underrepresentation is defined as "a lower percentage of the total number of employees within the employment category than the percentage that the minority constituted within the labor force of the United States" (Civil Service Reform Act of 1978, sect. 310).

All data utilized in this article were provided by the U.S. Office of Personnel Management (OPM), Central Personnel Data File (CPDF) (2003). The file is based on a point in time count conducted September 30th of each year. The aggregate data include federal civilian employees by gender and race/national origin (RNO) from 1988 to 2002. RNO is broken down into four groups: Black (non-Hispanic origin), Hispanic, Asian and Pacific

Table 1: Percentage Change in Federal Civilian Employment, Pre- and Post-*Adarand*

<i>Intervention Adarand 1995</i>	<i>Female Gender % Change</i>	<i>Total Minorities % Change</i>
Pre-1988 to 1994	4.03	6.37
Post-1996 to 2002	2.27	5.84
Difference	-1.76	-.53

Islander, and American Indian/Alaskan Native. The CPDF is an employee-based data system that covers total employment, including full-time, part-time, and intermittent workers. It does not include vacant positions. The federal civilian workforce population includes most executive branch agencies and independent regulatory commissions.⁸

WOMEN AND MINORITIES IN THE FEDERAL CIVILIAN WORKFORCE AS A WHOLE

If affirmative action were central to federal EEO for women and minorities, then *Adarand* should have had a negative impact on the employment interests of both groups. Given how the *Adarand* ruling was treated by the Clinton administration, it could be expected to influence the employment of women and minorities similarly. Based on the data obtained from the Central Personnel Data File, the *Adarand* ruling appeared to have similar but minimal impact on the employment of women and minorities in the federal civilian workforce. As illustrated in Table 1, the percentage change for both women and minorities slightly decreased post-*Adarand*, 1.76 for females and .53 for minorities. This suggests that *Adarand* did influence the hiring of women and minorities similarly but not markedly so. *Adarand* had minimal to no impact, or other factors might have influenced hiring decisions. For example, it is possible that the federal government's applicant pool included fewer women after 1996.

Women

The 1995 ruling did not appear to have practical significance on the percentage of women employed in the federal civilian workforce. Prior to the ruling, the percentage of women employed increased from 42.2 in 1988 to

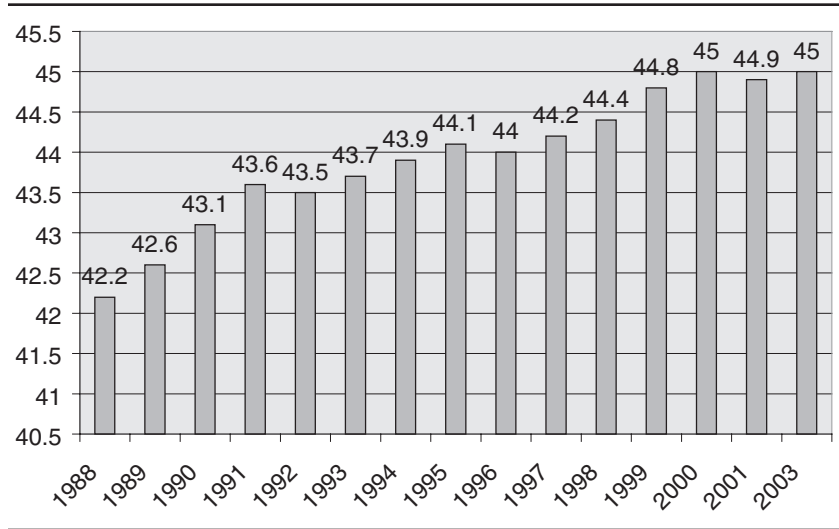


Figure 1. Women in the Federal Civilian Workforce, 1988-2002
 Source: United States, Office of Personnel Management, Central Data Personnel File.

