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Democracy, Law, and Comparative Politics

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Publication Date

2002-05-10

Peer reviewed

Democracy, Law, and Comparative Politics*

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I dedicate this article to my daughter Julia, for the metonymy and much love

This article offers a revision of democratic theory in light of the experience of recently democratized countries, located outside of the northwestern quadrant of the world. First, various definitions of democracy that claim to follow Schumpeter and are usually considered to be “minimalist” or “processualist” are critically examined. Building upon but clarifying these conceptual efforts, a realistic and restricted, but not minimalist, definition of a democratic regime is proposed. Thereafter, this article argues that democracy should be analyzed not only at the level of the political regime but also in relation to the state—especially the state qua legal system—and to certain aspects of the overall social context. The main underlying theme that runs through this article is the concept of agency, especially as it is expressed in the legal system of existing democracies.

The recent emergence of countries that are or claim to be democratic has generated important challenges to the comparative study of political regimes and to democratic theory itself. The literature on new democracies shares two basic assumptions: the existence of a sufficiently clear and consistent corpus of democratic theory, and the possibility of using this corpus, with only marginal modifications, as an adequate conceptual tool for the study of emerging democracies. Unfortunately, the first assumption—that there is a clear and consistent corpus of democratic theory—is wrong. By implication, the second, that existing democratic theory “travels” well, is impracticable.¹

The problem with the first assumption is evident in the remarkable number of qualifiers and adjectives scholars attach to the term “democracy” (Collier and Levitsky 1997). We should notice that the logic of attaching qualifiers to “democracy” implies that this term is taken to have a clear meaning, which then is partially modified by the qualifiers. In this view, what varies and may contain vagueness or ambiguity are the categories added to, or subtracted from,

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the core one.² This presumption, however, is problematic if the core concept itself is not clear. The problem, as Hart (1961: 14) puts it, is that “a definition which tells us that something is a member of a family cannot help us if we have only a vague or confused idea as to the character of the family.”

The problem with the second assumption is that practically all definitions of democracy are a distillation of the historical trajectory and the present situation of the originating countries.³ However, the trajectories and situations of other countries that nowadays may be considered democratic differ considerably from the originating ones. Thus, efforts to analyze new democracies need to recognize how democracies vary across different historical/contextual settings. More broadly, a theory of adequate scope should acknowledge how the emergence of democracy in different settings may generate specific characteristics; in turn, these characteristics may make it useful to distinguish among subtypes within the universe of relevant cases.

The import of these issues should be noted. Classifying a given case as “democratic” or not is not only an academic exercise. It has moral implications, as there is agreement in most of the contemporary world that, whatever it means, democracy is a normatively preferable type of rule. This classification also has political consequences, as nowadays the international system makes the availability of significant benefits contingent upon an assessment of a country’s democratic condition.

A core argument of the present article is that democracy should not be analyzed only at the level of the political regime. In addition, it must be studied in relation to the state—especially the state qua legal system—and to certain aspects of the overall social context. To develop this argument, I first offer a definition of democracy as a political regime, which delimits this level of democracy from other aspects. With this definition, which builds on the tradition from Schumpeter to Dahl, I hope to clarify some issues left unresolved by these authors. In a second section, I introduce the idea of agency and discuss the concept of democracy in relation to the state. This aspect has been elided in most contemporary analyses of democracy. I argue that a theory of democracy *tout court* must go beyond the level of regime and include, very centrally, various aspects of legal theory, insofar as the legal system enacts and backs fundamental aspects of both agency and democracy. In a third section, I offer some preliminary ideas about how democracy should also be considered in relation to the overall social context.

This article is primarily aimed at clearing conceptual ground. Consequently, the discussion should be considered a preliminary effort to provide some conceptual instruments that can serve as the basis for a theory of democracy of adequate comparative scope. Moreover, as I suggest in a series of comparative references, these conceptual instruments may provide the basis for studying democracy in the contemporary world in ways that do not overlook the important differences existing among the whole set of relevant cases. Finally, a number of propositions summarize the article’s main conclusions.

I. On the Components of a Democratic Regime

i. Some Definitions of Democracy: Schumpeter's Footnote

After stating that “Democracy is a political method ... a certain type of institutional arrangement for arriving at political—legislative and administrative—decisions,” Schumpeter offers his famous definition of the “democratic method”: “that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote” (Schumpeter 1975: 242, 269). This is the paradigmatic “minimalist” (or “processualist”⁴) definition of democracy. However, it is usually forgotten that Schumpeter does not stop here. First, he clarifies that “the kind of competition for leadership which is to define democracy [entails] free competition for a free vote” (Schumpeter 1975: 271). In the same breath, he introduces a caveat when, after commenting that “the electoral method is practically the only one available for communities of any size,” he adds that this does not exclude other, less than competitive “ways of securing leadership...and we cannot exclude them because if we did we should be left with a completely unrealistic ideal” (Schumpeter 1975: 271). Significantly, this sentence ends with a footnote that reads “As in the economic field, *some* restrictions are implicit in the legal and moral principles of the community” (Schumpeter 1975: 271, fn. 5, italics in original). The meaning of these assertions, in contrast to the definition Schumpeter offered earlier, is rather nebulous. The reason is, I surmise, that the author realized that he was about to open a can of worms: if the “competition for leadership” has something to do with “the legal and moral principles of the community,” then his definition or, equivalently, his description of how “the democratic method” works, turns out not to be so minimalist as an isolated reading of the famous definition might indicate.

Furthermore, Schumpeter realizes that, in order for the “free competition for a free vote” to exist, some conditions, external to the electoral process itself, must be met. As he puts it: “If, on principle at least, everyone is free to compete for political leadership by presenting himself to the electorate, this will in most cases though not in all mean a considerable amount of freedom of discussion for *all*. In particular it will normally mean a considerable amount of freedom of the press” (Schumpeter 1975: 271–72, italics in the original). In other words, for the “democratic method” to exist, some basic freedoms, presumably related to “the legal and moral principles of the community,” must be effective, and in most cases, as Schumpeter emphasizes, “for all.” Finally, when he looks back at his definition and his cognate statement that “the primary function of the electorate [is] to produce a government,” he further clarifies that “I intended to include in this phrase the function of evicting [the government]” (Schumpeter 1975: 272, 269, 273). Albeit implicitly, Schumpeter makes clear that he is not talking about a one-shot event but about a way of selecting and evicting governments over time; his definition slips from an event or, as it is often construed, a process—elections—to an enduring regime.

We should also note that Schumpeter goes on to assert several “Conditions for the success of the Democratic Method.” These conditions are: (1) Appro-

priate leadership; (2) “The effective range of policy decision should not be extended too far”; (3) The existence of “a well-trained bureaucracy of good standing and tradition, endowed with a strong sense of duty and a no less strong *esprit de corps*”; (4) Political leaders should practice a good amount of “democratic self-control” and mutual respect; (5) “A large measure of tolerance for difference of opinion,” for which, going back to his earlier-mentioned footnote, our author adds that a “national character and national habits of a certain type” are apposite; and (6) “All the interests that matter are practically unanimous not only in their allegiance to the country but also to the structural principles of the existing society” (Schumpeter 1975: 289–296).

Once again, these assertions are far from clear. First, he does not tell us if each of these conditions is sufficient for the “success of the democratic method” or if, as seems reasonable, the joint set of these conditions is needed. Second, he does not say if “lack of success” means that the “democratic method” itself would be abolished, or that it would lead to some kind of diminished democracy (Collier and Levitsky 1997). If the proper answer to this question is the first, then we would have to add to Schumpeter’s definition the vast array of dimensions just listed, at least as necessary conditions. This would make his definition anything but minimalist. If, on the other hand, the proper answer is that some kind of diminished democracy would exist, then Schumpeter, against his claim that he has fully characterized the “democratic method,” has failed to offer a typology that would differentiate full and diminished kinds of democracy.

