

Book Review

Ordinary People

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Spencer Overton. *Stealing Democracy: The New Politics of Voter Suppression*. New York: W.W. Norton Press, 2006, 224 pp., \$24.95 (hardcover).

IN 1986, A WEALTHY thirteen-year-old suburban kid named Trevor Ferrell was spearheading a 250-person operation that brought food and blankets to the homeless of Philadelphia. One day while he was engaging in activity more common for suburban teenagers—playing in his backyard—he received a call from an unlikely venue. It was the White House. More specifically, it was President Ronald Reagan, calling to ask if Ferrell would make the short jaunt to Washington so that the President could introduce him during the State of the Union. Ferrell said yes, and a few days later, President Reagan presented the precocious youngster to millions of Americans who watched the speech on television.¹

What started with President Reagan's 1981 introduction of Lenny Skutnik, a government worker who watched Air Florida Flight 90 crash into the icy Potomac River and then plunged into the frigid waters to assist in the audacious rescue of a flight attendant, has now become *de rigeur* for Presidents delivering their annual report to Congress. In 1999, President William Jefferson Clinton introduced America to Suzann Wilson, who after losing a child to school gun violence devoted herself to the

cause of gun control. More recently, President George W. Bush has paid homage to the families of Marines killed in Fallujah. At the State of the Union, Presidents now routinely highlight the role ordinary Americans play in making both the United States and the world a better place. Of course, we know these Americans probably are not truly ordinary, they are extraordinary; otherwise they would not be in the gallery of the United States House of Representatives receiving a standing ovation from hundreds of the world's most powerful politicians. But these "ordinary" people help other ordinary Americans watching the speech put a human face on grand government policies.²

George Washington University Law Professor Spencer Overton has, in many ways, sheared off a page from the Presidential State of the Union playbook in his excellent new work, *Stealing Democracy*. Professor Overton takes aim at two of the election law issues that

¹ USA Presidents, State of the Union Address (Feb. 4, 1986), available at <<http://www.usa-presidents.info/union/reagan-5.html>> (last visited Aug. 7, 2006); CBS News.com, American Heroes (June 11, 2004), available at <<http://cbsnews.com/stories/2004/06/11/48hours/printable622563.shtml>> (last visited July 3, 2006).

² 1999 State of the Union Address, Federal News Service (Jan. 20, 1999), available at <<http://www.washingtonpost.com/wp-srv/politics/special/states/docs/sou99.htm>> (last visited Aug. 7, 2006); The White House, President Bush Delivers State of the Union Address (Jan. 31, 2006) available at <<http://www.whitehouse.gov/news/releases/2006/01/print/20060131-10.html>> (last visited Aug. 7, 2006); The White House, State of the Union Address (Feb. 2, 2005), available at <<http://www.whitehouse.gov/news/releases/2005/02/print/20050202-11.html>> (last visited Aug. 7, 2006).

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have consumed academic debate for the last decade: partisanship, both in the designing of district lines and in election administration, and voting rights for racial and ethnic minorities. He uses stories, a significant number of which involve ordinary people, to make these sometimes academic and legalistic issues accessible to ordinary Americans. Of course, *Stealing Democracy's* ordinary Americans are also in many ways extraordinary and the book, while accessible to the non-academic populace, is not truly written for ordinary Americans, but rather is written for highly educated readers—ones who peruse publications like *The New York Times* or *Washington Post*.

Stealing Democracy introduces ordinary American Tanya Thivener, a middle-aged mortgage broker who suffered through an interminably long line so that she could cast her ballot at the November 2004 Presidential Election in Ohio (42–43). *Stealing Democracy* introduces ordinary American Truong Tran, an eighty-three-year-old Vietnamese resident of a tiny hamlet on the Gulf Coast of Alabama who faced a discriminatory challenge when attempting to vote in a town council election (75–76). And *Stealing Democracy* introduces ordinary American Edna Weddell, a Yankton Sioux tribal elder who was forced to make two journeys to her polling place in order to satisfy South Dakota's voter identification requirement (149–50). *Stealing Democracy* introduces all these "ordinary" people with the hope their ordinary stories will inspire "ordinary" readers to engage in the improvement of American democracy.