43.9 in 1994 resulting in a 4.03% increase. After the ruling, the percentage of women employed increased from 44% in 1996 to 45% in 2002 resulting in a 2.27% change. The difference between the pre- and postmeasurements is 1.76%. This suggests that the ruling may have had marginal to no influence in the hiring of women. In terms of trend data, from 1988 to 2002 the change was 6.64% reflecting an overall increase in the percentage of women employed by the federal governments (see Figure 1).

Minorities

During the pre-*Adarand* period, the percentage of minorities increased from 26.7 in 1988 to 28.4 in 1994 resulting in a 6.37% change. After the ruling, the percentage of minorities increased from 29.1 in 1996 to 30.8 in 2002 resulting in a 5.84% change. The difference between the pre- and postintervention is .53, or approximately one half of 1%, suggesting that *Adarand* had minimal to no influence on minority hiring (see Figure 2). In terms of trend data, from 1988 to 2002 the percentage change for minorities was +15.36 indicating an overall increase in the percentage of minorities hired or retained by the federal government resulting in a workforce that looks like America.

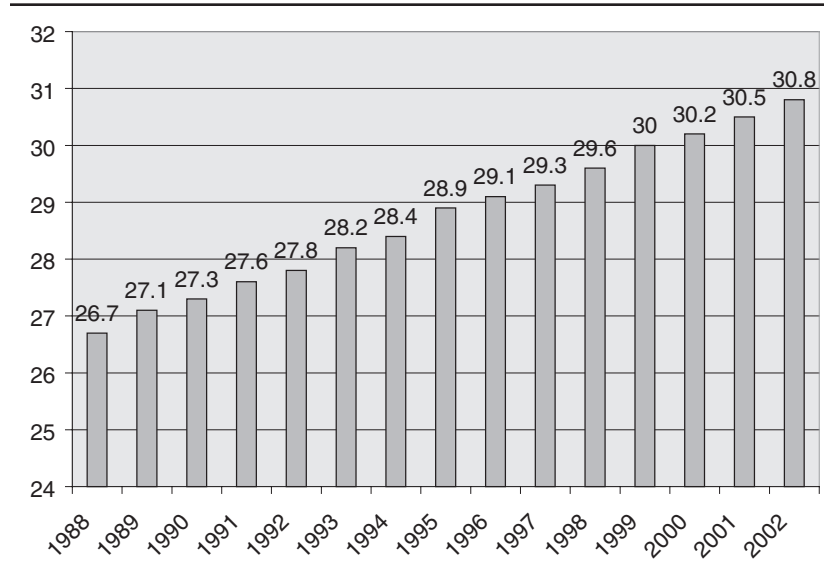


Figure 2. Minorities in the Federal Civilian Workforce, 1988-2002

Source: United States, Office of Personnel Management, Central Data Personnel File.

Individual Minority Groups

Although minority employment remained relatively constant pre- and post-*Adarand* (see Table 2), the ruling had a sizable negative impact on only one group: Asian and Pacific Islanders. Hispanics increased slightly in percentage change post-*Adarand*. Blacks remained constant indicating no change, and American Indians decreased slightly. It was expected that the *Adarand* ruling would have the same affect across all minority groups. This suggests that other factors, besides the *Adarand* ruling, may have influenced personnel decisions. For example, there may have been fewer Asian and Pacific Islanders and American Indians/Alaskan Natives who applied for or continued in federal civilian jobs from 1996 to 2002, compared to 1988 to 1994. Or more Hispanics may have applied for or retained federal jobs after the *Adarand* ruling. It is also plausible that the Clinton administration's response to *Adarand* had no impact in hiring decisions within the federal personnel system.

Blacks. Prior to the ruling, the percentage of Blacks employed increased from 16.5 in 1988 to 16.7 in 1994 resulting in a percentage change of +1.2. After the ruling, the percentage of Blacks increased from 16.6 in 1996 to

Table 2: Percentage Change in Minority Employment

<i>Intervention</i>	<i>Black %</i>	<i>Hispanic %</i>	<i>Asian and Pacific Islander %</i>	<i>American Indian/Alaskan Natives %</i>	<i>Women %</i>
Pre-1988 to 1994	1.2	11.8	24.2	11.1	9.3
Post-1996 to 2002	1.2	13.1	9.3	10.0	7.1
Difference	.0	+1.3	-14.9	-1.1	-2.2

16.8 in 2002, resulting in a percentage change of +1.2. No change was observed in the rate of growth of Black employment by the federal government, suggesting that *Adarand* did not have an impact on the hiring of Blacks.