These caveats, postulations of necessary conditions, and allusions to a regime occur in the pages that immediately follow the famous definition. There is no doubt that Schumpeter’s view of democracy is elitist: “The voters outside of parliament must respect the division of labor between themselves and the politicians they have elected ... they must understand that, once they have elected an individual, political action is his business and not theirs” (Schumpeter 1975: 296). But an elitist definition of democracy is not necessarily minimalist. Indeed, the various qualifications Schumpeter introduces imply that his definition of democracy is not as minimalist, or narrowly centered on the “method,” or process, of elections, as its author and most of his commentators took it to be.

The ambiguities inherent in Schumpeter’s definition are quite widespread and run through many prominent contemporary definitions that are deemed to be “Schumpeterian,” that is to say minimalist and/or “processualist.” Among these definitions, Przeworski’s (1991: 10) stands out for its sharpness: “Democracy is a system in which parties lose elections. There are parties: divisions of interests, values, and opinions. There is competition organized by rules. And there are periodic winners and losers.” More recently, Przeworski and collaborators have offered a similar definition, which they label “minimalist”: democracy is “a regime in which governmental offices are filled as a consequence of contested elections. Only if the opposition is allowed to compete, win, and assume office is a regime democratic. To the extent to which it focuses on elections, this is obviously a minimalist definition... [this], in turn, entails three features, *ex ante* uncertainty,... *ex post* irreversibility..., and [repeatability]” (Przeworski, Alvarez, Cheibub, and Limongi 1996: 50–51). In

spite of its avowed limitation to elections, the irreversibility and, especially, the repeatability of elections in which “the opposition has some chance of winning office as a consequence of elections” imply the existence of additional conditions, à la Schumpeter, for these kinds of elections to be held at all (Przeworski et al. 1996: 50).⁵ At the very least, if the opposition is to have such a chance, some basic freedoms must also exist.

Huntington (1991: 7), in turn, asserts that he is “following in the Schumpeterian tradition” and defines democracy “[as a political system that exists] to the extent that its most powerful collective decision makers are selected through fair, honest, and periodic elections in which candidates freely compete for votes and in which virtually all the adult population is eligible to vote.” But he adds, as Schumpeter explicitly and Przeworski implicitly do, that democracy “also implies the existence of those civil and political freedoms to speak, publish, assemble, and organize that are necessary to political debate and the conduct of electoral campaigns.” Di Palma (1990: 16) tells us that democracy is “premised ... on free and fair suffrage in a context of civil liberties, on competitive parties, on the selection of alternative candidates for office, and on the presence of political institutions that regulate and guarantee the roles of government and opposition.” Similarly, for Diamond, Linz, and Lipset (1990: 6–7; italics in original) democracy is “a system of government that meets three essential conditions: meaningful and extensive *competition* among individuals and organized groups (especially political parties) for all effective positions of governmental power, at regular intervals and excluding the use of force; a “highly inclusive” level of *political participation* in the selections of leaders and policies, at least through regular and fair elections, such that no major (adult) social group is excluded; and a level of *civil and political liberties*—freedom of expression, freedom of the press, freedom to form and join organizations—sufficient to ensure the integrity of political competition and participation.”

These definitions are centered on fair elections, to which they add, often explicitly, some surrounding conditions, stated as freedoms or guarantees that are deemed necessary and/or sufficient for the existence of this kind of election. Some of these definitions claim to be minimalist à la Schumpeter, but insofar as they must presuppose, at least implicitly, some surrounding freedoms, this claim is unwarranted. On the other hand, these definitions have the important advantage of being realistic: at least when referring to elections, they include with reasonable precision attributes whose absence or existence we can assess empirically.

Other definitions also purport to be realistic, but they do not qualify as such; they state characteristics that cannot be assessed empirically, because they cannot be found in any existing democracy, or propose excessively vague traits. Among them are definitions that remain tied to “etymological democracy” (as criticized by Sartori 1987: 21) by positing that it is the *demos*, the people, or a majority that somehow “rule.”⁶ This, in any understanding of “rule” that implies purposive activity by an agent, is not what happens in contemporary democracies, although it may have happened to a large but still incomplete extent in Athens (Hansen 1991).

Realistic definitions stand in contrast to maximalist or prescriptive ones, those that assert what democracy should be. These definitions tell us little about two important matters. One, how to characterize existing democracies (including if, according to these theories, they are even to be considered democracies) and, second, how to mediate, in theory if not in practice, the gap between realistically and prescriptively defined democracies. For example, Benhabib tells us that democracy is “a model for organizing the collective and public exercise of power in the major institutions of society on the basis of the principle that decisions affecting the well-being of a collectivity *can be viewed* as the outcome of a procedure of free and reasoned deliberation among individuals considered as moral and political equals.”⁷ The crucial words are italicized; we are not told in what sense, to what extent, and by whom democracies “can be viewed” as satisfying the requirement stipulated in the definition. Similar objections can be made to Habermas’s conception of democracy, which relies on the existence of an unimpeded deliberative sphere, extremely hard to locate in practice, for characterizing and legitimating democracy and democratic law.⁸

Now I invoke another realistic definition, Dahl’s (1989:221) polyarchy. This author usefully states that polyarchy consists of the following traits:

1. *Elected officials.* “Control over government decisions about policy is constitutionally vested in elected officials.”
2. *Free and fair elections.* “Elected officials are chosen [and peacefully removed (Dahl 1989: 233)] in frequent and fairly conducted elections in which coercion is comparatively uncommon.”
3. *Inclusive suffrage.*
4. *Right to run for office* [for] practically all adults.
5. *Freedom of expression.*
6. *Alternative information,* [including that] alternative sources of information exist and are protected by law.
7. *Associational autonomy.* “To achieve their various rights, including those listed earlier, citizens also have a right to form relatively independent associations or organizations, including independent political parties and interest groups.”

This definition stipulates some attributes of elections (clauses 1 to 4) and lists certain freedoms (clauses 5 to 7) deemed necessary for elections to be democratic. These freedoms are dubbed “primary political rights ... integral to the democratic process” (Dahl 1989: 170).

ii. Elections under a Democratic Regime

In a democratic regime, elections are competitive, free, egalitarian, decisive, and inclusive, and those who vote in principle also have the right to be elected—they are political citizens. If elections are competitive, individuals face at least six options: vote for party A; vote for party B; do not vote; cast a blank ballot; cast an invalid vote; or adopt some random procedure that determines which of the preceding options is effectuated. Furthermore, the competing parties must have a reasonable chance to let their views be known to all potential voters. In order to be a real choice, the election must also be free, in

that citizens are not coerced when voting. In order for the election to be egalitarian, each vote should count equally, and be counted as such without fraud, irrespective of the social position, party affiliation, or other qualifications of each one.⁹ Finally, elections must be decisive, in several senses. One, the winners attain incumbency of the respective governmental roles. Two, elected officials, based on the legal authority assigned to these roles, can actually make the binding decisions that a democratic constitutional framework normally authorizes. Three, elected officials end their mandates in the terms and/or under the conditions stipulated by this same framework.

Competitive, free, egalitarian, and decisive elections imply, as Przeworski (1991: 10) argues, that governments may lose elections and they abide by the result. This kind of election is a specific characteristic of a democratic regime, or polyarchy, or political democracy—three terms I use as equivalent. In other cases elections may be held (as in communist and other authoritarian countries, or for the selection of the Pope, or even in some military juntas), but only polyarchy has the kind of election that meets all the earlier mentioned criteria (Sartori 1987: 30; see also Riker 1982: 5).

These attributes say nothing about the composition of the electorate. Oligarchic democracies, those with restricted suffrage, satisfied the attributes already spelled out. But as a consequence of the historical processes of democratization in the originating countries, and of their diffusion to other countries, democracy has acquired another characteristic, inclusiveness: the right to vote and to be elected is assigned, with few exceptions, to all adult members of a given country.¹⁰ For brevity, from now on I will call fair elections those that have the joint condition of being free, competitive, egalitarian, decisive, and inclusive.¹¹

Realistic definitions of democracy, then, contain two components. The first spells out the attributes of elections that are considered fair. This is a stipulative definition,¹² no different from “triangle means a plane figure enclosed by three straight lines.” The second lists conditions, designated as freedoms, guarantees, or “primary political rights,” that surround fair elections. These freedoms are conditions of existence of an object—fair elections—to which they stand in a causal relationship. As we saw with Schumpeter, to my knowledge none of the realistic definitions make clear whether the conditions they proffer are necessary, and/or jointly sufficient, or simply increase the likelihood of competitive elections.

