What We Must Overcome

BY LANI GUINIER;

For years many of us have been calling for a national conversation about what it means to be a multiracial democracy. We have enumerated the glaring flaws inherent in our winner-take-all form of voting, which has produced a steady decline in voter participation, underrepresentation of women and racial minorities in office, lack of meaningful competition and choice in most elections, and the general failure of politics to mobilize, inform, and inspire half the eligible electorate. Still, nothing changed. Democracy was an asterisk in political debate and the diagnosis for what ailed it was encompassed in vague references to "campaign finance reform." But the harm was not just in the money and its sources; the problem has been the rules of American democracy itself.

Enter Florida and the surprising intervention by the United States Supreme Court in Bush v. Gore. On December 12, 2000, the Supreme Court selected the next president when, in the name of George W. Bush's rights to equal protection of the laws, it stopped the recounting of votes. Excoriated at the time for deciding an election, the Court majority's stout reading of equal protection is an invitation not just to future litigation but to a citizens' movement for genuine participatory democracy. The Court's decision -- and the colossal legal fight that preceded it -- might stimulate a real national debate about democracy. At minimum the ruling calls on us to consider what it means to be a multiracial democracy that has equal protection as its first principle.

The decision invites future litigants to rely on the Court's newfound equal protection commitments to enforce uniform standards for casting and tabulating votes in federal elections from state to state, county to county, and within counties. The conservative majority found that the source of the fundamental nature of the right to vote "lies in the equal weight accorded to each vote and the equal dignity owed to each voter." We have not heard such a full-throated representation of the equal protection clause in many years, at least not with regard to the rights of voters to do more than cast a ballot. This language harkens back to the broad commitment we once heard from the 1960s-era Warren Court, which affirmed the people's fundamental right to exercise their suffrage "in a free and unimpaired manner." Concerned that the lack of uniform standards for a manual recount would lead to "arbitrary and disparate treatment" of the members of the Florida electorate, the majority relied on two expansive Supreme Court decisions, Harper v. Virginia Board of Elections and Reynolds v. Sims. These cases, from the salad days of the
Warren Court, explicitly affirm Lincoln's vision of government of the people, by the people, for the people. Perhaps -- in the name of restoring "voter confidence in the outcome of elections" -- the conservative majority will now welcome, as it did in *Bush v. Gore*, other lawsuits that seek to challenge the very discretion the five-vote majority found so troublesome when exercised by local Florida county officials. Perhaps not.

It seems unlikely, of course, that the conservative majority will act in the future to rehabilitate our partial democracy. Some commentators undoubtedly will argue that the *per curiam* decision only addresses the remedial power of a state court seeking a statewide remedy. Others will point to the great irony that the Court has shown itself more deeply committed to safeguarding the rights of a major-party candidate than to protecting disenfranchised voters across the board.

The *Bush v. Gore* majority, which went out on a limb to protect the rights of a single litigant, George W. Bush, has been noticeably less exercised about arbitrary or disparate treatment when such considerations are raised by voters who are racial minorities. Indeed, in a 1994 concurring opinion, when the claim to a meaningful and equally valued vote was raised by black litigants, Justice Clarence Thomas declared that the Court should avoid examining "electoral mechanisms that may affect the 'weight' given to a ballot duly cast." Even where congressional statutes, such as the Voting Rights Act, explicitly define the term "voting" to "include all action necessary to make a vote effective," Justice Thomas urged the Court to ignore the actual text of the statute.

The *Bush v. Gore* invitation to value votes equally, in order to "sustain the confidence that all citizens must have in the outcome of elections," should be heeded, but not in the form of legal wrangling before a judge. That it is time for political agitation rather than judicial activism may be the most important contribution of the *Bush v. Gore* opinion. In fact, that is already happening, at least in the law schools. *The New York Times* reported on February 1, 2001 -- almost three months after the election -- that the decision continues to generate a beehive of activity among law professors furious at the Supreme Court's role. The debate in law schools already has the "flavor of the teachins of the Vietnam War era, when professors spurred their students to political action." As during the movements for abolition, women's suffrage, and black voting rights, we, the people, must take up the burden.

Indeed, the Court's choice of language explicitly valuing "no person's vote over another's" ought to launch a citizens' movement similar to the 1960s civil rights marches that led to the Voting Rights Act, demonstrations in which citizens carried banners with the "one person, one vote" slogan. One vote, one value -- meaning that everyone's vote should count toward the election of someone he or she voted for -- should be the rallying cry of all who wish to restore the confidence that even the conservative Court majority agrees "all citizens must have in the outcome of elections." This movement, let's recall, began in the streets, was cautiously then
boldly embraced by liberal politicians, and eventually led to raised grass-roots consciousness as well as national legislation. That is how democratic movements change the course of events -- and in the process enrich and renew democracy.

