

Be it enacted by the Senate and House of Representatives
United States of America in Congress assembled,

SHORT TITLE

Public Law 103-141

Nov. 16, 1993
[H.R.]
Religious
Freedom
Restoration
Act of 1978.

77 STAT. 1488
PUBLIC LAW 103-141—NOV. 16, 1993

Bad

F L O R I D A H O U S E

Law

TEN POPULAR LAWS THAT
ARE RUINING AMERICA

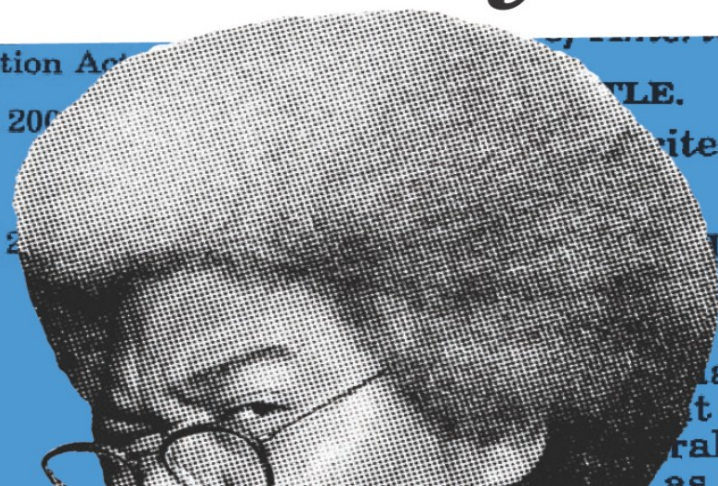
Public Law 103-141
103rd Congress

OV. 16,

Elie Mystal

religion.
use of
Assemble
air transportation systems which
determine the quality, variety, and
purposes.

SEC. 2. FINDINGS AND DECLARATIONS
Congress finds that—
the Constitution, recognize
alienable right secured by
to the Constitution;
"rational" toward religion may
as laws intended to interfere



Also by Elie Mystal

Allow Me to Retort: A Black Guy's Guide to the Constitution

BAD LAW

**TEN POPULAR LAWS THAT
ARE RUINING AMERICA**

ELIE MYSTAL



NEW YORK
LONDON

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INTRODUCTION

The law is not a set of objective rules. It's an amalgam of our subjective choices. Laws do not come down to us from on high. Charlton Heston did not climb up a mountain, find some laws, and throw them at us in anger. In our society, we, the people, govern our laws, not the other way around. We choose them. We choose what's legal or illegal; we choose what's punished or rewarded. We choose to live this way.

Our choices have been shitty. That's because, for the most part, "we" do not get to participate in the choosing of our laws. Not all of us, not in this country. America is a place where we specifically prohibited Black people and women from participating in the decisions about which laws we'd have for nearly two hundred years.

If it were up to me, I'd treat every law passed before 1965 as presumptively unconstitutional. Before the passage of the 1965 Voting Rights Act, the United States of America was functionally an apartheid state.^{[1](#)} The government of this country was illegitimate when it ruled over people who had no ability to choose the rules. America before 1965 wasn't a democratic republic; it was a white ethnostate that held captives.

Not every American apartheid-era law was *bad*, of course. The Civil Rights Act was passed in 1964, and that was a good one. I'm also a big fan of laws against murder and of, like, the Sherman Antitrust Act.^{[2](#)} But surely, the laws that we still actively like from our dark white age could be passed again, this time by representative bodies drawn from all Americans instead of from just the white male ones. My point is simply that all-white, all-male congresses and state legislatures are not a legitimate basis for power and

legal authority in the representative democracy of a pluralistic society. To quote Monty Python, “Strange women lying in ponds distributing swords is no basis for a system of government.”^{[3](#)}

Unfortunately (from my perspective), it’s not up to me. It’s up to rich white people. Even now that explicit political prohibitions have been lifted, structural impediments still limit the ability of racial and ethnic minorities, women, non-Christians, and poor people to become representatives in one of our many lawmaking bodies and, thereby, to participate fully in the law-choosing process. We live in a world saddled with the poor choices of our past, beset by those who want to perpetuate white supremacist policies into our future.