Hispanics. The Hispanic population fared slightly better than the Black population in obtaining federal civilian employment post-*Adarand*. Prior to the *Adarand* ruling, the percent of Hispanics employed in the civilian workforce increased from 5.1 in 1988 to 5.7 in 1994 resulting in a percentage change of +11.8. Whereas, after the ruling, the percentage of Hispanics increased from 6.1 in 1996 to 6.9 in 2002 providing a percentage change of +13.1. This reflects a percentage change of +1.3 for Hispanics after the *Adarand* ruling. It is unlikely that this indicates that the change in federal affirmative action had a negative effect on the employment of Hispanics.

Asians and Pacific Islanders. Prior to *Adarand*, the percentage of Asians and Pacific Islanders increased from 3.3 in 1988 to 4.1 in 1994 resulting in a percentage change of +24.2. After the ruling, the percentage increased from 4.3 in 1996 to 4.7 in 2002 resulting in a percentage change of +9.3. There was a percentage change of -14.9, the largest decrease of any minority group post-*Adarand*, suggesting that the Clinton administration's response to the decision had a negative impact on the hiring of Asians and Pacific Islanders. It is conceivable that these groups, which are small and politically less visible than other minorities, benefited more from affirmative action than the others. In the absence of specific goals or hiring and promotion targets, their employment interests may be neglected.

American Indian/Alaskan Natives. Prior to the ruling, the percentage of American Indian/Native Alaskans employed by the federal civilian workforce increased from 1.8 in 1988 to 2.0 in 1994 resulting in a percentage change of +11.1. After the ruling, the percentage increased from 2.0 in 1996 to 2.2 in 2002 resulting in a percentage change of +10.0. There was a

percentage change of -1.1 suggesting that the *Adarand* intervention had little practical impact on the hiring of American Indians/Alaskan Natives. Or, similar to the Asians and Pacific Islanders, the American Indian/Alaskan Native group experienced a percentage change decrease during the post-*Adarand* period, and for the same reasons.

Minority women. The 1995 ruling did not appear to have practical significance on the percentage of female minorities employed in the federal civilian workforce. Prior to the ruling, the percentage of minority women employed increased from 14.0 in 1988 to 15.3 in 1994 resulting in a 9.3% increase. After the ruling, the percentage of women employed increased from 15.6 in 1996 to 16.7 in 2002, a 7.05% change. The difference between the pre- and postmeasurements is 2.25%, suggesting that the ruling may have had a limited influence in the hiring of minority women. In terms of trend data, the percentage of minority women hired increased from 14.0 in 1988 to 16.7 in 2002 with an increase of 19.3%, reflecting an overall increase in the percentage of minority women employed by the federal government.

WOMEN AND MINORITIES IN GRADES 14-15 AND THE SES

The second stage of our analysis of the impact of the Clinton administration's response to *Adarand* focused on women and minorities in Grades GS/GM 14-15 and the SES. Historically, the underrepresentation of women and minorities has been most pronounced at these levels. Grades 14-15 are important because they constitute the feeder pool for the SES, which, of course, includes career employees having the broadest administrative responsibilities (see U.S. Government Accounting Office, 2003). As illustrated in Figure 3, the federal government has achieved parity for women and minorities in the GS 1-13 grades. However, women and minorities remain underrepresented in Grades 14-18 when compared to the civilian labor force (CLF). This trend data points to the importance of analyzing the impact of *Adarand* on federal employment for women and minorities in Grades 14-15 and the SES.