As I noted earlier, an often implicit assumption of these definitions is that elections are not a one-shot event but a series of events that continue indefinitely. Hence, these elections are institutionalized: practically all actors, political and otherwise, take for granted that fair elections will continue indefinitely, at legally preestablished dates (in presidential systems) or according to legally preestablished occasions (in parliamentary systems). The actors, then, also take for granted that the surrounding freedoms will continue to be effective. Under these circumstances, relevant agents rationally adjust their strategies, and this in turn increases the likelihood that such elections will continue.¹³ Otherwise, elections will not be “the only game in town,”¹⁴ and relevant agents

will invest in resources other than elections as means to access the highest positions of the regime.¹⁵

This last term needs specification. By “regime” I mean the patterns, formal or informal and explicit or implicit, that determine the channels of access to principal governmental positions; the characteristics of the actors who are admitted and excluded from such access; and the resources and strategies that they are allowed to use for gaining access.¹⁶ When fair elections are institutionalized, they are a central component of a democratic regime: they are the only means of access to the principal governmental positions (with the noted exception of high courts, armed forces, and eventually central banks). In democracy, elections are not only fair; they also are institutionalized.

iii. Comparative Excursus (I)

Decisiveness does not appear in the existing definitions of democracy and democratic elections,¹⁷ and its omission is symptomatic of the degree to which current theories include unexamined assumptions that should be made explicit for such theories to attain adequate comparative scope. The literature reflects the experience of the originating democracies by assuming that once elections are held and winners declared, they take office and govern with the authority and for the periods constitutionally prescribed.¹⁸ But this is not necessarily the case. In several countries, democratically elected candidates have been prevented from taking office, often by means of a military coup. Also, during their mandates, democratically elected executives such as Boris Yeltsin and Alberto Fujimori unconstitutionally dismissed congress and the top members of the judiciary. Finally, explicitly in cases such as contemporary Chile (and less formally but no less effectively in other Latin American, African, and Asian countries) some organizations insulated from the electoral process, usually the armed forces, retain veto powers or “reserved domains”¹⁹ that significantly constrain the authority of elected officials. In all these cases elections are not decisive: they do not generate, or they cease to generate, some of the basic consequences they are supposed to bring about.

iv. A First Look at Political Freedoms

It seems obvious that for the institutionalization of fair elections, especially as it involves expectations of indefinite endurance, some freedoms or guarantees must also exist. Otherwise, the government in turn could quite easily manipulate or even cancel future elections. Yet the combined effect of the freedoms listed by Dahl and other authors (expression, association, and access to information) cannot fully guarantee that elections will be fair. For example, the government might prohibit that opposition candidates travel within the country or subject them to police harassment for reasons allegedly unrelated to their candidacy. In such a case, even if the freedoms listed by Dahl held, we would hardly conclude that these elections were fair. This means that the conditions proposed by Dahl and others are not sufficient for guaranteeing fair elections. Rather, these are necessary conditions that jointly support a proba-

bilistic judgment: if they hold, then *ceteris paribus* there is a strong likelihood that elections will be fair.

We saw that while the attributes of fair elections are stipulated by definition, the surrounding “political” freedoms are inductively derived—the result of a reasoned empirical assessment of the impact of various freedoms on the likelihood of fair elections. Since the criterion of inclusion of some freedoms is an inductive judgment, there cannot exist a theory that establishes a firm and clear line between included and excluded freedoms. This is one reason why there is not, and it is very unlikely that there will ever be, general agreement about which these “political” freedoms should be. I surmise that the implicit hope to avoid this conundrum is the main reason for the persistent attraction of minimalist definitions of democracy—and the reason for the no less persistent failure of these definitions to stick just to elections. The can of worms that Schumpeter tried to, but could not, avoid is still with us.

So far I have discussed what may be called the external boundaries of freedoms, i.e., the issue of which freedoms to include. But another problem is the issue of the internal boundaries of each of these freedoms. All of them contain a “reasonability clause” that, once again, is usually left implicit in the theory of democracy, at least as proposed by most political scientists and sociologists.²⁰ The freedom to form associations does not include creating organizations with terrorist aims; freedom of expression is limited, among others, by the law of libel; freedom of information does not require that ownership of the media is not oligopolized; etc. How do we determine if these freedoms are effective or not? Surely, cases that fall close to one or the other extreme are unproblematic. But some cases fall in a gray area. The answer again depends on inductive judgments about the degree to which the feeble, partial, or intermittent effectiveness of certain freedoms still supports, or not, the likelihood of fair elections. Once again, there is no theoretical basis for a firm and clear answer: the external and the internal boundaries of political freedoms are theoretically undecidable.

A further difficulty is that the internal boundaries of freedoms potentially relevant to fair elections have undergone significant changes over time. It suffices to note that certain restrictions to freedom of expression and of association considered quite acceptable not long ago in the originating countries, nowadays would be deemed clearly undemocratic.²¹ Having this in mind, how demanding should be the criteria we apply to new democracies (and to older ones outside of the northwestern quadrant of the world)? Should we apply the criteria presently prevalent in the originating countries, or the criteria used in their past, or, once more, make in each case reasoned inductive assessments of these freedoms in terms of the likelihood of effectuation or prevention of fair elections? It seems to me that the latter option is the more adequate, but it sends us back squarely to the issue of the undecidability of the respective freedoms, now even further complicated by their historical variability.

For these reasons, there will continue to be disagreement in academia and, indeed, in politics, concerning where to trace the external and the internal boundaries of the freedoms that surround fair and institutionalized elections. The

inductive character of establishing these boundaries shows their limitations as theoretical statements per se and in their intersubjective persuasiveness. I am persuaded that, instead of ignoring such limitations, or artificially trying to fix the external and internal boundaries of these freedoms, a more fruitful avenue of inquiry consists of thematizing theoretically the reasons and implications of this problem.²² Before delving further into the matter, however, I offer some propositions that recapitulate the main arguments made thus far.

v. Some Propositions

- I. A realistic and restricted definition of a democratic regime consists of fair and institutionalized elections, jointly with some surrounding, even if ultimately undecidable, political freedoms.
- II. Even “minimalist,” “processualist,” or “Schumpeterian” definitions, those that limit themselves to mentioning fair elections as the sole characteristic of democracy, presuppose the existence of some basic freedoms, or guarantees, if such elections are to exist. Consequently, these definitions are not, nor could be, minimalist or processualist as they usually claim to be. These definitions, however, are restricted in the sense that they do not include a highly detailed, and ultimately inexhaustible and analytically barren, listing of potentially relevant freedoms, and do not introduce maximalist, or prescriptive, notions into the definition of a democratic regime.
- III. The surrounding freedoms of fair and institutionalized elections can only be inductively derived, both in terms of the freedoms to be included and of the internal boundaries of each. As a consequence, widespread agreement, grounded on firm and clear theoretical criteria, is impossible in this matter.²³
- IV. In spite of their undecidability, since some surrounding freedoms can be construed as generating a high likelihood of fair and institutionalized elections, it is convenient to spell them out, both for reasons of definitional adequacy and because it helps clarify the disagreements that may ensue on this matter.
- V. A realistic and restricted, but not minimalist definition of a democratic regime, such as that stated in Proposition I, can be used to distinguish this kind of regime from other types of political rule, a task with important normative, practical, and theoretical consequences.