It’s frustrating because there are so many obvious problems with the laws that have been passed and the choices that have been made. Our laws promote bigotry and discrimination, the rapacious accumulation and hoarding of wealth, and vigilante justice, even at the cost of watching our own children die in the cross fire. We have oft-repeated euphemisms to justify these choices: we call the hoarding of wealth “fostering competition,” we call bigotry “religious freedom,” and we call the mass murder of schoolchildren “the Second Amendment.” But at core, the issues most people would identify as problems with our society are the intentional result of the laws we’ve chosen. We live in the most violent wealthy country on earth not in spite of the law; we live in a first-person shooter video game *because* of the law.

Indeed, even something as basic and core to the functioning of society as where each of us is allowed to live is defined not by freedom or economic opportunity but by laws passed and choices made, often with terrible intentions. I, for instance, live in a well-manicured suburb just north of Manhattan. Like nearly all suburbs, it’s culturally inert, and like all New York City suburbs, it’s massively overpriced to maintain access to a city I’m basically too old and cranky to enjoy properly anymore. But it’s pretty and safe, and I’m privileged to live here.

Sixty years ago, the law wouldn't have allowed me to live here. I (like many of my Black neighbors) live in the "white" part of a town that was historically "redlined." Redlining was the colloquial term for practices that grew out of New Deal-era programs—like the Home Owners Loan Act—to spur homeownership after the Great Depression.⁴ The government created an agency, the Home Owners' Loan Corporation, to issue government-backed mortgages, but there was a catch: the government produced maps to indicate where mortgages were a "safe" investment and outlined in red places where government mortgage assistance should not be provided. All of the "red" communities were predominately Black, meaning Black people could not get a government loan to own property in their communities.

And they couldn't get a mortgage to live in white communities either because banks just wouldn't lend to them.⁵ The inability to get a mortgage through either private or public means essentially invented "ghettos": low-service, low-income enclaves where Black people were forced to live. It was only a slightly more subtle version of South African apartheid, but based on the same idea that Black people should not be free to move about the country and live anywhere they pleased. Redlining practices (from both the government and banks) were in effect until the 1970s. They restricted where Black people could live and incentivized white people to move to where Black people were legally prohibited from going.

The effects of redlining extended far beyond the restrictions on the individual choices and freedoms of Black Americans. These laws caused property values to plummet in Black areas, the ones legally redlined by the government, while "white flight" from urban areas destroyed the tax bases of cities. The cash-poor cities in turn started cutting services, which created more decay, more poverty, and more crime. That ghettoization also destroyed the generational-wealth creation of countless middle-class Black families who saw the value of their single biggest investment, their home, crater, while whites-only suburban homeowners saw their assets increase in value. Unable to "move on up," many Black families fell back down as their property values tanked.

The generational damage extended beyond wealth creation because the public education system is (by operation of other terrible laws) tied to the property values in each school district, as opposed to being based on the overall wealth of the state or the country. Therefore, schools in white areas benefited, while schools in Black areas suffered. Public education tied to property values created vast differences between the educational environments and opportunities available for poor Black kids living in cities and those enjoyed by their rich white counterparts living in suburbs.

The effects of redlining are all around us today in the form of urban decay, failing schools, violent crime rates, and, not for nothing, the urban-rural divide that defines our polarized political discourse. Donald Trump (whose racist real estate mogul father was sued by the Department of Justice in 1973, following an FBI investigation, for systematically excluding Black and Latino people from renting in his buildings), probably wouldn't have existed as a political figure able to play into the worst fears of aggrieved suburban whites if redlining hadn't already allowed those whites to live in protected enclaves.⁶ Redlining stunted America's racial and social progress, and MAGA is one of the prices we're still paying for that.

Redlining is an example of how one law can have a disastrous effect on an entire society. It's an example of how one racist *choice* (because our laws are choices) can lead to a host of other crappy choices as we try to treat the symptoms of our failures instead of addressing the gross laws and policies that are the root cause of it all.

Our very worst laws cannot be salvaged through reform or amendment. They must be repealed outright before we can even begin to recover from the damage that these laws have done. Redlining was outlawed completely by the 1968 Fair Housing Act (it's not an accident that housing rights were pretty much the first thing Black people set to work on after they secured civil rights and voting rights). And the fact that redlining laws could be totally repealed offers a template for what could and should happen to other fundamentally bad laws.

