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## Dividing Line: Racial Preferences in Arizona

by Clint Bolick, Director of the Goldwater Institute Scharf-Norton Center for Constitutional Litigation; and John Robb, Ronald Reagan Fellow, Goldwater Institute

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### EXECUTIVE SUMMARY

The issue of governmentally imposed racial preferences has been raised in Arizona in the context of a proposed voter initiative to ban discrimination in public education, employment, and contracts. Following similar initiatives that voters overwhelmingly approved in California, Washington State, and Michigan, anti-racial preference activist Ward Connerly is collecting signatures to place the issue on the November 2008 Arizona statewide ballot as part of a “Super Tuesday” in which such measures will appear on the ballots in five states. If enacted, the initiative will amend the Arizona Constitution to completely forbid such preferences, making state law more restrictive than the federal Constitution, which has been construed to forbid most but not all racial classifications.

Appropriately, the question has been raised whether the initiative is a solution in search of a problem. This paper documents more than three dozen such classifications in Arizona government programs at the state, local, and university levels. Given that governmental entities are rarely candid about whether and the extent to which they confer preferences on the basis of race, color, or sex, the fact that three dozen visible programs were easily discovered suggests that the programs identified in this paper may represent only the tip of the Arizona preference iceberg. The range of programs makes clear that such preferences exist in numerous public institutions at every level of Arizona government. That factual predicate sets the stage for a vitally important public debate over whether Arizona governments should take such factors into account in allocating opportunities in public education, employment, and contracting.

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### **Background**

Over 60 years ago in his dissent in the infamous Japanese internment case, Supreme Court Justice Robert Jackson warned presciently that whenever government validates the principle of racial discrimination, no matter how compelling the circumstances may appear, “The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.”<sup>1</sup>

Unfortunately, our nation has not heeded the words of Justice Jackson or others who have warned about the corrosive effects of government’s power to classify and discriminate among its citizens. Despite numerous court decisions purporting to limit them to only the most extraordinary circumstances, classifications based on race, color, national origin, and sex permeate the American landscape. These classifications affect not only educational, employment, and contracting opportunities but even the voting districts to which we are assigned and, in Arizona, access to the courts in which we may seek justice.<sup>2</sup>

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When presented with the opportunity to amend their state constitutions to prohibit such discrimination once and for all, voters in three politically blue states did so by overwhelming margins, approving California’s Proposition 209 in 1996 (55-45 percent), Washington State’s I-200 in 1998 (58-42 percent), and Michigan’s Proposition 2 in 2006 (59-41 percent). Each of the initiatives prohibits state and local governments and agencies from discriminating or providing preferences on the basis of race, color, national origin, or sex in public education, employment, or contracts.

Earlier this year, an initiative allowing Arizonans to weigh in on this issue was announced for the November 2008 election. The initiative is being spearheaded by Ward Connerly, who led the fight for the earlier initiatives, and Maricopa County Attorney Andrew Thomas, who will be the campaign’s honorary chairman. Connerly’s American Civil Rights Institute plans to place the issue before voters in five states in a “Super Tuesday” effort.

The measure would amend the Arizona Constitution to absolutely forbid such preferences (unless they are necessary to comply with federal law or funding). Presently, the U.S. Supreme Court analyzes all racial classifications under a “strict scrutiny” test to determine whether they are “narrowly tailored” to a “compelling governmental interest.” Although most challenged classifications fail to withstand

such scrutiny, the Court upheld a University of Michigan law school racial preference program, creating a narrow loophole that advocates are attempting to pry open wider.<sup>3</sup> The initiative, if passed, would categorically outlaw such preferences in Arizona.<sup>4</sup>

Connerly's announcement launched a spirited public debate, starting with an important threshold question: is there a problem in Arizona in search of a solution? The answer is yes. The state of Arizona, along with its universities, agencies, and municipalities, are awash with racial classifications. Racial preference policies can be difficult to ferret out—often they are contained in municipal ordinances, agency regulations, or informal policies (such as university admissions) that are not easily accessible to (or hidden from) the public. Nonetheless, we were able to identify more than three dozen overt classifications, all of which are listed in the appendix and several of which are discussed below. We suspect that the classifications we identified are the tip of the preference iceberg; however, they provide ample tangible examples of the types of government policies that the proposed constitutional amendment would target.

### **Preference Policies in Arizona**

In Arizona, numerous racial preferences can be found in government contracting, employment, and education.

One of the areas in which the government is least shy about using racial preferences is government contracting. Programs exist at the state and local levels that specifically define and require preferential treatment for minority-owned businesses. The Arizona Disadvantaged Business Enterprise (DBE) Program is one such program, seeking to “remedy past and current discrimination against disadvantaged businesses.”<sup>5</sup> The DBE Program defines disadvantaged as being “a member of one of the following groups: Black American, Hispanic American, Native American, Asian-Pacific American, Subcontinent American, or Woman.”<sup>6</sup> The program assists disadvantaged companies in a variety of ways, offering training programs and providing assistance when bidding on jobs.