I have thus agreed with realistic definitions but have found it useful to “precise” (Collier and Levitsky 1997) them by adding some elements they usually leave implicit. This realistic and restricted definition of a democratic regime is useful for several reasons. The first is conceptual and empirical: it allows us to distinguish a set of cases that are different from the large and varied set of cases that are non-democracies, whether they are various sorts of openly authoritarian regimes or regimes that hold elections but not ones that are fair and institutionalized.²⁴ Second, once such a set is generated, the way is opened for the analysis and comparison of similarities and differences among its cases and subsets of cases.²⁵

Other reasons are both practical and normative. The third is that the existence of this kind of regime with its surrounding freedoms, despite many remaining flaws, entails a huge difference in relation to authoritarian rule. At the very least, the availability of these freedoms generates the possibility of using

them as sites of protection and empowerment for the expansion or achievement of other rights. Fourth, it was in demand for this type of regime and its surrounding freedoms that throughout history people have mobilized and taken big risks. It seems clear that, in addition to sometimes mythical hopes about other kinds of outcomes, the demand for political freedoms was at the core of the great mobilizations that often preceded the inauguration of democracy.²⁶ Fifth, abundant survey data as well as impressionistic observation suggest that, whatever additional meanings they attach to the term “democracy,” most people in most places include some political freedoms and elections that, in their view, are reasonably fair. In common parlance and, indeed, according to the criteria proposed by the scholarly definitions that—in part for this reason—I have called realistic, the existence of these freedoms and elections suffices for calling a given country democratic. This naming carries a positive normative connotation, as shown by the fact that calling “a country” “democratic” is a metonymy; i.e., naming the larger part, a country, by an attribute, positively connoted, of one of its components, its regime.²⁷

vi. An Institutionalized Wager

In addition to the right to vote, assigned by democracy to practically all adults in the territory of a state, each voter also has the right to run for election. Each adult carries the right of sharing in the responsibility of making collectively binding decisions, and eventually in the application of state coercion. These participatory rights of voting and gaining access to elected roles define an *agent*. These rights are assigned by the legal system to most adults in the territory of a state, with exceptions that are themselves legally defined. The assignment is universalistic; it is attached to all adults irrespective of their social condition and of ascriptive characteristics other than age and nationality. Agency entails the legal attribution, apart from narrowly defined exceptions, of the capacity to make choices; agents are deemed sufficiently reasonable both to elect the government and to occupy governing roles. Individuals may not exercise these rights, yet the legal system construes them all as equally capable of effectuating these rights and their correlated obligations (such as, say, abstaining from fraud or violence when voting, or acting within legally mandated limits in governmental roles).

This is agency—sufficient autonomy and reasonableness for making choices that have consequences which, in turn, entail duties of responsibility—at least in relationships related to a regime based on fair and institutionalized elections. Perhaps because this universalistic attribution of agency has become commonplace in the originating countries, we tend to forget what an extraordinary and recent achievement it is.

Seen from this angle, political democracy is not the result of some kind of consensus, individual choice, social contract, or deliberative process. It is the result of an institutionalized wager. The legal system assigns manifold rights and obligations to individuals who, already at birth, are immersed in a web of rights and obligations enacted and backed by the legal system of the territorially based state in which they live. We are social beings well before any willful

decision of ours, and in contemporary societies an important part of that being is legally defined and regulated. This fact is also obvious, and has important consequences. Yet it is also overlooked by most existing theories of democracy.

The attribution of rights and obligations is universalistic: everyone is expected to accept that, barring exceptions detailed by the legal system, everyone else enjoys the same rights and obligations that she has. Some of these rights refer to a peculiar way of making collectively binding decisions, by means of individuals chosen in fair and institutionalized elections.

What is the wager, then? It is that, in a democratic regime, every *ego* must accept that practically every other adult may participate—by voting and potentially also by being elected—in the act, a fair election, that determines who will govern for some time. It is an institutionalized wager because such elections are imposed on every *ego* independently of his will, entailed and backed as they are by the legal system of a political democracy.²⁸ *Ego* has no option but to take the chance that the “wrong” people and policies are chosen as the result of fair elections.²⁹ *Ego* may dislike or even strongly object³⁰ to the fact that *alter* is assigned the same rights of voting and being elected that she has. Yet for *ego* this is not a matter of choice; she is immersed in a legal system that establishes those same rights for *alter* and prohibits *ego* to ignore, curtail, or deny these rights.

Political democracy is the only regime that is the result of an institutionalized, universalistic, and inclusive wager. All other regimes, whether they include elections or not, place some kind of restriction on this wager or suppress it entirely. New or old, beyond their founding moment democratic regimes are the result of this wager, and are profoundly imprinted by this fact.

This legally backed wager defines broad but operationally important parameters for individual rationality: ignoring, curtailing, or denying the rights that the wager assigns to *alter* normally generates severe negative consequences for the perpetrator. In *ego*'s interactions with *alter*, at least in the political sphere contoured by fair and institutionalized elections, normally it is in his interest to acknowledge and respect *alter*'s rights. This interest may be reinforced by altruistic or collectively oriented reasons, but by itself it entails the recognition of others as carriers of rights identical to each *ego*'s. This is the nutshell of a public sphere, as it consists of mutual recognitions based on the universalistic assignment of certain rights and obligations.

Two important points emerge from the preceding discussion. First, we have reached a definition of political citizenship as the individual correlate of a democratic regime. It consists of the legal assignment and the effective enjoyment of the rights entailed by the wager; i.e., both the surrounding freedoms (such as of expression, association, information, and free movement, however undecidable) and the rights of participation in fair elections, including voting and being elected. Second, with this definition we have gone beyond the regime and run into the state, in two senses: one, as a territorial entity that delimits those who are the carriers of the rights and obligations of political citizenship; two, as a legal system that enacts and backs the universalistic and inclusive assignment of these rights and obligations. The democratic wager and political citizenship presuppose each other, and they together presuppose the state, both as a territorial delimitation and as a legal system.

At this point it may be useful to include the following propositions:

- VI. The individual correlate of a democratic regime is political citizenship, which consists of the legal assignment of the rights entailed by the democratic wager, i.e., the rights of participation in fair elections, including voting and being elected, and the surrounding freedoms.
- VII. Political citizenship and hence a democratic regime presuppose: (A) a state that within its territory delimits those who are considered political citizens and are thus the carriers of the rights and obligations of political citizenship; and (B) a legal system of that same state that assigns political citizenship on an universalistic and inclusive basis.

II. From Regime to State

i. Agency

The adoption of a wager assigning universalistic political rights is quite recent, even in the originating countries. For a long time, many social categories were excluded from voting, let alone being elected: peasants, blue-collar workers, domestic workers (and, in general, non-property owners and poorly educated individuals), blacks in the United States, Indians in the latter country as well as elsewhere, and women. Only during the twentieth century, and in several countries in relation to women as late as after World War II, did political rights become inclusive.³¹ Interestingly, some countries in the South and East adopted inclusive suffrage before the originating countries. But the various “tutelary” or “facade” democracies, and of course openly authoritarian regimes that emerged, meant the denial of the democratic wager.

Everywhere, the history of democracy is the history of the reluctant acceptance of the universalistic and institutionalized wager. The history of the originating countries is punctuated by the catastrophic predictions, and sometimes the violent resistance, of privileged sectors opposing the extension of their political rights to other, “undeserving” or “untrustworthy” sectors.³² In other latitudes, by means often even more violent and comprehensively exclusionary, this same extension has been repeatedly resisted.

What were the grounds for this refusal? Typically, lack of autonomy and lack of responsibility—in other words, denial of agency. Only some individuals (whether they were highly educated and/or property owners, or a political vanguard that had deciphered the direction of history, or a military junta that understood the demands of national security, etc.) were deemed to have the moral and cognitive capabilities for participating in political life. Only they, too, were seen as sufficiently invested (in terms of education, property, revolutionary work, or patriotic designs) so as to have adequate motivation for responsibly making collective decisions. Of course, revolutionary vanguards, military juntas, and the like generated authoritarian regimes, while in the originating countries the privileged generated in most cases oligarchical, non-inclusive democratic regimes for themselves and political exclusion for the rest.