This stage of our analysis uses the same pre-and postresearch design as for the federal workforce as a whole but with a more sensitive measure to determine the effect of the Clinton administration's response to *Adarand*. Following Kellough and Rosenbloom (1992), who assessed the impact of the

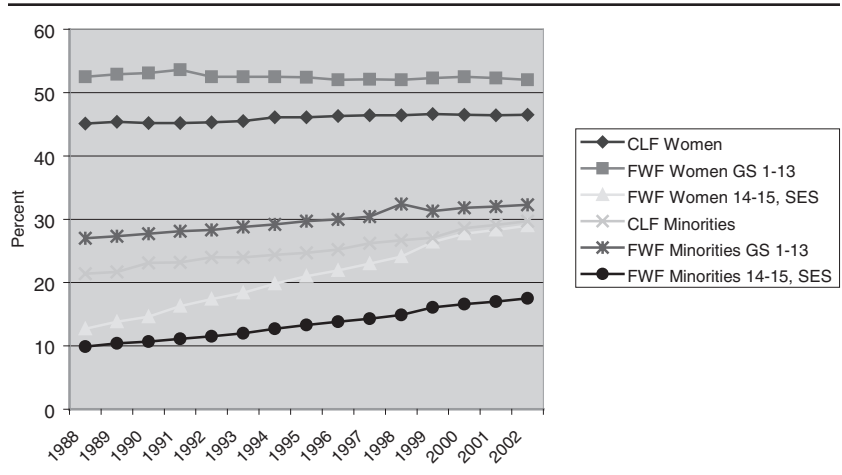


Figure 3. Federal Workforce Compared to Civilian Labor Force
 Source: United States, Office of Personnel Management, Central Data Personnel File, and the U.S. Department of Labor, Bureau of Labor Statistics.
 Note: CLF = Civilian Labor Force, FWF = Federal Work Force

Civil Service Reform Act of 1978 on federal employment trends, we used a quasi-experimental, interrupted time series analysis. The pre- and posttime periods and data source were the same as for our Stage 1 analysis of the federal civilian workforce as a whole.

The linear regression model is represented by the following equation:

$$Y_t = b_0 + b_1X_{1t} + b_2X_{2t} + b_3X_{3t} + e_t$$

The dependent variable Y_t is the percentage of grades 14-15 and SES positions held by women, minorities, Blacks, Hispanics, Asian and Pacific Islanders, and American Indians/Alaskan Natives in a given year. Variable X_{1t} represents other forces, such as employment trends for women and minorities in the time series. The dependent variable is regressed on time in years. It is coded 1 for 1988, 2 for 1989, 3 for 1990, 4 for 1991 and so on. The variable X_{2t} represents a dichotomous dummy variable to account for *Adarand*. Years in the pre-*Adarand* time period, 1988 to 1995, are coded 0. Years in the post-*Adarand*, 1996 to 2002, are coded 1.⁹ The variable X_{3t} represents a postintervention counter for time. It is coded 0 for observations between 1988 and 1995 and 1 for 1996, 2 for 1997, 3 for 1998, and so on. The linear regression is designed to detect four possible effects: (a) no

impact; (b) an immediate change in the percentage of employment, then a return to the preintervention rate; (c) a change in the average rate of employment; and (d) an immediate shift and a change in the average rate of employment (Kellough & Rosenbloom, 1992). If *Adarand* had an impact on the employment of women and minorities, then the regression analysis should reflect an immediate shift in the rate of employment accompanied with a return to pre-*Adarand* rate, a change in the average rate of employment among these groups, or both.

Table 3 displays the results of the regression analysis of the effects of *Adarand* on women, minorities overall, and individual minority groups. All the model summaries are statistically significant at .000 and have high adjusted R^2 values ranging from .929 to .996. At the low end (percentage of American Indians/Alaskan Natives in Grades 14-15 and the SES), this means that the regression model can explain approximately 93% of the variation in the dependent variable. At the high end (women), this means that the regression model can explain 99% of the variation in the dependent variable. The Durbin-Watson (DW) values suggest that autocorrelation is not a problem.