Aside from a legal academic actually focusing energy on engaging in a dialogue with ordinary Americans, *Stealing Democracy* is refreshing, enjoyable and worthy of praise in many other ways:

- The book is eminently readable. It avoids jargon and when jargon cannot be avoided, as when discussing "preclearance" under Section 5 of the Voting Rights Act, explains the jargon in relatively simple terms (94–96).
- The book has political balance. Republicans are taken to task, particularly in the discussion of the racial implications of ex-

felon disfranchisement (58–59); yet so are leading civil rights organizations, who are criticized for focusing too much on race and ignoring the obvious fact that political motives also play a role in the disfranchisement of minority voters (77–78); and the Democratic Party takes it on the chin, too, particularly during a lengthy discussion of political consultant Michael Berman's role in the partisan gerrymandering of California's congressional and state legislative districts (17–25).

- The book proposes concrete solutions. For instance, advocating universal voter registration as a way to eliminate fraud by the organizations currently conducting voter registration drives (166–67) and proposing that state and local governments be required to publish "democracy statements" that provide an assessment of the strengths and weaknesses of electoral practices (63).

In all these ways, *Stealing Democracy* is far from ordinary; it's extraordinary. But, like everything, it's not perfect.

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Ordinary People is a 1980 Academy Award winning motion picture starring Mary Tyler Moore and Donald Sutherland in which the life of a quintessentially perfect American family—one that perhaps resides in President Reagan's shining city upon the hill—becomes shattered by the death of its eldest son in a sailing accident; an accident that the youngest son survives. The reality, though, as we learn toward the *denouement* of this cinematic *tour de force* is that the death of the eldest son may not have been entirely accidental. The reality is that he may well have quit on life.

Opening one's eyes to life's reality marks an important theme of *Stealing Democracy*, though Professor Overton uses a more recent Academy Award winning Hollywood blockbuster, *The Matrix*, to make his point. The main character of the film, played by Keanu Reeves, asks the question: "What is The Matrix?" (13). And while we never really get an answer, it would seem that *The Matrix* is, as Laurence Fishburne's character informs us, "the world that

has been pulled over your eyes to blind you from the truth" (12); it is an invisible system that is not reality and that controls the lives of people who unquestioningly allow the system to control their existence. It is a system that gives the appearance of freedom, rather than freedom's reality.

Today's American democracy, according to Professor Overton, has *Matrix*-like qualities. Most Americans blithely accept the simplified version of the American democratic story: Everyone has a right to vote, each person has the freedom to choose which candidate to vote for, the candidates support popular policies in an effort to win the most votes, ballots are cast, votes tabulated, a winner announced, and democracy thrives (13). In reality, though, the people are not free, for their preferences are guided by "a predetermined matrix of thousands of election regulations and practices"—whether it be the questions included on a voter registration form, the type of machinery used to record voter preferences, the location of polling places, or the boundary lines used to define electorates (14).

For the most part, *Stealing Democracy's* analogy to *The Matrix* works. American democracy is not simple, feel-good cinema. However, the analogy does not seem to completely hold together throughout the entire course of the book. In *Stealing Democracy*, Professor Overton advocates the elimination of the portions of the American democratic matrix that allow for the entrenchment of incumbent politicians, yet he also advocates retention of the portions of the matrix that protect minority voting rights. There is, however, a bit of a tension between these two positions with which *Stealing Democracy* does not adequately deal.

Consider first Professor Overton's omission of campaign finance—a subject on which he has considerable expertise—from his description of the American democratic matrix. Indeed, *Stealing Democracy* contains virtually no discussion of campaign finance regulations, of the impact of money on elections, or of the way in which the system of campaign finance can be rigged to advantage or disadvantage particular candidates and political parties. Undoubtedly, Professor Overton's omission of campaign finance and focus on partisanship and

minority voting rights reflects the democratic events of significance in the middle of the first decade of the twenty-first century. A comprehensive campaign finance regime has been enacted into law. In contrast, eliminating partisanship in election administration and partisan gerrymandering appears to be a reform bridge too far, particularly on the latter front where the Supreme Court has declined to enter the fray³ and where voters themselves, such as those in California and Ohio, appear less than enthused. And while the extension and amendment of the special provisions of the Voting Rights Act have now been accomplished (they had not been at the time of *Stealing Democracy's* publication), survival of some of the Act's core provisions remains uncertain in the shadow of the Roberts Court.