We see, then, that an agent is conceived as somebody who is endowed with practical reason; i.e., she uses her cognitive and motivational capability to make choices that are reasonable in terms of her situation, of which she is deemed to be the best judge.³³ This capacity makes the agent a moral one, in the sense that normally he will feel, and will be construed by relevant others as responsible for his choices and for at least the direct consequences that ensue. As a democratic regime is the result of an institutionalized wager grounded in the universalistic legal assignment of agency, we have run into the issue of the democraticness of at least some dimensions of the state itself. First, however, I explore some comparative implications of this discussion.

ii. Comparative Excursus (2)

The history of the concept of agency—and of its concomitant, the subjective rights of the individual—goes back to classical Greece and Rome, and can be traced through the Middle Ages, the Enlightenment, and finally to the adoption of this idea by the great liberal theorists. It developed in a distinctive sequence in the originating countries of the northwestern quadrant. The idea of agency became deeply and widely embodied—basically in the shape of what today we call civil rights—in the legal systems of the originating countries well before this same idea was transposed by liberalism into the political realm. In these countries, the implantation of agency in the legal system developed in tandem with the emergence of capitalism and the making of national states. This sequence, of implantation of civil rights and guarantees of liberal constitutionalism before these countries adopted the universalistic democratic wager, significantly tempered the perceived risks of this wager.³⁴

As Weber (1968) never tired of insisting, these were historically unique circumstances that profoundly imprinted the originating countries. On the other hand, in most other democracies, new and old, in the East and in the South, these processes occurred later, in different sequences, and with less completeness and fewer homogenizing consequences than in the originating countries. These differences, attested by the respective historical records, have also profoundly shaped the contemporary characteristics of the latter countries, including their states and regimes. Yet the ahistorical and narrow focus on the formal aspects of the regime in many existing theories of democracy hinders the study of these factors. Insofar as they may be surmised as having strong influence on the characteristics of many contemporary democracies, this omission is a serious hindrance to the proper comparative scope of democratic theory.

In this respect we should notice that in many new democracies, even if elections are fair and both elections and the universalistic wager are institutionalized, there is little effective legal texturing of civil rights, both across their territory and their social classes and sectors. Furthermore, in these countries many of the liberal safeguards were not in place, and in some of them remained absent when the inclusive wager was adopted. The privileged, consequently, saw the extension of the wager as extremely threatening, often unleashing a dynamic of repression and exclusion, counteracted by deep popu-

lar alienation and eventual radicalization that further eroded the extension of political and civil rights. In the past and until quite recently, this dynamic fed the emergence of various forms of authoritarian rule in Latin America and elsewhere (O'Donnell 1973: 1988).

We thus see that civil and political citizenship have a historical, legal, and conceptual connection that is much more intimate than recognized by most theories of democracy, realistic or otherwise. These remarks have empirical implications. By definition, all political democracies have a central set of political freedoms. However, in some countries these freedoms are surrounded and supported by a dense web of civil rights; in other countries, instead, civil rights are unevenly distributed across different kinds of individuals, social categories, and regions. These differences, which may be mapped across cases and time, should have a strong bearing on what we might call the depth or degree of civil and legal democratization, or the overall quality of democracy. A big pending research agenda springs from these remarks; yet we will not undertake it if democratic theory remains constrained to a minimalist, formalistic and/or ahistorical reduction to its regime.

iii. Political Citizenship and its Correlates

The presumption of agency was extremely important for subsequent legal developments in the originating countries, as it raised the issue of the options actually available to individuals, in terms of both their capabilities and their actual range of choice.³⁵ The answer to this issue branched out in two directions.

One focused on private rights, especially but not exclusively, in the broadly defined area of contract. A series of legal criteria were elaborated for voiding, redressing, or preventing situations in which there exists a “manifestly disproportionate”³⁶ relationship among the parties, and/or where one of the parties may not be reasonably construed—because of duress, fraud, mental incapacity, etc.—as having lent autonomous consent to the contract. Through these legal constructions, the fairness requirement of creating a minimally level playing field among agents was textured into the legal systems of the originating countries. Consequently, numerous substantive legislative and jurisprudential considerations of fairness were added to the historically and analytically prior legal imprinting of universalistic conceptions of agency. These additions contradicted the earlier constructions of agency in that they introduced non-universalistic criteria for the assignment and adjudication of rights in various kinds of cases. On the other hand, these additions were consistent with the earlier legal constructions in that they reflected the recognition that agency should not just be assumed but had to be examined for its effectiveness. This ambivalence—part contradiction with universalistic premises, part consistency with the underlying conception of agency—has greatly contributed to giving to the legal systems of the originating countries, and others inspired by the former, their enormous complexity.

The second direction in which the issue of agency and its relationship to options branched out was the emergence and development of welfare legisla-

tion. Here again the value of fairness owed to agency stands out, albeit focused on various social categories, not so much on individuals as in private law. Through another long and convoluted process, the newly accepted participants in the wager exchanged their acceptance of political democracy for a share in the benefits of the welfare state. These gains were not only material; through collective representation and other devices, these actors diminished the sharp *de facto* inequality with respect to capitalists and the state that, as Marx and others had pointedly denounced, lay behind the universalism of the then existing legal systems. By means of welfare legislation, and with ups and downs in terms of the respective power relationships, various views of fairness, building on earlier conceptions of individual agency and partially transforming them, were textured into the legal system. As in private law, but usually referring to collectively defined categories of agents, welfare legislation expressed the view that the presumption of agency requires that society, and especially the state and its legal system, should not be indifferent to the options everyone actually faces. Although they have not been an unmixed blessing, these developments, imprinted in private and public law, were democratizing changes. They further densified the legal texture that enacts and backs the very same agency that is presupposed by democracy.

We see that in relation to civil and social rights the issue of the actual options of agency could not be ignored by private law and by welfare legislation. This raises the question: on what grounds is it permissible to ignore this issue in relation to political rights? It seems to me inconsistent to omit, as most theories of democracy do, the question of the effectiveness of political citizenship when referring to individuals who are deprived of many civil and social rights and, consequently, of minimally reasonable options. While the assignment of universalistic political rights in a democracy is indeed great progress in relation to authoritarian rule, looking exclusively at this side of the matter means suppressing from democratic theory the very issue of actual agency and options that private law and welfare legislation could not ignore.

We can grasp now the root reason of the boundary problems of political rights, and of their undecidability. Agency has direct and concurrent implications in the civil, social, and political spheres because it is the legally enacted aspect of a moral conception of the human being as an autonomous, reasonable, and responsible individual. This view, or presumption, cannot be validly elided—logically, morally, or legally—in considering the options available to each individual, both in terms of capabilities and of range of choice. In turn, insofar as political democracy entails agency, there is no way to exorcise from its theory and practice the questions referring to the effectiveness—the actual options—of political citizenship. The can of worms turns out to be even bigger than Schumpeter feared, but still may be amenable to intellectually disciplined treatment.

At this point it may be useful to include some propositions:

- VIII. A democratic regime is the result of a universalistic and inclusive, but (in some countries) tempered, wager.
- IX. In the originating countries, political citizenship found direct roots, including well-developed and broadly diffused concepts, practices, and institutions, in the long

preceding process of the construction of agency, conceived as a legal person and his/her subjective civil rights. This conception of agency is the legally enacted aspect of a moral view of the individual as an autonomous, reasonable, and responsible being.

- X. The rules that enact political citizenship are part and parcel of a legal system that is based on this conception of agency. In turn, this conception grounds and justifies the democratic wager.
- XI. Some philosophies and moral theories dispute the validity or usefulness of this conception, while others that accept it disagree as to its foundations and implications. This is interesting and important. Yet we must not forget that, in the originating countries, this conception has been deeply and profusely impressed in their legal systems and, consequently, in their social structure.
- XII. It was in and by these legal systems that, partially contradicting their universalistic orientation, the issue concerning the options of each agent was recognized. As a consequence, many partially equalizing measures were undertaken in both civil law and welfare legislation. These measures, inspired by a view of fairness due to a proper consideration of agency, generated further overall democratization.

iv. Comparative Excursus (3)

When non-originating countries imported, recently or in the past, the institutional paraphernalia of a democratic regime (elections, constitutions, congress, and the like), they did more than this. These countries also imported legal systems that were premised on universalistic conceptions of individual agency and its consequent subjective rights. However, the overall social texture of the adopting societies may not include an extensive and elaborate implantation of these rights; rather, organic, or otherwise traditional or even mafia-like, conceptions of justice and law may prevail (O'Donnell 1993). When this is the case, the adoption of democracy and its surrounding political freedoms generates a severe disjunction between these rights and the general texture of society, including the ways in which all sorts of rights and obligations are conceived and effectuated. In other words, political citizenship may be implanted in the midst of very little, or highly skewed, civil citizenship, to say nothing of social rights.

