

THE WEEK

Arizona's anti-gay bill shows why conservatives struggle to win over minorities

Jan Brewer's veto of an anti-gay bill was a good start. But it's not enough.

By Zack Beauchamp
February 27, 2014

It's a sweet coincidence that Arizona Gov. Jan Brewer vetoed her state's bill protecting Jim Crow-style discrimination against LGBT Americans at the end of Black History Month. The legislators who pushed the bill are in many ways segregation's modern heirs, and their defeat was richly deserved.

But even the well-meaning conservatives who supported the bill out of a sincere concern for religious liberty should take notice of the timing. The defenses of S.B. 1062 revealed a profound conservative blindspot about power and identity in American life, one animated by their fantasy of a race-blind and sexual orientation-less world. Unless these conservatives learn from Brewer's veto, and start building a worldview that acknowledges people's real identities, conservatism will remain utterly unappealing to the vast majority of racial and sexual minorities.

The Arizona bill would have [amended](#) the state's Religious Freedom Restoration Act (RFRA), a law designed to protect the freedom of churches and explicitly religious institutions. The new RFRA would have [allowed](#) *all* individuals and businesses (not just religious ones) to run their organization in accordance with any "practice and observance" of their faith unless the government can show a "compelling government interest" in shutting them down.

That sounds innocuous enough until you remember that there's no state or [federal](#) law defining the protection of equal rights for LGBT Americans as a compelling interest. So long as anti-gay store owners cite religious reasons for kicking gay clients out of their stores, they'd have had a powerful legal tool for defending their actions. And the discriminated-against clients wouldn't have a great legal counterweight.

"There is absolutely nothing in the act that would preclude a bed store from arguing that selling beds to same-sex couples violates its religious beliefs because it facilitates sinful conduct," Carolina Mala Corbin, a University of Miami law professor, told [MSNBC's Adam Serwer](#). You can see why that might trouble LGBT people who live in states where large numbers of people — many of whom surely operate businesses — believe them to be [hell-bound sinners](#).

That's something of a moot point in Arizona now. But there's an interesting tic in the conservative defenses of the law, something that tells us a lot about the future of this debate. Many of them mention, as if it was some kind of trump card, the idea that the bills don't explicitly mention sexual orientation.

"There's no mention of sexual orientation (or any other class or category)," the Cato Institute's Ilya Shapiro [writes](#). "The proposed legislation never even mentions same-sex couples," [pleads](#) the Heritage Foundation's Ryan T. Anderson. *National Review's* editor, Rich Lowry, [took](#) it the furthest:

Clocking in at barely two pages, it was easy to scan for disparaging references to homosexuality, for veiled references to homosexuality, for any references to homosexuality at all. They weren't there...there was nothing anti-gay about Arizona's anti-gay bill.

The point is wholly absurd. The problem with these laws isn't that they explicitly condemn LGBT Americans; it's that they permit bigots to act out their bigotry with the force of the state at their back. Poll taxes and literacy tests [didn't need](#) to mention black people in the text of the bill to have the desired effects either.

In a world where [a full third of Americans](#) think "society should not accept homosexuality" — a figure that's likely higher in Arizona and other states where these bills could plausibly pass — permission for businesses to discriminate could make life miserable for gay folks.

This ignorant objection from the bill's defenders neatly encapsulates everything that's wrong with the conservative-libertarian approach to the Arizona bill. When you live in a society marked by deeply rooted discrimination, a facially neutral government is *taking the bigots' side*.

There's an enormous gulf in social power in this country. Conservative Christians are a much larger group, and wield far more social and financial capital than gays do. LGBT folks, by contrast, have a long history of being [brutalized by overt discrimination](#) — and [the scars to prove it](#).

Let me put it another way. After the passage of the federal Civil Rights Act, you didn't see hordes of vindictive black folks forcing white-hooded caterers to work their weddings and baptisms. Rather, the law gave blacks a way to dismantle Jim Crow, both in its legal and private sector incarnations. Protecting the power of businesses to discriminate doesn't protect an individual right to conscience. It protects the right to *enact* that conscience on members of a socially marginalized group.

Not every defender of the Arizona bill is blind to this point. In a [Bloggingheads segment](#) I encourage you all to watch, Cato's Jason Kuznicki argues that there's an important asymmetry between racial discrimination in 1964 and anti-gay discrimination today: The gays are winning. While Jim Crow racism wasn't going anywhere on its own in 1964, the [broad trend](#) toward acceptance of equal LGBT rights is at this point irreversible. There's no need to infringe on religious liberty to protect rights that will shortly be self-enforcing.

Kuznicki is right to celebrate America (and the world's) extraordinary progress on sexual and gender tolerance. But it's a bit strange to say that today's gays should suffer through discrimination now because tomorrow's will have to deal with less of it.

Perhaps more fundamentally, I'm less sanguine than Kuznicki that anti-gay discrimination will disappear anymore than racism has. Subtle anti-black prejudices today permeate housing, employment, and other critical sectors. This is the legacy of [deeply ingrained anti-black beliefs](#). There's [good social scientific evidence](#) that LGBT anti-discrimination protections are needed to counteract the same thing.

And while race has certainly been far more central to American politics and social life than sexual orientation, anti-LGBT discrimination has been a hallmark of Western societies for over a millennia. "The most fundamental" problem with studying gay life, writes eminent Yale historian John Boswell, "is the fact that the longevity of prejudice against gay people and their sexuality has resulted in the deliberate falsification of historical records concerning them." His book starts around the time that Christianity took over the Roman Empire.

So when Shapiro writes that the core of the issue is that "private individuals should be able to make their own decisions on whom to do business with and how — on religious or any other grounds," he couldn't be more wrong. Anti-gay prejudice permeates the private sphere, and constitutes historically deep and systematic discrimination of the sort not easily dispelled absent rigorous government oversight.

But to really integrate that insight into conservative and libertarian thought would be to admit that blackness and gayness are fundamental identities that people have, shaped both by historical discrimination and proud self-labeling. Conservatives would rather pretend that these categories are withering away rather than here to stay.

Don't take my word for it. Here's conservative Kevin Williamson, [witness for the prosecution](#):

We are closing in on the end of Black History Month, and *National Review* has not exactly been inundated by copy relating to the occasion.

Conservatives are not big on viewing human beings as racial aggregates. We are capitalists who see people as buyers and sellers, investors and entrepreneurs in a marketplace that cares more about returns than race; we are constitutionalists who believe that we are equal individuals under the law; we hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights. [[National Review](#)]

The idea that making people "equal individuals under law" may require accepting the legitimacy of black and LGBT identity escapes Williamson ([unsurprisingly](#)) and, really, most of the conservative movement. It's like the Stephen Colbert joke about how he "doesn't see color," only for real.

It's not just historical oppression that should make us take minority identity seriously. It's that black and LGBT individuals take pride in their identity, seeing their group membership as a

source of valuable tradition and support. Ignoring identity in law, or worse, stripping it away, isn't empowering. It's oppressive and atomizing.

Until conservatives understand that point, they'll have trouble developing a policy message that's capable of even remotely appealing to members of these groups. The process starts by seeing Jan Brewer's veto not as a defeat for human freedom, but as step toward its triumph.