WHERE'S THE OUTRAGE?

Certainly many people outside the legal academy continue to feel alienated by the outcome of this presidential election. A survey released in early December from the Harvard Vanishing Voter project suggests that large majorities of the American people believe election procedures have been "unfair to the voters." Not surprisingly, nationwide those most likely to feel disenfranchised are blacks. In December 2000, almost 90 percent of black voters felt that way. One out of 10 blacks reported that they or someone in their family had trouble voting, according to a national report produced by Michael Dawson and Lawrence Bobo, of the Center for the Study of Race, Politics and Culture, and the W. E. B. Du Bois Institute. A CBS News poll, made public on the eve of the inauguration, found that 51 percent of the respondents said they considered Bush's victory a legitimate one, but only 19 percent of Democrats and 12 percent of blacks said so.

The anger over what happened in Florida has only been reinforced by the failure of the Democratic Party leadership to move quickly and seriously to engage the legitimacy issue. Right after November 7, when the perception first emerged that the election was being hijacked, the Gore campaign actively discouraged mass protest. On January 12, when Al Gore presided over the counting of the electoral college votes, it was only members of the Congressional Black Caucus (CBC) who rose, one by one, to protest the filing of Florida's votes. They could not get a single Democratic senator (from a body that includes not a single black representative) to join their objection. The silence of the white Democrats in Congress turned the CBC demonstration into an emphatic recapitulation of the election drama. As the presiding officer, Al Gore overruled the protests. The moment was especially poignant, because the Black Caucus members, in speaking out for Floridians whose votes were not counted, were speaking out for all Americans, while even their progressive white colleagues sat in awkward silence. E. J. Dionne, a columnist for The Washington Post, watched the drama unfold on television. Turning to his eight-year-old son, seated next to him, Dionne explained, "They are speaking out for us too."

"It was the Black Caucus, and the Black Caucus alone," James Carroll wrote in The Boston Globe "that showed itself sensitive to . . . what is clearly true about the recent presidential election in Florida." That truth is the gap between what the rules permit and what democracy requires. Florida made it obvious that our winner-take-all rules would unfairly award all of Florida's electoral college votes to one candidate even though the margin of victory was less than the margin of error. Yet our elected officials in Washington are committed to those rules and, even more, to maintaining civility between those adversely affected by the rules and those who benefited. As Carroll wrote, "Those who sit atop the social and economic pyramid
always speak of love, while those at the bottom always speak of justice."

The CBC protest shows that outrage over the election continues. But the CBC protest also speaks to the fact that the conversation about the true meaning of democracy is not happening yet, at least not at the highest levels of government. There is talk, of course, about fixing the mechanics of election balloting; but it is the rules themselves, and not just the vote-counting process, that are broken. This is all the more reason that the conversation, which needs to address issues of justice, not just compassion, also needs to rise up from communities as a citizens' movement.

Those who were disenfranchised -- disproportionately black, poorer, and less well educated -- were not asking for pity; they wanted democracy. Stories of long lines at polling places, confusing ballots, and strict limitations on how long voters could spend in the voting booth help explain why turnout numbers are skewed toward those who are wealthy, white, and better educated. We are a democracy that supposedly believes in universal suffrage, and yet the different turnout rates between high-income and low-income voters are far greater than in Europe, where they range from 5 percent to 10 percent. More than two-thirds of people in America with incomes greater than $50,000 voted, compared with one-third of those with incomes under $10,000. Many poor people are also less literate; for them time limits and complex ballots proved disabling when the menu of candidates was organized around lists of individuals rather than easily identified icons for political parties. Indeed, more ballots were "spoiled" in the presidential race than were cast for so-called spoiler Ralph Nader. The shocking number of invalid ballots is a direct result of antiquated voting mechanics, an elitist view of the relationship between education and citizenship, and an individualistic view of political participation that would shame any nation that truly believes in broad citizen participation.