Women

In Grades 14-15 and the SES, female employment in the federal workforce increased from 12.7% in 1988 to 21.0% and in 1995 and to 29.0% in 2002. This employment trend is illustrated in Figure 3. According to the regression output in Table 3, only one of the three coefficients for independent variables is statistically significant (t value ≥ 2). The coefficient of 1.198 is statistically significant with a t value of 20.4. It indicates an approximate slope of 1.2 for the years 1988 to 1995. This means that employment for women in positions grades 14-15 and the SES increased at a rate of approximately 1.2 per year before *Adarand*, on average holding other variables constant. The coefficient b_2 suggests that immediately after *Adarand* there is a negative change (-.242) in federal employment for women in Grades 14-15 and the SES, however the coefficient is not statistically significant. The coefficient b_3 suggests that the average rate of increase for female employment rose slightly after *Adarand*, however, the coefficient -.070 is not statistically significant. The slope for the post-*Adarand* years is reduced to 1.128 (1.198 - .07). In sum, the regression analysis indicates that the only factor that appears to account for the increase in federal employment among women in Grades 14-15 and the SES is time. This could be the

Table 3: Regression Analysis of Effects of the 1995 Court Case *Adarand* on the Federal Employment of Women and Minorities, General Schedule 14-18

Category	Regression Equation	Adj. R ²	DW
Women	$Y_t = 11.361 + 1.198X_{1t} - .242X_{2t} - .070X_{3t} + e_t$ (38.4)* (20.4)* (-.59) (.758)	.996	1.525
Minorities	$Y_t = 9.329 + .471X_{1t} + .043X_{2t} + .179X_{3t} + e_t$ (61.79)* (5.77)* (.20) (3.77)*	.995	1.410
Blacks	$Y_t = 4.471 + .204X_{1t} - .071X_{2t} + .125X_{3t} + e_t$ (40.349)* (9.276)* (-.472) (3.602)*	.985	1.517
Hispanics	$Y_t = 1.846 + .120X_{1t} + .120X_{2t} - .013X_{3t} + e_t$ (40.71)* (13.38)* (1.943) (-.922)	.989	1.875
Asian and Pacific Islander	$Y_t = 2.418 + .124X_{1t} + .049X_{2t} + .058X_{3t} + e_t$ (45.64)* (11.80)* (.675) (3.517)*	.991	1.380
American Indian/ Alaskan Natives	$Y_t = .543 + .032X_{1t} - .029X_{2t} - .011X_{3t} + e_t$ (23.53)* (7.036)* (-.907) (-1.483)	.929	2.374

Note: Adjusted R² represents the adjusted R² and is a measure of goodness to fit; DW = Durbin-Watson statistic; all numbers in parentheses are *t* values.
 Minorities = Blacks, Hispanics, Asian and Pacific Islanders, and American Indians/Native Alaskans
 * Significant at .005. .05 was used as the cut-off point for testing statistical significance.

influence of employment trends or other social factors such as education levels.

Individual Minority Groups

In Grades 14-18 and the SES, minority employment percentage increased from 9.9 in 1988 to 14.9 in 1995 to 17.5 in 2002. This upward trend is illustrated in Figure 3. According to Table 3, two of the coefficients are statistically significant. The coefficient *b*₁ of .471 is statistically significant with a *t* statistic value of 15.7. This means that the slope for the years 1988 to 1995 is .471, indicating that minority employment increased at a rate of .47% per year pre-*Adarand*, on average holding other variables constant. The coefficient *b*₂ suggests that post-*Adarand* there was an immediate but short-term increase of .043 in federal employment for minorities. However, the coefficient is not statistically significant. The coefficient *b*₃ of .179, which is statistically significant, indicates that the post-*Adarand* slope increased over the pre-*Adarand* slope by .179% a year on average holding

other variables constant. This provides a rate of increase for the post-*Adarand* time period of .650% (.471 + .179) per year.