Nevertheless, ending redlining and restrictive covenants did not end housing discrimination, but it did take a key discriminatory tool out of the racists' arsenal. Which brings me back to my house. The house I live in is actually the second house in my town for which I made an accepted offer. The first house my family went in on was a little nicer, a little closer to the train, and a little more expensive. We put in an offer, it was accepted, agreements were signed, and everything was going smoothly. We scheduled a home inspector to make sure there weren't any termites or whatever, and, stupidly, I went along and met the owners.

Less than a week later, the owner had a "change of heart" and took the house off the market. I could have sued, made a big stink in the media, and gone full "you fucked with the wrong Marine" on these people. But my pride kicked in, and that pride told me that I would not, under any circumstances, give these racist-ass white folks my money. I would not go to courts and beg them to make these white people allow me to pay them for their house. And I wouldn't spend another year or more in my crappy Manhattan one-bedroom waiting for a judge to decide whether the white owners had to let me and my family move to the place where we wanted to raise our children.

I found another house. I didn't defeat racism or overcome structural oppression or weaponize my Harvard law degree to fight the system. I took the "L" and moved on.

In case you can't tell, I'm still bitter about it. I have to walk past that first fucking house *on my way* to and from the train. The first two years I lived here, I actually walked out of my way to avoid passing the house, until I accepted that I was just punishing myself for no good reason. I often sneer at the white family who bought the house a year later, oblivious as to why that house was available to them. It's not their fault, which is why I haven't met them or burdened them with my baggage, but I'm also not going to waste my own energy forcing my face into a neighborly smile.

Repealing redlining and restrictive covenants did not end racial discrimination in housing. And yet, without those changes, I'd probably still be living in a crappy apartment with kids more used to climbing the subway

stairs than sitting under trees. Getting rid of the law didn't mean I could buy the house I wanted, as if I were some kind of white man, but it did mean I could go find another one. Repealing bad laws doesn't automatically fix the problems they've caused, but repealing them is the first step toward overcoming them.

This book is about ten laws (and one constitutional amendment) that are still on the books—despite the fact that they cause massive social or political harm—and that must be repealed. It's about rules just as bigoted, ignorant, and unfair as redlining that are still the law of the land—sometimes because people miss how cartoonishly evil they are and sometimes because the evil they cause is the key feature that gets people excited. It's about what must be stopped in this country before we can move forward.

All of these laws were popular at the time they were passed. Some still are, but all of them were overwhelmingly supported by Republicans at the time of their passage, and quite a few of them were also supported by Democrats. It's likely that most readers of this book will have supported some of these laws in the past. That's okay: you're here now and that means you're open to the possibility that you were wrong. I am a recovering neoliberal—which means that I have been wrong about a great many things. But we read, we learn, and we get better.

If you are new here, hello. My name is Elie Mystal. I'm no longer a lawyer, but I play one on TV. I'm also a columnist and author. I talk and write because I'm not good at marching and fighting. I approach the law from the perspective of activism and advocacy, which is an intellectually acceptable way of saying that I'm biased as fuck. I'm biased toward fairness, toward racial and social justice, and toward gender equality. I also like puppies. I'm prejudiced against stupidity, violence, slavery and colonization, and the unearned privileges enjoyed by the enslavers and colonists and their progeny. I'm also not particularly fond of cats. Like, I respect them and all, but a dog is a friend, while a cat has merely decided to allow you to live for the time being.

Obviously, I think my biases are righteous and other people's biases are misguided, but it's important to understand when reading me that I'm not trying to convince *other people*. You can read many books that try to appeal to and persuade people on "both sides" of an issue, but that is not my mission. This isn't a remedial law class for fairness-curious Republicans who wonder what the world would look like if their grandfathers had been better people.

I'm not trying to convince people who disagree with me; I'm trying to arm people who want the same things I want with the legal and political arguments to fight for the world they want to see. Politicians and lawyers will defend the indefensible with carefully tested arguments that hint at having special knowledge beyond the reach of most people. But this is false. People who write laws don't actually know anything that is beyond the comprehension of most citizens. They're not scientists working at the cutting edge of particle physics; they're more like customer service reps whose solutions to most problems boil down to "turn it off, then turn it back on."