CLASS, RACE, AND BALLOTING

In addition to class, the window into the workings of Florida's balloting allowed us to see how race affects -- and in turn is affected by -- voting rules and procedures. The election debacle revealed gaps not just in our democracy but in the way our democracy racializes public policy and then disenfranchises the victims of those policies. Old voting machines, more likely to reject ballots not perfectly completed, were disproportionately located in low-income and minority neighborhoods. These problems contributed to stunning vote-rejection numbers. According to The New York Times, black precincts in Miami-Dade County had votes thrown out at twice the rate of Hispanic (primarily Cuban and Republican) precincts and at close to four times the rate of white precincts. In that county alone, in predominantly black precincts, the Times said, "one in 11 ballots were rejected, . . . a total of 9,904" -- thousands more than Bush's margin of victory.

The balloting rules in Florida did not just incidentally disenfranchise minority
voters; they apparently resulted from what many think were aggressive efforts to suppress black turnout. *The New York Times* also reported that county officials in Miami-Dade gave certain precincts -- mostly the Hispanic (that is, Cuban and Republican) ones -- laptop computers so that they could check names against the central county voter file. In black precincts, where there were a lot of recently registered voters whose names didn't appear on the local list, the precinct workers were not given computers and were supposed to call the county office to check the list -- but no one answered the phones or the lines were busy, so countless voters, who were in fact registered, were just sent away.

Florida's minority residents and many others faced another structural hurdle to having their voices heard. Anyone convicted of a felony is permanently banned from voting in Florida and 12 other states (disproportionately from the old Confederacy) even after they have paid their debt to society. As a result, 13 percent of black men nationwide and in some southern states as many as 30 percent of black men are disenfranchised. In Florida alone, more than 400,000 ex-felons, almost half of them black, could not vote last November. Also worth noting is that before the election Florida's secretary of state hired a firm to conduct a vigorous cleansing of the voting rolls -- not just of Florida's felons, but also of ex-offenders from other states whose rights had been restored in those states and who were thus still legally eligible to vote in Florida. The Hillsborough County elections supervisor, for example, found that 54 percent of the voters targeted by the "scrub" were black, in a county where blacks make up 11 percent of the voting population. While Canada takes special steps to register former prisoners and encourage citizenship, Florida and other states ostracize them.

One short-term solution to the problem of the disenfranchised ex-offender population is to lobby state legislators to abolish the permanent disenfranchisement of felons. Alternatively, Congress could pass a statute providing voting rights for all ex-felons in federal elections.

THE SOUL OF A DEMOCRACY MOVEMENT

Unfortunately, in pursuit of bipartisan civility, the Democratic Party leadership appears to be marching to a false harmony: Charmed by compassionate conservatism and conscious of middle-of-the-road swing voters' aversion to conflict, top Democrats have ignored issues of justice and the troubling disenfranchisement of many of the party's most loyal supporters. If we learn anything from the Supreme Court's role in the 2000 election travesty, it must be that when the issue is justice, the people -- not the justices of the Court or the Democratic leaders in Washington -- will lead. And if anything is true about the fiasco in Florida, it is the need for new leaders who are willing to challenge rather than acquiesce to unfair rules. New leadership will not come from a single, charismatic figure orchestrating deals out of Washington, D.C.; nor will it be provided by a group devoted only to remedying the disenfranchisement of black voters. What is needed instead is a courageous assembly of stalwart individuals
who are willing to ask the basic questions the Black Caucus members raised --
questions that go to the very legitimacy of our democratic procedures, not just in
Florida but nationwide. These are likely to be individuals organized at the local
level, possibly even into a new political party that is broadly conceived and
dedicated to real, participatory democracy. Such a movement could build on the
energy of black voter participation, which between 1996 and last year went from
10 percent to 15 percent in Florida and from 5 percent to 12 percent in Missouri.

But while black anger could fuel a citizens' movement or a new, European-style
political party that seeks reforms beyond the mechanics of election day voting, the
danger is that whites will be suspicious of the struggle if they perceive that its aim
is simply to redress wrongs done to identifiable victims or to serve only the
interests of people of color. And people of color can alienate potential supporters if
they focus exclusively on vindicating the rights of minority voters and fail to
emphasize three dramatic distortions in our present rules that undermine the ability
of low-income and working people, women, and progressives, as well as racial
minorities, to participate in a genuinely democratic transformation. These rules (1)
limit voting to 12 hours on a workday and require registration weeks or even
months in advance; (2) disenfranchise prisoners for the purpose of voting but count
them for the purpose of allocating legislative seats [see sidebar on page 30]; and (3)
waste votes through winner-take-all elections. A pro-democracy movement has a
good chance to succeed if it focuses on unfair rules whose dislocations may be felt
first by blacks but whose effects actually disempower vast numbers of people
across the country.