These cases may still be political democracies as defined earlier, but the workings of this regime, as well as its relationships with state and society, are likely to be significantly different from those of the originating countries.³⁷ At least, we may surmise that the extension and the vigor of political citizenship rights will be strongly influenced by the overall effectiveness of the legal system, including its civil and social rights. At the present stage of our knowledge, these are no more than hypotheses that remain to be empirically explored; but we can formulate them only if we take into consideration historical and legal aspects that too often remain implicit in democratic theory.

v. "Political" Freedoms?

We saw that there are some freedoms—more properly defined as rights—that pertain to the effectuation of fair and institutionalized elections: the right

to vote and to be elected as well as, generally, participating in actions related to the holding of these elections. Again taking up the freedoms proposed by Dahl, we note a difference among them. The availability of alternative—i.e., free and pluralistic—information, is a characteristic of the social context. The other two freedoms, of expression and association, are subjective rights.³⁸ They are part of *ego's potestas*, her right to undertake, or not, the actions of expressing herself or associating. These rights have two sides: first, they are valuable per se; second, they have an instrumental relationship with respect to the earlier-mentioned participatory rights—they are necessary conditions for the effectiveness of the participatory rights enacted by a democratic regime and its wager.

Once again we find a boundary problem: it is undecidable which acts of expressing or associating are “political” or not. The reason is that the rights of expression and of association, and others relevant to political democracy, are part of the civil rights discussed earlier. Consequently, the social sites in which the rights of expression and association are relevant and legally protected are much broader than the sphere of the political regime. In this sense, albeit implicitly, the realistic definitions of democracy, as well as others, perform a double operation. One, they “adopt” some of these rights, in the sense that they take them into consideration as long as they deem them to directly refer to a democratic regime. Second, these definitions “promote” the same rights to the rank of necessary conditions of such a regime. However, because of the problem of internal boundaries, this adoption and promotion is unavoidably arbitrary: it is hard to imagine that, say, the rights of expression and of association would be effective in the realm of politics while they are grossly denied in other spheres of social life. Expressing and associating are typical civil freedoms; they became legally enacted rights long before they were also recognized as “political” rights. Consequently, there is no clear and firm dividing line between the civil and the political side of these rights—arriving from a different angle we have re-encountered the boundary problems noted earlier.³⁹

vi. On the State and its Legal Dimension

In contemporary societies most rights—civil, political, and social—are enacted and backed by a legal system, both by statutes and by courts. This legal system is a part, or an aspect, of the state. Normally, the state extends its rule, most of it effectuated in the grammar of law, throughout the territory it encompasses. Since, as we have seen, for a democratic regime to exist there must also exist a territorial delimitation and at least some legally sanctioned rights, we have shifted our discussion from a regime to a state. In addition to a set of bureaucracies, the state includes the legal system that it enacts and normally backs with its supremacy of coercion over the territory that it delimits (O'Donnell 1993, 1999b). It is this legal system that embraces and constitutes qua legal persons the individuals in the territory. It follows that, insofar as it upholds the democratic wager as well as a regime consisting of fair and institutionalized elections as well as some surrounding rights, this legal system, and the state of which it is a part, is democratic. Democraticness is an attribute

of the state, not only of the regime. This state is a Democratic *Rechtsstaat*, an *Estado Democrático de Derecho*, in that it enacts and backs the legal rules referred to the existence and persistence of a democratic regime.

Earlier I noted a difference between the right to alternative information and rights such as those of expression and association. The latter are often considered negative rights, although this criterion has been persuasively criticized by several authors (Holmes and Sunstein 1999; Raz 1986; Skinner 1984; Taylor 1993). At any event, there is at least one right, implied by the former, that is clearly positive: the right of fair and expeditious access to courts. This right is positive, as it involves the expectation that some state agents will undertake, if legally appropriate, actions oriented to the effectuation of the earlier mentioned rights as well as others (Fabre 1998). With this assertion we have again run into the state qua legal system that enacts and backs rights that are widely agreed to be basic components of democracy. A legal system is not just an aggregation of rules but properly a system, consisting of the interlacing of networks of legal rules and of legally regulated institutions. In turn, a species of this genus, a democratic legal system, is one that not only, as noted earlier, enacts and backs the rights attached to a democratic regime; it is a system also characterized by the fact that there is no power in the state nor in the regime (nor, for that matter, in society) that is *de legibus solutus*.⁴⁰ In a democratic *Rechtsstaat* or *Estado Democrático de Derecho* all powers are subject to the legal authority of other powers; this legal system “closes,” in the sense that nobody is supposed to be above or beyond its rules.⁴¹

We have reached, thus, another conclusion. Before I noted that there are two specific characteristics of political democracy, not shared by any other regime: fair and institutionalized elections, and an inclusive and universalistic wager. Now we have seen that there are two other specific characteristics: one, by implication of the definition of a democratic regime, a legal system that enacts and backs the rights attached to this regime; and two, the rounding of the legal system so that no person, role, or institution is *de legibus solutus*.⁴² The difference is that the first two characteristics are located at the level of the regime, while the last two are located at the level of the legal system of the state⁴³—again we see that an exclusive focus on the regime is insufficient for an adequate characterization of democracy. These conclusions may be stated as a proposition:

- XIII. Political democracy has four unique differentiating characteristics in relation to all other political types: (1) fair and institutionalized elections, jointly with some surrounding “political freedoms”; (2) an inclusive and universalistic wager; (3) a legal system that enacts and backs—at least—the rights included in the definition of a democratic regime; and (4) a legal system that prevents anyone from being *de legibus solutus*. The first two characteristics pertain to the regime, the last two to the state and its legal system.

III. On the Overall Social Context

Freedom of information is a social given, independent of the will of any single individual. This is a public good, characterized as such by being indivis-

ible, non-excludable, and non-rival. The availability of alternative information is the collective side of the coin of the effectiveness of the subjective rights of expression and association; one could hardly imagine one existing without the other.

The freedom of information and its cognates, the rights of opinion and expression, as shown by the enormous attention paid to them in legal theory and practice, span over practically all social sites, well beyond the regime. To be effective, this freedom presupposes two conditions. One is a social context that is generally pluralistic and tolerant of the diversity of values, views, lifestyles, and opinions entailed by the rights of expression and association. The other condition is a legal system that effectively backs these rights. Consequently, if we agree that the availability of alternative sources of information is one of the necessary conditions of a democratic regime we have, once again, gone beyond the regime and run not only into the state and its legal system, but also into some general features of the overall social context.

Another boundary problem emerges here: it is undecidable where and on the basis of what theoretical criteria we may trace a clear and firm dividing line between aspects of the freedom of alternative information that are relevant to political democracy and those that are not. For example, quite open discussion might be allowed on some political issues but at the same time severely limited on others. If, say, the public discussion of gender or sexual diversity rights were censored, or if groups promoting agrarian reform were prohibited from accessing the media, we would have serious doubts about considering this freedom satisfied. Yet, in the not-distant past in the originating countries these restrictions were not considered problematic. We confront again a vexing comparative question: Would it be fair, theoretically and normatively, to apply to new democracies the criteria that nowadays the originating countries apply to themselves, or should we accept less restrictive criteria such as those they applied decades ago—or is there another alternative? Whichever the answer to this question, it seems appropriate to assert that countries where the ability to express opinions and access the information media has been widely secured are in an important sense more democratic than countries where this is not the case. If this judgment makes sense, then we should realize that democraticness also characterizes the overall social context, not just the regime or the state. Thus, we can now introduce some new propositions:

- XIV. In the realistic definitions of democracy, the rights (or freedoms) that surround fair elections are deemed to be “political” by means of an operation of adoption and promotion of what actually are classic civil rights. Although this operation is useful for characterizing a democratic regime, it further adds to the boundary problems, and the subsequent undecidability, of these freedoms.
- XV. The freedoms listed by Dahl, and in more or less detail by other authors, turn out to be of a different nature. Some are positive rights of participation to vote or run in fair elections. Other rights, such as freedom of expression and association, are commonly viewed as negative ones, although their effectiveness implies at least one positive right, fair and expeditious access to courts. Finally, freedom of access to alternative information and, by implication, a basically pluralist and tolerant social context, is neither a negative nor a positive freedom, but a public good that qualifies the overall social context and is itself backed by a (democratic) legal system.

i. Comparative Excursus (4)

I have discussed the freedoms, or rights, that many definitions of democracy list, and noted the boundary problems that these listings share. This requires further examination, which I begin by bringing in situations that nowadays are rare in the originating countries but are frequent, if not widespread, in many new democracies. In these, by definition, fair and institutionalized elections, certain political rights exist. However, other important rights and guarantees are not effective, including some that are part of the classic repertoire of civil rights. I refer to situations where women and various minorities are severely discriminated against even if the text of the law prohibits it; workers or peasants are denied, *de jure* or *de facto*, rights of associating; various rights of the poor and of minorities are regularly violated by the police and various mafia-like groups; access to courts is extremely biased; and a long *et cetera* (Méndez, O'Donnell, and Pinheiro 1999). These people may enjoy political rights of the kind already spelled out; however, many of their civil rights are curtailed, if not unavailable. They are political citizens, but they enjoy a truncated or low-intensity civil citizenship. In many democracies, new and old, of the South and the East, the individuals who suffer truncated civil citizenship are a large proportion, if not a majority, of the respective populations.

This is a very important difference in relation to the originating countries, where in most cases the rights entailed by civil citizenship achieved extensive and elaborate implantation before the democratic wager was adopted and, later on, additional civil and social welfare rights were enacted. This difference is closely related to the fact that in the originating countries the process of state making and the emergence of capitalism preceded the inclusive democratic wager. This in turn meant that a legal system based on conceptions of individual agency actually ruled across the territory of these states. By contrast, in many democracies in the East and the South, few of these homogenizing processes have taken place. Rather, the geography of these countries is marked by regions, some of them huge, where the legal system enacted by the state has little effective presence. This is not only a problem in the rural areas; it is also true of many urban areas.⁴⁴ Part of the problem is that during the past twenty years, in many cases already under democratic regimes, these "brown areas" have grown, not diminished. Another way of looking at this problem is in terms of the very uneven way in which capitalism has expanded in these countries. In them there exists a complex mix of capital/labor relations; in particular, huge, and growing, informal sectors that are a depository, not only of deep poverty, but also of pre- and proto-capitalist, even servile, social relations.⁴⁵

We must also take into consideration that many of these people live under such poverty that their overwhelming concern is sheer survival; they do not have opportunities, material resources, education, time, or even energy to do much beyond survive. These privations mean that these individuals are materially poor, while the previously listed ones entail that they also are legally poor. Material and legal poverty is the actual condition of large parts and, in some countries, of the majority of the population of political democracies, new and old, in the East and in the South.

An important question is whether these facts should be taken as relevant to a theory of democracy, at least one that purports to include cases afflicted by characteristics such as the ones I have sketched. Some observers, especially in the countries that suffer this kind of problem, argue that these problems demonstrate that “democracy” is just a fake for masking huge inequalities—this is one reason for the proliferation of adjectives and qualifiers registered by Collier and Levitsky (1997). These views are particularly worrisome if we consider that in many countries democratically elected governments have been unable to ameliorate, and in some cases have worsened, this morally repugnant situation. On the other hand, others who observe the relevance of this situation answer a curt “no”; they may regret it, but a theory of democracy is about a regime, and the regime is about behaviors and institutions that, unless grievous loss of parsimony is incurred, the analysis should isolate from legal, social, and economic conditions—these conditions are better left to the respective professions, and to moralists and ideologues of various guises.

The intimate connection I have drawn between civil, social, and political rights, and their common grounding in conceptions of agency and the fair treatment due to it, suggests that this position is untenable. I believe that from this perspective there are two issues that should be confronted head on. One, simply but tragically, is the millions of individuals who have their physical and intellectual development cruelly “stunted” by malnutrition and diseases typical of extreme poverty. The other issue is life under constant fear of violence, about which Shklar (1989) has so eloquently written, and which in these countries plagues the lives of many, especially those who inhabit brown areas and/or belong to groups that are discriminated against. For all but a few exceptional individuals, destitution and constant fear prevent basic aspects of agency, including the availability of a range of options minimally consistent with agency; this “life of coerced choices” is intrinsically opposed to agency (Raz 1986: 123).

These issues are ignored by most theories of democracy. Yet, insofar as democracy entails agency and agency is meaningless without minimally reasonable capabilities and options, I can hardly see how these problems can be ignored; we saw that there are no logical, legal, or historical grounds for eliding political from civil and social agency. That, by and large, widespread and extreme poverty and constant fear are not problems that seriously affect the originating countries is not a good reason for overlooking them in new democracies. For these cases one crucial question—arguably the most important one raised from the perspective I have adopted—is to what extent and under what conditions poor sectors and other disadvantaged groups may use the available political rights as a platform of protection and empowerment for struggles toward the extension of their civil and social rights.

IV. Concluding Thoughts

I have considered various definitions of a democratic regime and generally agreed with realistic ones, although I have found it necessary to precise them. In proposing a realistic and restricted definition, I pursued the logical and some of the empirical implications of its attributes and components, and noted as-

pects that spill over, with undecidable boundaries, into broader issues. These issues I attached first to the regime, later to the state, and finally to some characteristics of the overall social context. Through these explorations we discovered a common underlying theme, agency.

In the present article these connections are just pointers to topics to be pursued in future work. However, starting from the relatively firm terrain that I hope we have achieved by means of a realistic and restricted definition of a democratic regime, these pointers indicate paths through which a disciplined theory of democracy may be expanded. This expansion seems to me necessary, both for the sake of democratic theory *tout court* and because it would help guide the huge research agenda that the comparative study of democracy has pending. Moreover, as I have stressed in this article, all the dimensions of democracy irresistibly spill over every aspect on which agency is at stake. This may bother a geometric mind. I believe, however, that this is what gives democracy its peculiar dynamic and historical openness. The undecidability of political rights, the always possible extension or retraction of political, civil, and social rights, and—at bottom, encompassing them all—the issue of the options that enable agency, are the very field on which, under democracy, political competition has been and forever will continue being played.⁴⁶ Truly, some of the rules of this game are determined by the regime; but the struggles for limiting and expanding rights are political and, indeed, moral issues that take place both inside and well beyond the regime.

I close these reflections with a final set of propositions.

- XVI. In agreement with common parlance, the existence of a democratic regime suffices to (metonymically) qualify a given country as “democratic,” even though it may exhibit serious deficiencies as to the effectiveness of civil and social rights.
- XVII. The existence of such a regime implies a state that bounds territorially those who are political citizens, i.e., the carriers of the rights and obligations instituted by the regime. It also implies a legal system that, whatever its deficiencies in other respects, guarantees the universalistic and inclusive effectiveness of the positive rights of voting and being elected, as well as of some basic “political” rights included in the definition of a democratic regime.
- XVIII. However, the undecidability of these rights means that, even at the level of the regime, excepting cases clearly located at the opposite poles of high effectiveness and of negation of these rights, disputes are deemed to arise as to the democratic or non-democratic character of the respective case.
- XIX. Still at the level of the regime, a high degree of effectiveness of political rights, together with various measures enhancing the participation of citizens as well as the transparency and accountability of governments, may justify assessments as to the various degrees or types of political democratization of the countries that include such regimes.
- XX. Beyond the regime, various characteristics of the state (especially its legal system) and of the overall social context, may justify assessments as to the various degrees of civil and social democratization of each country.
- XXI. The conception of human beings as agents indissolubly links the preceding spheres and logically grounds their pertinence to democratic theory, particularly insofar as this conception is textured by the legal system into manifold social sites, including the regime.