This book will give you arguments to deploy against the forces of injustice, along with demands you can make of your elected representatives. The next time a politician responds to a mass shooting with "thoughts and prayers," you can respond with the specific law you'd like to see repealed instead. The next time a politician says "Don't say gay," you can tell them where to stick their euphemism because you'll be aware of all the intentional bigotry such laws require.

I've focused the book on laws and issues I think both do great harm and can easily be solved by simple repeal—something Congress (or a state legislature) is completely empowered to do. Our broken Constitution forces us to make many choices, but the laws in this book can be repealed outright with no constitutional concerns. We could all wake up tomorrow and simply decide to do better and vote for people with a more robust appreciation for fairness and equality.

America has tens of thousands of active federal, state, and local laws, rules, and statutes. I haven't read all of them, though I'm told by people I

trust that many of them are stupid. But I'm not interested in the knuckleheaded stuff. I don't care that there's a law in Alabama that makes it illegal to chain your alligator to a fire hydrant (for obvious firefighter-safety reasons, I imagine) or one in New Jersey that makes it illegal to "frown" at a police officer (even when the officer is harassing you).

I'm also not particularly concerned with old laws made new again by Republicans trying to drag this country back into the nineteenth century. I know that there are lawyers such as Jonathan Mitchell— a Republican fetus whisperer and one of the legal minds behind Texas's bounty-hunting provisions in its anti-abortion law—who have seemingly spent every minute since the Supreme Court overturned *Roe v. Wade* searching for old laws that criminalize abortion and contraception. I know laws such as the 1873 Comstock Act (which defined contraception as obscene and thus illegal) have never technically been repealed and are therefore being reanimated by Republicans looking to restrict women's rights further.⁷ But I view a lot of those kinds of zombie laws as *examples* of injustices past instead of the *causes* of injustices today: they're the hangover effect from centuries of white male domination, not the poison that is actively being poured into our body politic on a daily basis.

Similarly, certain laws are just too complicated to fix with my preferred approach of smashing them to bits. I think, for instance, that every antidrug law is probably bad and needlessly criminalizes addiction. But I can't comfortably say we should have *no* drug laws because then I'd just sound like a hack lawyer trying to get a job at Purdue Pharma with the Sackler family. Some of our drug laws need to be repealed, but most of them just need to be massively reformed.

The laws in this book, from felony murder and the Hyde Amendment to "illegal reentry" for immigrants and the Religious Freedom Restoration Act, are ones that we could just be rid of. They don't need to be reformed, and they don't need to be reimagined for our current age; they need to be burned out of our system with fire and have their ashes weighted to the bottom of the ocean. While they may not all be familiar to everyone, these laws have an

outsized detrimental impact on ordinary people today. They represent deeply flawed choices and were passed to codify some of the worst instincts of our society.

To put it another way: these are the laws that piss me off the most. These are the ones that make me scream at my television and call my congressperson and submit “audience questions” (which never get picked) at presidential primary debates.

My previous book, *Allow Me to Retort*, was about the Constitution and how that poorly written document has been misinterpreted by conservatives who want to hold us back. This one is about Congress and state legislatures, but the biggest difference is that this book is about laws that are being interpreted and applied correctly. The laws that I’ve highlighted here are causing social, racial, and gendered injustice *as intended*.

The people who wrote these laws wanted to hurt the people the laws are hurting. Throughout the book I will highlight words from the legislators themselves and their stated reasons for supporting these bad laws. You’ll see that they knew what they were doing when they were doing it and thought the damage they were causing was justified.

In some cases, the very same people who passed the law later admitted their mistakes. Yet even after the core reason, pseudoscience, or outright bigotry that inspired the law was debunked, even after the law’s initial sponsors acknowledged their own failures, the bad law remains on the books. It’s as if Congress were forcing everyone to drink sour milk, until an actual congressperson belatedly takes a swig and exclaims, “Oh God, milk was a bad choice.” But then, instead of throwing the milk away as an intelligent creature would do and providing fresh milk for the people, the congressperson says, “Welp, I guess we all have to finish this terrible milk now. Don’t worry, in four more years we’ll develop a tolerance for it.”