A pro-democracy movement would need to build on the experience of Florida to
show how problems with disenfranchisement based on race and status signify
systemic issues of citizen participation. Such mobilization would seek to recapture
the passion in evidence immediately after the election as union leaders, civil rights
activists, black elected officials, ministers, rabbis, and the president of the Haitian
women's organization came together at a black church in Miami, reminded the
assembly of the price their communities had paid for the right to vote, and vowed
never to be disfranchised again. "It felt like Birmingham last night," Mari
Castellanos, a Latina activist in Miami, wrote in an e-mail describing the mammoth
rally at the 14,000-member New Birth Baptist Church, a primarily African-
American congregation.

The sanctuary was standing room only. So were the overflow rooms and the school
hall, where congregants connected via large TV screens. . . . The people sang and
prayed and listened. Story after story was told of voters being turned away at the
polls, of ballots being allegedly destroyed, of NAACP election literature being
allegedly discarded at the main post office, of Spanish-speaking poll workers being
sent to Creole precincts and vice-versa.

Although not encouraged by Democratic Party leaders, by joining their voices
these Florida voters were beginning to realize their collective potential -- as
ordinary citizens -- to become genuine democrats (with a small \( d \)). By highlighting our nation's wretched record on voting rules and practices, these impassioned citizens were raising the obvious questions: Do those in charge really want large citizen participation, especially if that means more participation by poor people and people of color? Even more, do Americans of all incomes and races realize that everyone loses when we tolerate disenfranchisement of some? And how can we tolerate the logjam of winner-take-all two-party monopoly, especially at the local level?

**ENRICHING DEMOCRATIC CHOICE**

As the Florida meltdown suggests, the problem includes mechanical defects, but it is the rules themselves, not just old technology, that limit the political clout of entire communities. Weak democracy feeds on itself. There are some technical fixes worth pursuing [see "Reclaiming Democracy" by Burt Neuborne, on page 18, and "Democracy's Moment" by Miles Rapoport, on page 41]. But reform of voting mechanisms -- while important -- is not enough. The circumstances of this last election call for a larger focus on issues of representation and participation. A longer-term and more-far-ranging solution to the problems in Florida as well as those around the country would be to enrich democracy by broadening ways of reflecting and encouraging voter preferences.

For example, in South Africa, where the black majority now shares political power with the white minority, there is a successful system of proportional representation. Voters cast their ballots for the political party they feel most represents their interests, and the party gets seats in the legislature in proportion to the number of votes it receives. Instead of a winner-take-all situation in which there are losers who feel completely unrepresented when their candidate doesn't capture the top number of votes, each vote counts to enhance the political power of the party of the voters' choice. Under South Africa's party-list system, the party that gets 30 percent of the vote gets 30 percent of the seats. Or if the party gets only 10 percent of the vote, it still gets 10 percent of the seats in the legislature. Only because of this system does South Africa's white minority have any representation in the national legislature. Ironically, South Africa, only seven years out of apartheid, is more advanced in terms of practicing democratic principles than the United States is 150 years after slavery and 40 years after Jim Crow.

As June Zeitlin, executive director of the Women's Environment and Development Organization points out, proportional representation systems also benefit women. In a letter that *The New York Times* declined to publish, Zeitlin wrote: "Women are grossly underrepresented at all levels of government worldwide. However, women fare significantly better in proportional representation electoral systems. . . . The 10 countries with the highest percentage of women in parliament have systems that include proportional representation." Zeitlin, who spearheads a campaign -- 50/50 Get the Balance Right -- aimed at increasing women's participation in government, has noticed that proportional representation mechanisms work in many countries in
tandem with the deliberate political goals of progressive parties.

Proportional representation reforms for legislative bodies, even Congress, would not even require an amendment to the U.S. Constitution. Nothing in the Constitution says that we have to use winner-take-all single-member districts. Since seizing the initiative in 1995, two Democratic members of the Congressional Black Caucus, Representatives Cynthia McKinney of Georgia and Mel Watt of North Carolina, have repeatedly introduced legislation called the Voter Choice Act, which provides for states to choose proportional representation voting. It's a system that should have great appeal not just for African Americans but for every group that has ever felt disenfranchised.

A pro-democracy movement would look seriously at forms of proportional representation that could assure Democrats in Florida, Republicans in Democratic-controlled states, and racial minorities and women in all states fair representation in the state legislatures. It would focus renewed attention on the importance of minority voters -- racial, political, and urban minorities -- gaining a more meaningful voice as well as a real opportunity to participate throughout the democratic process and not just on election day. The five-member Supreme Court majority allowed the interests of the Florida legislature (in obtaining the safe-harbor benefits of a congressional statute for certifying electors) to trump any remedy to protect the rights of the voters, about whom it was ostensibly so solicitous.