Phoenix and Tucson also give advantages to businesses owned by people of specific races. In Phoenix, a business can become certified under the Minority- and Woman-Owned Business Enterprise Certification Program. To qualify, the applicant must own at least 51 percent of the business, run the day-to-day operations, be African-American, Asian-American, Native-American, Hispanic, or female.<sup>7</sup> A certified firm enjoys a substantial advantage when bidding for

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government contracts:

If you are a certified [Small Business Enterprise] and you bid on a city eligible goods or general services contracts of between \$250,000 and \$500,000, a 2.5 percent bid incentive may be applied to your bid. This means that your bid may be up to 2.5 percent higher than the lower bidder and still be considered the low bid.<sup>8</sup>

The city also reserves the right to designate certain contracts that may only be bid on by certified firms. The Tucson program has the same application requirements as Phoenix, and certified firms are eligible for a 7 percent bid price preference on contracts between \$25,000 and \$150,000 and a 5 percent preference on contracts between \$150,000 and \$250,000.<sup>9</sup>

Governor Janet Napolitano has also become involved with promoting minority-owned businesses. On December 17, 2004, the governor signed Executive Order 2004-29, issuing several directions concerning government contracting. The order requires government agencies to request at least one quote from a minority- or woman-owned business when contracting with private business, and it directs that those agencies promote the use of minority-owned businesses.<sup>10</sup> The governor also initiated a program called Arizona Steps Up, which makes available a database of small and minority- and woman-owned businesses for use by government agencies when complying with Executive Order 2004-29.<sup>11</sup>

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Contracting is not the only area in which the governor's office has mandated use of racial preferences. In 1993, then-Governor Fife Symington issued Executive Order 93-20, which contained directives for many of the governmental policies now in place that use racial preferences. One of those directives was that state agencies must develop an Equal Opportunity Plan designed to increase the size of their minority workforce.<sup>12</sup>

These Equal Opportunity Plans have language indicating racial preferences. The Pima County plan examines the workforce, identifies races that are underrepresented based on census data, and lists steps to increase employment of those races.<sup>13</sup> Maricopa County's diversity policy seeks "to recognize, reward, and compensate employees based solely upon the merit of their contributions." Part of that contribution, however, appears to be their race. A key element of the policy is that measures should be taken "to hire, retain, develop, manage, and promote a diverse workforce." A "diverse workforce," as defined by the policy statement, has a racial makeup reflecting that of the county.<sup>14</sup>

The employment policies of state universities are more specific about the use

of race as a criterion for hiring decisions. The Arizona Board of Regents' hiring procedures have clear racial preferences:

Between equally qualified candidates, preference shall be given to candidates whose hire will help correct under utilization as identified in university affirmative action plans.<sup>15</sup>

Correcting "under utilization" involves preferential treatment of specific races, as defined by both the Regents' and universities' policies. The affirmative action policy for Northern Arizona University specifies percentage goals for women and minorities in certain job groups and establishes methods for meeting those goals.<sup>16</sup> The Equal Opportunity and Affirmative Action Office of the University of Arizona has also established placement goals for minorities in various job groups. It goes on to direct the university to attempt to fill positions in a way that satisfies the placement goals.<sup>17</sup>

Numerous student programs at state universities also exhibit racial preferences. Arizona State University (ASU) has a multicultural student center that, while open to students of all races, specifically tailors its services to students who are African-American, Asian-American/Pacific Islander, or Hispanic/Latino.<sup>18</sup> ASU also aggressively recruits minorities by, among other incentives, offering scholarship packages aimed at high-achieving Hispanic and African-American students.<sup>19</sup> The University of Arizona has a minority student recruitment department that actively recruits "students from the four major ethnic groups (African-American, Asian/Pacific Islander, Hispanic, and Native American)."<sup>20</sup> Northern Arizona University's "Successful Transition and Academic Readiness"<sup>21</sup> program is designed to assist incoming freshmen with the transition to college life and uses race as a criterion for acceptance.<sup>22</sup>

Higher education is not the only place where racial preferences in public education can be found. Although the Tucson Unified School District recently abandoned strict racial and ethnic ratios for school assignments in favor of an open enrollment plan, it still plans to seek "diversity" in magnet school admissions.<sup>23</sup>

## Conclusion

The question of whether Arizona should ban racial classifications is not an abstraction. Public officials at every level of Arizona government have resorted to classifying their constituents on the basis of race, color, national origin, and sex, and have apportioned opportunities on that basis. Are such policies morally

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right or wrong? Should the government continue to have the power to do so? Are there better ways to provide opportunities to those who need and deserve a helping hand? We expect to address those important questions in due course, but they are outside the limited scope of this paper (although one of the authors has written extensively on the topic).<sup>24</sup> The preferences identified in this paper provide a tangible foundation from which to debate a moral and constitutional issue that goes to the heart of our society.