At least, that’s how Democratic politicians behave. Republican politicians are more like, “My milk tastes fine. If you can’t afford fresh milk, it’s because Jesus hates you.”

The law is not an accident. It is a plan. It is written with intentionality by people who want to shape society in one way or another. In our society, that shape is distorted to benefit a ruling class of white male elites and the industries and opportunities those elites control.

It's not an accident that I wrote this book fueled by coffee and cigarettes instead of by cocaine and opium. It's the law. It's, probably, a good law. Let's talk about some of the bad ones.

1

WHY ISN'T EVERYONE REGISTERED TO VOTE?

The right to vote does not exist in the federal Constitution. The Constitution acknowledges our rights to talk, to pray, and to shoot things, but the fundamental right to participate in the political process, through voting, appears nowhere in our organizing document.

That's not surprising when you consider the group of bourgeois white male slaveholders, and bourgeois white male friends of slaveholders, who wrote the Constitution. The white merchant elites who were desperate to gain political representation for themselves and their shuttlecock buddies had no intention of sharing political power with anybody else. They didn't want poor people to be able to vote, and they didn't want working people to be able to vote. It almost goes without saying that they didn't want women people to be able to vote or have a voice in the laws their husbands passed for them. And they obviously didn't want Black people to be able to vote because they didn't consider Black people "people" so much as occasionally mouthy farm equipment who could be raped, slaughtered, or used as beasts of burden as the white people who wrote the Constitution saw fit.

People who defend the morally decrepit, wealthy, white founding generation will justify the exclusion of a right to vote from the Constitution as an example of "federalism"—the American idea that rights flow up from the disparate states instead of down from a centralized federal government. In this view, voting rights are conferred by state governments, not the

federal one. Defenders of federalism believe that the states—which they sometimes call the “incubators of democracy”—are best positioned to decide who gets to vote.

Their argument would be somewhat compelling if the states and their individual constitutions weren’t lathered in the same antidemocratic dog shit as the federal government’s is. But rest assured, the same white male racists and misogynists who couldn’t be bothered to erect national voting rights were also in charge of restricting voting rights at the state level. States, both South *and* North, explicitly prohibited Black people and women from voting. And almost every state at the signing of the Constitution had property requirements white men needed to meet in order to *earn* the ability to vote (though this had been broadly repealed before the Civil War).¹

The white men who bestowed voting rights on themselves and nobody else knew exactly what they were doing. They were not mere prisoners of their moment in history, for there were other, better white men who told them in real time that a republic that restricted voting rights to only rich white people was hypocritical trash. Some pleaded and lobbied the founding fathers to expand the franchise to more people and tried to enact state laws that allowed at least poor white men also to participate in the government. But those voices were rebuffed by the people who wrote the Constitution.

One famous example of a less despicable white man was James Sullivan of Massachusetts. Sullivan was an opponent of British colonial rule, one of the first to call for a Continental Congress, and a successful revolutionary. After the war, Sullivan would go on to serve as attorney general for Massachusetts, and eventually as governor. But he also kept a lively correspondence with John Adams— a constitutional drafter who became the second president of the United States.

In 1776, Sullivan proposed liberalizing Massachusetts’s voting requirements by lowering the property requirements needed to vote. Sullivan also supported granting women the franchise and was an early advocate for the rights of children. Adams opposed all of this and told Sullivan exactly why in a letter.

According to Adams, poor men, specifically those who do not own land, cannot be trusted to vote because “very few Men, who have no Property, have any Judgment of their own.”² Evidently, men without property are “too little acquainted with public Affairs” to form their own opinions and will “vote as they are directed by Some Man of Property”—such as their landlord—who “has attached their Minds to his Interest.”

Moreover, Adams believes that if poor people are allowed to vote, then women and children would also eventually demand the franchise: “There will be no End of it. . . . Women will demand a Vote. Lads from 12 to 21 will think their Rights not enough attended to, and every Man, who has not a Farthing, will demand an equal Voice with any other in all Acts of State.” That’s a huge problem for Adams because he thinks children are children and women, whose “delicacy renders them unfit for Practice and Experience, in the great Business of Life,” are like children, but with boobs, so they have to spend their diminished mental capacity “engaged with the necessary Nurture of their Children, that Nature has made them fittest for domestic Cares.” Adams is using the specter of women and children voting to deny poor people the right to vote the same way a modern person might say, “Next you’ll be telling me dogs should have a right to vote.”