If legislatures are to enjoy such power to speak for all citizens, it is imperative that voters' voices be reflected in fully representative legislative bodies. Florida voters are closely divided along party lines, but in the legislature they are represented by an overwhelmingly Republican leadership. And the partisan acts of the Florida legislature in the 2000 election should focus renewed attention on how the winner-take-all system in a state legislature can fail to recognize the will of racial and political minorities: It wastes the votes of those whose ballots are cast and tabulated but don't lead to the election of any candidate they selected.

If we are not to abolish the electoral college, we might at least mitigate its winner-take-all effect and apportion electoral votes based on the popular split. In Florida, where all of the state's 25 electoral votes went to the Republican candidate, Bush could have gotten 13 votes and Gore 12 (or vice versa!). Such a system is perfectly constitutional and can be readily enacted by the state legislature. Two states do this already, although they use unfairly gerrymandered congressional districts rather than statewide proportions to allocate electoral college votes.

Proportional representation voting, which is used in most of the world's democracies, ensures that each voter's ballot counts when it is cast. Voters essentially "district" themselves by how they mark their ballots. The method thus eliminates the problem of gerrymandering by incumbents protecting their seats. Proportional voting could also encourage the development of local political
organizations to educate and mobilize voters. Only when voters are vigilant, even after the voters are counted, shall we return to a government of, by, and for the people. Developing local grass-roots organizations that can monitor not only elections but also legislative actions is especially important in 2001, a year when every state legislature will be engaged in the decennial task of redistricting. The spread of such organizations -- which a proportional representation system makes possible because the participants actually have a chance to win elections -- could also fuel a new era of issue-centered politics in which people exercise their political views through advocacy groups focused on issues of concern to them. As Richard Berke has written in The New York Times:

The first half of the last century was dominated by party-centered politics. Then came candidate-centered politics. Now, some foresee an era where the power moves to activists, who create local coalitions around specific issues. That could happen because, with the rise of the Internet, activists have far greater access to communication and organizing tools -- and no longer have to rely on help from campaigns or party committees.

Local grass-roots and issue-centered coalitions are more likely if we adopt proportional representation because it rewards those who mobilize directly with seats in the local collective-decision-making body. And local multiparty organizing could effectively generate citizen engagement and meaningful participation not merely on election day but in between elections, too.

Of course, there are downsides to a politics that depends primarily on activists building multiple coalitions of overlapping constituencies through issue-oriented organizing. Creating such coalitions requires enormous energy; they often have to be built from scratch, and for every one that gets it together, dozens will fall short. Moreover, they can encourage a fragmentation of progressive energy and what Urvashi Vaid, the gay rights activist who is now at the Ford Foundation, memorably called "a misuse of powerlessness."

But the upside is that coalitions that start with narrowly focused issues and then engage multiple constituencies can create sustainable alliances even after an election. They can grow into institutions that use their aggregated power again and again -- getting organized labor to join fights that affect Latinos and gays, civil rights groups to join labor, and so forth. These coalitions can also aspire to an electoral strategy and nurture leaders who can eventually become candidates.

Over time, the best of these permanent coalitions might begin to look a little bit like parties: presumably they would have broad platforms, sizable but loose constituencies, and candidates and elected officials allied to them. Proportional representation would lower the bar to successful cross-constituency and multiracial-coalition organizing. But even with a proportional voting system, realizing a fully democratic movement would still require us to fight fragmentation and to aggregate, rotate, and share power among progressive interests in a lasting
and sustainable way.

"One vote, one value," a notion underscored by the conservative Supreme Court majority, ironically could become the rallying cry of a multiracial and multi-issue grass-roots movement of voters throughout the nation. It could herald a new era of issue-centered rather than candidate-centered politics. Black leaders may be key in some communities; union activists or environmentalists in others. But in the end, an aroused and engaged citizenry -- one committed to a broad, multiracial democracy -- will be our best, indeed our only protection to ensure that every vote counts and that every citizen can truly vote. Mobilizing citizens requires local, grass-roots political organizations accountable to the people themselves instead of ad hoc candidate machines that are too often driven by money. Voting should not be an obstacle course of arbitrary deadlines, lousy lists, untrained poll workers, and outdated ballot technology. Rather, voting should be just the first step in a democratic system by which we, the people -- through democratic institutions that are accountable to all of us -- actually rule.