The Civil Rights Movement strove to make society race-blind, and an inherent part of that goal was to ensure that the government treats its citizens in a race-neutral manner. In Arizona, this is simply not occurring. Racial preferences exist throughout many layers of government in the state. The message is clear: in the eyes of Arizona government, the color of your skin still matters.

## APPENDIX

### Public Programs in Arizona with Racial Preferences

#### Arizona State University

- ❖ American Indian Support Services
  - <http://www.asu.edu/clas/aiss/>
- ❖ Bridges to Biomedical Careers Program (CEO Report 3, p. 8)
- ❖ Minority Engineering Program (MEP)
  - <http://www.fulton.asu.edu/fulton/departments/cedar/mep.php>
- ❖ Minority Recruitment
  - <http://www.asu.edu/enroll/news/news3.html>
- ❖ Multicultural Student Services
  - <http://www.asu.edu/studentaffairs/mss/msc/about.htm#about>
    - African-American Men of Arizona State University
    - Community Alliance for Black Student Support
    - Native American Achievement Program
- ❖ Underrepresented Graduate Enrichment Match
  - <http://graduate.asu.edu/ugem.html>

#### Northern Arizona University

- ❖ Minority Student Development Program
  - <http://www.research.nau.edu/undergrad/msd.html>
- ❖ Multicultural Student Center
  - <http://home.nau.edu/msc/>
- ❖ Undergraduate Student Training in Academic Research
  - <http://www2.nau.edu/%7Efpm/research/MARC/Cover.htm>

#### University of Arizona

- ❖ African American Student Affairs
  - <http://dmps.arizona.edu/aasa/>
- ❖ Arizona Hispanic Center of Excellence
  - <http://www.azhcoe.medicine.arizona.edu/>
- ❖ Librarian Recruitment
  - <http://uanews.opi.arizona.edu/cgi-bin/WebObjects/UANews.woa/wa/MainStoryDetails?ArticleID=3965>
- ❖ Minority Access to Research Careers
  - <http://www.biochem.arizona.edu/marc/>
- ❖ Minority Health Disparities Research Opportunities
  - <http://grad.arizona.edu/imsd/>
- ❖ Minority Scholarship German Studies
  - <http://www.coh.arizona.edu/german/funding/minority.htm>

- ❖ Minority Student Recruitment
  - <http://admissions.arizona.edu/MSR/MSR.htm>
- ❖ Minority Writing Program
  - <http://www.law.arizona.edu/rss/minority.cfm?page=program&link=i>
- ❖ McNair Achievement Program
  - <http://grad.arizona.edu/mcnair/>
- ❖ Native American Student Affairs
  - <http://nasa.web.arizona.edu/>
- ❖ Writing Skills Improvement Program
  - <http://wsip.web.arizona.edu/>

### **K-12 Education**

- ❖ TUSD Magnet Schools
  - Governing Board Policy 5090  
(<http://www.tusd.k12.az.us/contents/govboard/gbpol5000/pol5090.html>)
- ❖ Office of Indian Education
  - <http://www.ade.state.az.us/asd/indianed/>
- ❖ Revised State Plan for Highly Qualified Teachers
  - <http://www.ade.az.gov/certification/downloads/book/ApprovedStateRevisedPlan.pdf>
  - “Targeted High-Need Groups: High Poverty, Minority, Urban” (p. 41)

### **Government Contracts**

- ❖ Arizona Disadvantaged Business Enterprise Program
  - <http://www.azdot.gov/azdbe/index.asp>
  - [http://www.azdot.gov/azdbe/dbe\\_Application.asp](http://www.azdot.gov/azdbe/dbe_Application.asp)
- ❖ Arizona Steps Up
  - <http://az.gov/webapp/azstepsup/>
- ❖ Executive Order 2004-29
  - <http://www.azspo.az.gov/mbewbe/intro.htm>
- ❖ Minority- and Woman-Owned Business Enterprise Certification Program (Phoenix)
  - <http://phoenix.gov//BUSINESS/mwbecert.html>
- ❖ Minority and Woman-Owned Businesses Program (Tucson)
  - <http://www.tucsonaz.gov/eoo/MWBE/mwbe.html#program>
- ❖ State Procurement Office
  - <http://www.azeps.az.gov/>

### **Employment**

- ❖ Arizona Board of Regents’ Hiring Procedures
  - [http://www.abor.asu.edu/1\\_the\\_regents/policymanual/chap6/6-401.pdf](http://www.abor.asu.edu/1_the_regents/policymanual/chap6/6-401.pdf)
- ❖ Executive Order 93-20