Perhaps, though, the omission of extensive discussion of campaign finance regulation merely reflects the larger problem with the analogy to *The Matrix*. As Professor Overton admits at the outset of *Stealing Democracy*, the American democratic matrix can never be completely eliminated (15). Unlike dictatorship, democracy will always need some rules and regulations to guide the electoral process. Whatever the choice of electoral rules, some group or entity will seemingly always benefit or suffer from the choice. The trick, perhaps an impossible one, is to provide some guidepost or, in less ordinary and more academic parlance, theory for distinguishing those regulatory aspects which constitute an improvement to the democratic matrix and those that do not.

Maybe this is why the theme of *The Matrix* becomes less prevalent about a third of the way through *Stealing Democracy*. The opening chapter, *How to Rig Elections*, discusses the manner in which politicians use election rules to entrench themselves at the expense of ordinary voters. The second chapter, *Patchwork Democracy*, examines how the democratic matrix gets complicated by the vast number of different entities and partisan officials (federal, state, local) who play a role in administering and setting the ground rules for elections. The theme of *The Matrix* works extremely well here. The Ameri-

³ *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

can democratic matrix is vast, is virtually everywhere, and is manipulated by an equally vast and omnipresent number of political elites. By my count, during the course of these two chapters covering forty-eight pages, Professor Overton refers to the "matrix" five times (27, 36, 46, 48, and 64).

The next three chapters, however, shift to the topic of voting rights for racial and ethnic minorities and the unique role of race in American democracy. The third chapter, *Does Race Still Matter?*, answers the query with a resounding affirmative. The fourth chapter, *No Backsliding*, makes the case for renewal of the preclearance provisions of Section 5 of the Voting Rights Act. The fifth chapter, *La Sociedad Abierta*,⁴ espouses continuation of the Act's minority language provisions—Sections 4(e), 4(f)(4), and 203. In all these chapters, *Stealing Democracy* makes the case for retaining aspects of the democratic matrix that serve to assist racial and ethnic minorities in exercising their right to vote. At eighty-four pages, these chapters comprise nearly half the book—yet Professor Overton employs use of the term "matrix" on only three occasions (83 (twice) and 102).

What's missing here is a more comprehensive explanation of why the Voting Rights Act cannot be just as plausibly conceived as a matrix to manipulate voter preferences as, say, partisan gerrymandering and that conception is not limited to the occasional, out-of-the-ordinary partisan preclearance decision by politicians in the United States Department of Justice, such as the post-2000 Mississippi congressional redistricting fiasco.⁵ It includes large-scale policy decisions involving minority voting rights. Indeed, the recent extension of the Act's special provisions with nearly unanimous Republican Senate and House support could be viewed as contributing to the manipulation of voter preferences in a partisan way, most notably by reason of the amendments to Section 5 reversing a couple of Supreme Court decisions that appeared to benefit the Democratic Party.⁶

Professor Overton's overall, comprehensive mantra for separating the positive portions of the matrix from the negative seems to be a Lennon-esque *Power to the People*—let the people decide, instead of political elites (16). *Stealing Democracy's* conclusion offers a paragraph laying bare Professor Overton's comprehensive

approach for examining proposals to reform the democratic matrix. He says elections should be the "tool of average citizens rather than political operatives," that the vote "should allow a meaningful opportunity for citizens to participate in government and check politicians," that voting should offer a "sense of connectedness to the community and of equal political dignity and promote broader respect for the legitimacy of society's laws" (169).