But here’s the realpolitik rub: what Adams is actually saying is that if women and children and poor white people are allowed to vote, rich white people won’t accept the outcome. His letter asks, “How then does the Right arise in the Majority to govern the Minority, against their Will?” and references the “obligation of the minority to obey.” He’s doing this to raise the issue that powerful white men simply won’t submit to the authority of the government if that government is based on the majority rule of all the people in the country or in a state. He’s saying, straight out, that wealthy whites will reject democracy if democracy does not produce the outcomes desired by the rich and powerful.

Adams is not really worried that poor people will vote as their landlords direct them to, he’s worried that they *won’t*. And if they don’t, that means Adams’s very small white bourgeoisie class will be outnumbered in its new

“democracy.” Adams surmised that powerful whites simply won’t stand for that: voting must be restricted to only wealthy white men because wealthy white men won’t listen to anybody else.

Adams explained, in his own time, with his own words, the antidemocratic heart that animates the entirety of American-style “democracy.” The “American experiment” is not and has never been an experiment in democracy or republican self-government. It has always been an exercise in wealthy white male domination over everybody else, and the only question has been how long those whites can get away with it before everybody else comes together to defeat them. The wealthy white male winning streak has lasted 248 years, as of this writing, and unless there is a Visigoth army training somewhere in Canada that I don’t know about (Alaric, if you’re out there, call me), it’s set to go on for quite a bit longer. The voting laws in this country are designed, from their inception and with intentionality, to maintain this permanent wealthy white male rule.

You can draw a through line from fucksticks like John Adams to the Confederate secessionists to the modern Republican Party, right to the white supremacists who stormed the Capitol on January 6, 2021. Voting rights are never about who has the right to vote, they’re always about who has the right to win and who has the right to rule.

We see that whenever the white patriarchal class loses, whenever the duty of the minority to obey falls to them, the losing white folks act a fool. They react with violence. They dispute the results of the election. They fire on Fort Sumter. And when they regain power, the first thing they do is restrict voting rights and voting access to try to prevent people from using democracy to defeat them again. The lack of a right to vote is not an oversight in our constitutional system. It’s not a bug. It’s the key, defining feature of our polity. America has not had a fully free and fair election in its entire history. The wealthy white folks running the place simply won’t allow it.

To stop them, to rip out America’s foul, antidemocratic heart and try, for once, to have an actual democratic election in this country, we don’t need

new laws or new constitutional amendments. We've had new laws and new constitutional amendments that the white ruling class have found far too easy to mitigate or outright ignore. To start to fix this problem, we need to start repealing laws. Specifically, voter registration laws. All of them. Everywhere.

Every single voter registration law is an antidemocratic anathema. Every single one is designed to prevent people from voting. Not one of them is necessary for election security or to combat voter fraud. Even if you are one of those absolute mouth-breathing idiots who thinks voter fraud is an actual problem in this country (it's not), you should be capable of understanding that voter registration does nothing to prevent voter fraud, if for no other reason than most every fraudster is stealing somebody's identity based on information *provided through voter registration*.³ If anything, you voter ID people should be the most in favor of eliminating voter registration laws, because forcing people to show up on voting day with government-issued identification obviates any conceivable need for preelection-day registration.

It is important to make a distinction between voter registration requirements and voter eligibility requirements. I could make an argument that all voter eligibility rules are "antidemocratic," but the reality is that voter eligibility rules have been a part of every democracy that we know of. If you roll the tape all the way back to ancient Athens, you'll find voter eligibility requirements. Some eligibility requirements make sense and are largely unavoidable. Take, for instance, a residency requirement. It makes sense for a polity to restrict voting access to only those who live there. You don't want Spartans showing up on election day and voting for Athens to disband its navy.

Other eligibility requirements are less defensible. In Athens, women couldn't vote, nor could enslaved people, yet both groups were certainly permanent residents of the city-state and expected to live under its laws. Citizenship and property requirements also make little sense in terms of voter eligibility. If you live somewhere, you should have a say in how you are governed, regardless of where you were born or how much money you have.