- <http://www.governor.state.az.us/eop/documents/EXECUTIVEORDER93-20.pdf>
- ❖ Maricopa County Policy: Diversity Policy
  - <http://www.maricopa.gov/diversity/PDF/a1510.pdf>
- ❖ NAU Affirmative Action Plan
  - <http://www4.nau.edu/diversity/plan.asp>
- ❖ Pima County Equal Employment Opportunity Plan
  - <http://www.co.pima.az.us/hr/eoplan.html>
- ❖ University of Arizona Equal Opportunity & Affirmative Action Office
  - <http://fp.arizona.edu/affirm/AA%20Goals.htm>

NOTES

1. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).
2. Michael Kiefer, “Thomas threatens lawsuit against Spanish-language courts,” *Arizona Republic*, January 5, 2006.
3. *Grutter v. Bollinger*, 539 U.S. 306 (2003).
4. See, e.g., *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000), which applies the California anti-preference provision.
5. Arizona Disadvantaged Business Enterprise Program, homepage, <http://www.azdot.gov/azdbe/index.asp>.
6. Arizona Disadvantaged Business Enterprise Program, “General Criteria for DBE Certification,” [http://www.azdot.gov/azdbe/dbe\\_Application.asp](http://www.azdot.gov/azdbe/dbe_Application.asp).
7. City of Phoenix, “Minority- and Woman-Owned Business Enterprise and Small Business Enterprise Certification Programs,” <http://phoenix.gov/BUSINESS/mwbecert.html#QUALIFY> (“Who Qualifies for Certification as a Minority- or Woman-Owned Business Enterprise?”).
8. City of Phoenix, “Minority- and Woman-Owned Business Enterprise and Small Business Enterprise Certification Programs,” <http://phoenix.gov/BUSINESS/mwbecert.html#INCENTIVE> (“What Are the Incentive Programs for Certified Companies?”).
9. City of Tucson, Office of Equal Opportunity Programs, “Minority and Women-Owned Business Enterprise (MWBE) Program,” <http://www.tucsonaz.gov/eoo/MWBE/mwbe.html#program> (“Program Advantages”).
10. Arizona Department of Administration, State Procurement Office, “Diversity Reporting for State Agencies,” <http://www.azspo.gov/mbewbe/intro.htm>.
11. State of Arizona, “Arizona Steps Up: A Statewide Partnership for Equity in Procurement,” <http://az.gov/webapp/azstepsup/>.
12. Executive Order 93-20, “Equal Opportunity Office,” <http://www.governor.state.az.us/eop/documents/EXECUTIVEORDER93-20.pdf>.
13. Pima County Human Resources, “Pima County Equal Opportunity Plan,” <http://www.co.pima.az.us/hr/eeoplan.html>.
14. Maricopa County, “Maricopa County Policy: Diversity Policy,” <http://www.maricopa.gov/diversity/PDF/a1510.pdf>.
15. Policy Number: 6-401, “Hiring Procedures,” [http://www.abor.asu.edu/1\\_the\\_regents/policymanual/chap6/6-401.pdf](http://www.abor.asu.edu/1_the_regents/policymanual/chap6/6-401.pdf).
16. Office of Affirmative Action and Equal Opportunity, Northern Arizona University, “Affirmative Action Plan,” <http://www4.nau.edu/diversity/plan.asp>.
17. Equal Opportunity & Affirmative Action Office, “2007 Affirmative

Action Placement Goals,” <http://fp.arizona.edu/affirm/AA%20Goals.htm>.

18. Arizona State University, Multicultural Student Center, “About the Center and Programs,” <http://www.asu.edu/studentaffairs/mss/msc/about>.

19. Eugene Scott, “ASU’s Enrollment Reflects Effort to Recruit Minorities—Student Body Is Most Diverse in School’s History,” *Arizona Republic*, October 24, 2005, <http://www.asu.edu/enroll/news/news3.html>.

20. University of Arizona, “Minority Student Recruitment,” <http://admissions.arizona.edu/MSR/MSR.htm>.

21. Northern Arizona University, Multicultural Student Center, “Welcome to STAR!” <http://home.nau.edu/msc/star.asp>.

22. Northern Arizona University, Multicultural Student Center, “Eligibility & Costs,” <http://home.nau.edu/msc/star/value.asp>.

23. Josh Brodesky, “TUSD Adopts Open-Enrollment Policy,” *Arizona Daily Star*, August 29, 2007, <http://www.azstarnet.com/sn/education/198708>.

24. See, e.g., Clint Bolick, *The Affirmative Action Fraud: Can We Restore the American Civil Rights Vision?* (Washington, DC: Cato Institute, 1996).

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