Blacks. In Grades 14-15 and the SES, Black employment percentage increased from 4.7 in 1988 to 6.2 in 1995 to 8.2 in 2002. These data are illustrated in Figure 3. The regression output listed in Table 3 indicates that two of the coefficients are statistically significant. The coefficient b_1 of .204 is statistically significant with a t statistic value of 9.276. This means that Black employment increased at a rate of .20% per year pre-*Adarand*, on average holding other variables constant. The coefficient b_2 suggests that post-*Adarand* there was an immediate but short-term decrease of .071 in federal employment for Blacks, however, the coefficient is not statistically significant. The coefficient b_3 of .125, which is statistically significant, indicates that the post-*Adarand* slope increased over the pre-*Adarand* slope by .125% a year on average holding other variables constant. This provides a rate of increase for the post-*Adarand* time period of .329% (.204 + .179) per year.

Hispanics. In Grades 14-18 and the SES, Hispanic employment percentage increased from 2 in 1988 to 2.8 in 1995 to 3.6 in 2002 (see Figure 3). In the model testing the impact of *Adarand* on Hispanics employed in the federal workforce, Grades 14-18 and the SES, one coefficient, b_1 , is statistically significant. The coefficient b_1 of .120 means that Hispanic employment increased at a rate of .120% per year pre-*Adarand*, on average holding other variables constant. It indicates an approximate slope of 1.2 for the years 1988 to 1995. Coefficients b_2 and b_3 are not statistically significant.

Asians and Pacific Islanders. In Grades 14-15 and the SES, Asian and Pacific Islander employment percentage increased from 2.6 in 1988 to 3.5 in 1995 to 4.7 in 2002 (see Figure 3). According to Figure 3, b_1 and b_3 are statistically significant. The b_1 coefficient of .124 means that Asian and Pacific Islander employment increased at a rate of .124% per year pre-*Adarand*. The b_3 coefficient of .058, which is statistically significant with a t -statistic value of 3.5 indicates that the post-*Adarand* slope increased over the pre-*Adarand* slope by approximately .06% a year on average holding other variables constant. This provides a rate of increase for the post-*Adarand* time period of .182% (.124 + .058) per year.

American Indians/Alaskan Natives. Employment percentage for American Indians/Alaskan Natives in Grades 14-15 and the SES increased from .6 in 1988 to .8 in 1995 to .9 in 2002. In terms of the regression analysis, one coefficient is statistically significant for this minority group. The b_1

coefficient of .032 indicates an approximate slope of .032 for the pre-*Adarand* years. This means that employment for American Indians/Alaskan Natives increased by .032% per year, on average holding other variables constant. The coefficient b_2 of $-.029$ suggests that post-*Adarand* there was an immediate but short-term increase of .043 in federal employment for American Indians/Alaskan Natives. However, the coefficient is not statistically significant. The b_3 coefficient of $-.011$ suggests that the post-*Adarand* slope decreased over the pre-*Adarand* slope by .011% a year on average holding other variables constant. This would provide a rate of increase for the post-*Adarand* time period of .021% ($.032 - .011$) per year. However, the coefficient is not statistically significant.

DISCUSSION

The Clinton administration's response to the Supreme Court's decision in *Adarand* was a major intervention in federal personnel policy. The administration repeatedly instructed the agencies to re-evaluate their affirmative action programs. This message came from the highest levels of the Department of Justice as well as from the president. If affirmative action classifications were central to federal EEO for women and minorities, then the administration's response to *Adarand* should have had a negative impact on the employment interests of both groups.

Analysis of the impact of the Clinton administration's response to *Adarand* on the federal civilian workforce as a whole suggests instead that the post-*Adarand* policy change had minimal to no influence in the hiring of women and minorities. Overall, both groups observed a slight decrease in their rates of growth post-*Adarand* but not markedly so. Hispanics gained federal employment at a slightly higher rate in the post-*Adarand* period than before, while Blacks experienced no change. Affirmative action may have been most helpful to the smaller minority groups—Asians and Pacific Islanders and American Indians/Alaskan Natives, whose employment interests declined after *Adarand* policy change; Asian and Pacific Islanders markedly so and American Indians/Alaskan Natives marginally.