This rationale works relatively well when one considers voting in light of what Stanford University's Pamela Karlan has described as the participatory aspect of democracy.⁷ For instance, at several points *Stealing Democracy* relates stories involving what appear to be blatant attempts by local officials to suppress or deny the ability of racial and ethnic minorities to simply cast a ballot. These anecdotes provide more than adequate examples of the Voting Rights Act working as a part of the democratic matrix to properly restrict "political operatives" who seek to deny average citizens "equal political dignity," and a "meaningful opportunity" to "participate in government and check politicians."

But the rationale works less well when considering the Voting Rights Act from an aggregation perspective.⁸ The Act mandates the consideration of race and ethnicity in districting. District lines are drawn to achieve a particular electoral goal—to allow minority voters the ability to elect candidates of their choice, candidates who almost invariably will be of the same race or ethnicity as those minority voters. Might not some suppose that such manipulation removes power from average citizens, places power in the hands of political elites, lessens the probability that average citizens can check the politicians elected from those districts, and reduces the connectedness of non-minority voters who reside in those districts?

To be fair, Professor Overton does not com-

⁴ "Open Society."

⁵ Samuel Issacharoff, *Is Section 5 of the Voting Rights Act A Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1714 (2005).

⁶ *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

⁷ Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709–12 (1993).

⁸ *Id.* at 1712–16.

pletely ignore the tension between decrying a complicated democratic matrix designed to thwart the true preferences of voters and advocating portions of the matrix that might be similarly characterized. He says the democratic matrix needs to be redesigned to include people of color because race is different for many reasons (79–83). So manipulations of the matrix designed to benefit minority voters are positive. Of course, such a view inexorably leads to the academic debate about how easy it is to identify which electoral outcomes present a net positive for minority voters—substantive outcomes or descriptive outcomes—a debate *Stealing Democracy* does not address.

Although the book might have benefited from a more detailed and extended explanation of how one is to separate the positive from the negative portions of the American democratic matrix, this is a minor problem. It may well be impossible to come up with a comprehensive theory to distinguish between various portions of the matrix. The American democratic matrix does—and needs to—represent trade-offs between various contestable values such as political competition, equality, respect for majority preferences, and protection of discrete and insular minorities. Rather than grand theory, election law issues may need to be viewed from a more contextual perspective.

And the lack of a more detailed and extended explanation of the rationale for separating the “good” from the “bad” portions of the matrix also does not lend much insight into the soundness of the specific positions taken in *Stealing Democracy*. For Professor Overton is correct that the worst aspects of partisan gerrymandering should somehow be redressed, that race still matters in American politics, and that the Voting Rights Act still has a worthy role to play in fostering the participation of racial and ethnic minorities in American democracy. Perhaps, too, the lack of a detailed and extended explanation fits nicely and intentionally with *Stealing Democracy*’s target audience. Unlike academics, ordinary people don’t need detailed explanations of theoretical frameworks. In fact, ordinary people, for better or worse, seem to shun them.

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Academics devoted to election law would do

well to read *Stealing Democracy* and it is also worthy of assignment to students in either an election law seminar or political science course focused on the law’s impact on the political process. Ultimately, though, Professor Overton hopes to reach the students more than their instructors. Students and other educated readers—ordinary people—are the target audience. And, in the end, he’s not just asking these folks to read a couple of hundred pages. Rather, he’s urging them to go forth and do something—to exercise greater vigilance in protecting the most basic of rights in a democracy, the right to freely cast a ballot for the candidate of one’s choice. In a sense the book is Professor Overton’s personal get out the vote effort, but on a higher plane.

Stealing Democracy’s conclusion intends to inspire. Here the reader meets an ordinary rancher from Nebraska who worked to repeal the state’s ban on voting by ex-felons; an ordinary college student from Memphis who has worked to register young voters; an ordinary lawyer from Florida who serves on the national board of the League of Women Voters; an ordinary pastor from North Carolina who established a multiracial organization to open democracy up to the poor and the working-class; an ordinary stay-at-home mother active with Common Cause; and an ordinary Mexican-American immigrant who directs state and public policy for National Council of La Raza (172–84). These ordinary people from around the nation have made the commitment to recognizing reality and improving the American democratic matrix.

Only time will tell if ordinary readers of *Stealing Democracy* will be moved to make a similar commitment. They should be.

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