The following conclusions can be drawn with regard to minority and female federal civilian employment in Grades 14-15 and the SES: (a) all six groups experienced a marginal increase in the average rate of employment, women more markedly than the other groups; (b) the intervention had no immediate short-term impact on employment for women, minorities, Blacks, Hispanics, Asians and Pacific Islanders, or American Indians/

Alaskan Natives; (c) the post-*Adarand* slope increased marginally over the pre-*Adarand* slope for three minority groups, Blacks and Asians and Pacific Islanders (.179, .125, and .058, respectively), yielding a rate of increase for the post-*Adarand* period of .650, .329, and .182, respectively. As such, no substantial long-term impact of the intervention was realized for Blacks or Asians and Pacific Islanders. However, minorities as a whole increased at an average of 0.6% a year. As of 2002, minorities remain considerably under-represented in the Grades 14-15 and the SES when compared to the CLF, 17.5% versus 29.7%. However, when minorities are compared to their counterparts in the CLF (professional/managerial occupations) the federal workforce does a better job of representing minorities (17.5% vs. 14%). According to the regression estimates, *Adarand* did not have an impact on the employment of women, Hispanics, or American Indians/Alaskan Natives in federal workforce Grades 14-15 and the SES.

Based on our analysis of the federal civilian workforce as a whole and Grades 14-15 and the SES, one plausible conclusion is that by 1995 workforce diversity, educational opportunity, and social change may have rendered affirmative action a far less substantial personnel tool than many of its proponents and opponents thought. In sum, post-*Adarand* change in affirmative action policy in federal HRM did not make much or, perhaps any overall difference in the hiring of women and minorities in the federal workforce as a whole or in their employment at the Grade 14-15 and SES levels.

These findings are of considerable importance in deciding whether to change public sector HRM policies in response to the new constitutional space created by *Grutter*, as limited by *Gratz*. However, as with much policy impact analysis, some caveats are in order. Although now impracticable, assessment of the impact of the post-*Adarand* policy change could be affected by a thorough analysis of how the Clinton administration's instructions were implemented throughout the government. Also unavailable, information on the demographic breakdown of the pool of applicants from 1988 to 2002 would determine if there was a shift in the percentage of women and minorities who applied for federal positions. In other words, are the results partly a reflection of changes in who sought federal employment during the pre- and post-*Adarand* years? The 1990s were a period of unprecedented economic expansion, which undoubtedly affected many individuals' decisions regarding where to seek or retain jobs. In addition, affirmative action goals and timetables applied to only one side of the equation—hiring and promotion—not the other side, retention. There may have been significant gender, racial, and ethnic differences in removal

rates, acceptances of buy-outs, normal attrition, and reductions in force for which comprehensive, comparable data over the time period studied are unavailable (see Naff, 2001, chapter 5).

Even with these limitations in mind, the findings here cannot be disregarded. If hiring and promoting according to goals and timetables using racial, ethnic, and gender classifications are not part of the answer to increasing federal workforce diversity, then there is no point in regretting their general demise under the Clinton administration or trying to engineer their resuscitation within the confines of *Grutter* and *Gratz*. Affirmative action has always generated intense feelings, pro and con, as the justices' divisions in *Adarand*, *Grutter*, and *Gratz* indicate.¹⁰ If it is inefficacious, then policy makers might be better off investing in other means for achieving full EEO and a workforce that looks like America in terms of gender, race, ethnicity, disability, and sexual orientation (Naff, 2001; Shafritz et al., 2001).

Finally, it should be noted, that no one—on the Supreme Court or off—could have predicted the effects *Adarand* has had on federal employment. Contrary to expectations generated by some research on the courts and public administration, the Clinton administration responded seriously to *Adarand* by changing federal HRM affirmative action policy.¹¹ With so much invested by both sides of the decades old affirmative action debate, one could have reasonably anticipated that response to have dramatic impacts for women and the larger minority groups. These simply did not materialize. From this perspective, analysis of the *Adarand* intervention exemplifies the value of policy analysis in informing the politics and design of public personnel administration.

NOTES

1. See Clinton, 1995, pp. 4-5, "The purpose of affirmative action is to give our nation a way to finally address the systematic exclusion of individuals of talent on the basis of their gender or race from opportunities to develop, perform, achieve and contribute. Affirmative action is an effort to develop a systematic approach to open the doors of education, employment and business development opportunities to qualified individuals who happen to be members of groups that have experienced longstanding and persistent discrimination. . . . It does not mean and I don't favor the unjustified preference of the unqualified over the qualified of any race or gender. It doesn't mean and I don't favor numerical quotas. It doesn't mean and I don't favor rejection or selection of any employee or student solely on the basis of race or gender without regard to merit."

2. In *Grutter*, the University's immediate objective was to create a "critical mass" of minority students in order to enhance diversity in its legal education.

3. The Rehnquist Court has reinvigorated constitutional federalism by restricting Congress's Commerce Clause powers and strengthening the states' protections under the Tenth and Eleventh Amendments (*U.S. v. Lopez*, 1995; *Printz v. U.S.*, 1997; *U.S. v. Morrison*, 2000; *Federal Maritime Commission v. South Carolina State Ports Authority*, 2002). However, it has not been more deferential to the states than to Congress per se. Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas have been at the forefront of limiting congressional incursions into traditional state police powers, reserve powers, and sovereign immunity. However, among these five, only O'Connor was in the majority of justices deferential to the University of Michigan's Law School in *Grutter*. All five have ruled in favor of restricting the states in some areas, such as property rights under the Fourteenth Amendment's incorporation of the Fifth Amendment's "takings clause" (e.g., *Dolan v. City of Tigard*, 1994). Rehnquist and O'Connor supported Congress's Fourteenth Amendment override of state sovereign immunity in the Family and Medical Leave Act of 1993. See *Nevada Department of Human Resources v. Hibbs* (2003). These two justices also supported gender equality over state flexibility in *U.S. v. Virginia* (1996).

4. The assumption is based on the belief that federal personnel overwhelmingly obey the rule of law and official policy directives as best they can. Historical and anecdotal evidence regarding the polarizing impact of affirmative action suggests that many supervisors and managers would have welcomed the policy change (see Shafritz et al., 2001). Compliance may also have been bolstered by reluctance to run the risk of being named in a formal discrimination complaint. See Naff (2001) for an analysis of supervisors' attitudes toward achieving a representative workforce.

5. Even the major works are too numerous to list here. Naff (2001) may have the most comprehensive bibliography.

6. Although President Clinton's rhetoric was more favorable to affirmative action in the federal career service than President George Bush's, prior to the Clinton administration's response to *Adarand*, neither president took explicit steps to modify the EEO/Affirmative Action processes that had been in place as of 1988.

7. Naff (2001) analyzed employment patterns into the mid- to late-1990s. See Rosenbloom (1977) for a baseline analysis.

8. The CPDF does not include the Postal Service, Postal Rate Commission, intelligence agencies, the White House and vice presidential offices, Board of Governors of the Federal Reserve, Tennessee Valley Authority, the judicial branch, and the legislative branch except for the Government Printing Office and U.S. Tax Court (see U.S. Office of Personnel Management, 2001).

9. The year 1995 was also coded as 0 to take into account the implementation process because Clinton did not state his policy directive until July 19th and the U.S. Office of Personnel Management point in time count for employees occurred on September 30, allowing only 72 days for implementation.

10. The opinions and dissents in *Adarand* itself were biting. Justice Thomas's concurring opinion suggested that affirmative action is polarizing across the general population and within minority groups:

There can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably such programs engender

attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority that may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences. (*Adarand Constructors v. Pena*, 1995, p. 241).

The intensity of feelings toward affirmative action is reflected in the fact that six justices wrote opinions in *Grutter*, as did seven in *Gratz*.

11. For example, see DiIulio (1990) and Rosenberg (1991).

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