Notes

- * I presented previous versions of this paper and received useful comments at seminars held in April and May 1999 at the University of North Carolina; Cornell University; Berlin's Wissenschaftszentrum; the annual meeting of the American Political Science Association, Atlanta, August 1999; and in September 1999 at the Kellogg Institute. I also appreciate the comments and criticisms received from Michael Brie, Maxwell Cameron, Jorgen Elklit, Robert Fishman, Ernesto Garzón Valdés, Jonathan Hartlyn, Osvaldo Iazzetta, Gabriela Ippolito-O'Donnell, Iván Jaksic, Oscar Landi, Hans-Joachim Lauth, Steven Levitsky, Juan Linz, Scott Mainwaring, Juan M. Abal Medina, Martha Merritt, Peter Moody, Gerardo Munck, Luis Pásara, Timothy Power, Adam Przeworski, Héctor Schamis, Sidney Tarrow, Charles Tilly, Ashutosh Varshney, and Ruth Zimmerling. I am particularly grateful for the careful revision and editing undertaken by Gerardo Munck and Ruth Collier for the present issue of *SCID*.
1. Sartori (1995) has also criticized this procedure; however, our views about how to tackle the resulting problems differ.
 2. For useful discussion of these procedures see Collier and Levitsky (1997).
 3. This term is shorthand for referring to the early democratized countries located in the north-western quadrant of the world, plus Australia and New Zealand.
 4. By this term some authors refer to definitions that purport to focus exclusively on the "process" of elections. Since this meaning is equivalent to "minimalism," I use this latter term.
 5. More recently, Przeworski (1998) has offered another characterization of democracy in a text that, in spite of its title ("Minimalist Conception of Democracy. A Defense"), moves away from the professed minimalism of the ones I quote here.
 6. Consider, for example, the definitions offered by Barber (1984: 151), Beetham (1993: 61), and Shapiro (1996: 224).
 7. Benhabib (1996: 68, italics added). This definition, as well as other prescriptive ones, do not refer, at least explicitly, to elections. The same is true of some non-prescriptive definitions grounded in rational choice theory, such as Weingast's (1997), where the focus is on limitations on rulers and guarantees of the ruled. Since elections are clearly an integral part of existing democracies, this omission hinders the usefulness of these definitions.
 8. See for example Habermas (1996: 296): "the central element of the democratic process resides in the procedure of deliberative politics." This author (107) adds "Just those action norms [among which are those that "establish a procedure for legitimate lawmaking," are valid to which all possibly affected persons *could agree* as participants in rational discourses" (110) [italics added]. Niklas Luhmann (1998: 164) objects, to my mind decisively, to this and similar definitions: "Every concept of this maxim is carefully explained with the exception of the word 'could,' through which Habermas hides the problem. This is a matter of a modal concept, which, in addition, is formulated in the conjunctive. Ever since Kant, one knows that in such cases the statement must be specified by giving the conditions for [its] possibility. That, however, remains unsaid.... Who determines, and how does he do so, what *could* find rational agreement?" [italics in original]. John Rawls (1997: 770) has recently proposed a definition of legitimate law, and by implication of democracy, that is also marred by the problem of proposing hypothetical ideal conditions without stating their conditions of possibility or the consequences of their lack. I hasten to add that I am persuaded that deliberation, dialogue, and debate have an important place in democratic politics and that, in principle, the more there are of these, the better a democracy is. But this does not mean that some idealized or hypothetical public deliberation sphere should be made a definitional component or a requisite of democracy.
 9. Here I am simply asserting that, at the moment of vote counting, each vote should be computed as one (or, in the case of plural voting, in the same quantity as every other vote). In saying this I am glossing over the complicated problem—which I do not have the space nor the skills to solve here—resulting from rules of vote aggregation that provoke the problem that votes cast in certain districts actually weigh more, and in some cases significantly more, than in other districts. (In relation to Latin America and the severe overrepresentation of some districts in some of these countries, see Mainwaring 1999; Samuels and Snyder 2001). Obviously, at some point overrepresentation may become so pronounced that any semblance of voting equality is eliminated.

10. Another stipulation is needed, although it is a structural precondition of competitive elections rather than an attribute of them. I refer to the existence of an uncontested territorial domain that univocally defines the electorate. Since recently several authors have conveniently discussed this matter (Linz and Stepan 1996, 16–37, Offe 1991 and 1993, Przeworski et al. 1995, and Schmitter 1994), I shall not deal in detail with it here.
11. Actually, as with markets, few elections, if any, are fully fair; there may be, for example, factual restrictions due to differential access to economic resources by various parties, or high barriers to the formation of parties that otherwise would have expressed salient social cleavages, or inconsistent and even suspicious criteria for vote counting in some parts of the given country. See Elklit and Svensson (1997). This caveat, however, points to the issue of different degrees of democratization of the regime, an important topic with which I do not deal here.
12. On definitions, see Copi and Cohen (1998).
13. This likelihood of endurance does not mean that after N rounds of such elections a democracy has “consolidated” (as argued, for example, in Huntington 1991) or that other aspects of the regime (as they are deemed to exist in the originating countries) are institutionalized or in the process of becoming so. For discussion, see O'Donnell (1996a and 1996b).
14. Przeworski (1991: 26); Linz and Stepan (1996: 5). Actually, these authors refer not to elections but to democracy as the “only game in town,” but the nuance implied by this difference need not be discussed at this point.
15. Even if agents anticipate that elections at t_1 will be fair, if they believe that there is a significant likelihood that elections at t_2 will not be fair, by a regression well explored in prisoner's dilemmas with fixed numbers of iterations, agents will make this kind of extra-electoral investment already at t_1 .
16. This definition slightly modifies that in O'Donnell and Schmitter (1986: 73, fn.1).
17. Exceptions are the discussion of the “*ex post* irreversibility” of democratic elections in Przeworski, Alvarez, Cheibub, and Limongi (1996: 51), and in Linz's (1998) analysis of democracy as government *pro tempore*. However, these authors refer to only some aspects of what I call the decisiveness of such elections (see O'Donnell 1996). In a personal communication, Przeworski (June 1999) has warned this usage of “decisive” might be confused with the meaning it has acquired in the social choice literature (i.e., a procedure that generates a unique decision out of the set of available alternatives). With the present footnote I hope to dispel this possible confusion.
18. Obviously, this possibility is not ignored in country and regional studies. The fact that it has barely found an echo in democratic theory says a lot about the tenacity with which implicit assumptions regarding the originating countries remain unexamined in contemporary versions of this theory.
19. On Chile, see Garretón (1987, 1989) and Valenzuela (1992).
20. Instead, this issue has generated an enormous literature among legal theorists. I will return to some aspects of this literature and its unfortunate split from most of political science and political sociology.
21. For instance, Holmes and Sunstein (1999: 104) note that “What freedom of speech means for contemporary American jurisprudence is not what it meant fifty or one hundred years ago.” These authors add that “rights are continually expanding and contracting.”
22. Albeit in a different context (concepts of equality), Sen (1993: 33–34) puts it well: “If an underlying idea has an essential ambiguity, a precise formulation of that idea must try to *capture* the ambiguity rather than hide or eliminate it” (italics in the original).
23. I state here only one kind of reason, epistemic, for the undecidability of this matter.
24. Some cases will unavoidably fall into a gray zone between these two sets. Yet, because of the undecidability of political freedoms (and of the different degrees of competitiveness of each election, a topic that as already noted I cannot discuss here), I see no way to avoid this problem. On the other hand, clarification of the definition of a democratic regime should minimize this problem or at least make clear in each case which are its more problematic aspects.
25. For example, in his definition of “liberal democracy,” Diamond (1999: 11) includes, in addition to the usual attributes postulated by realistic definitions, characteristics such as the effective existence of horizontal accountability, of equality under the law, and of an independent and nondiscriminatory judiciary. I have no doubt that these are highly desirable features. But I

also believe that rather than making them definitional components of political democracy, it is more fruitful to study the degree to which these and other relevant characteristics are present, or not, within the set of cases generated by the definition I am arguing for. This procedure should facilitate the study, across cases and time, of differences and changes in, among others, the features proposed by Diamond.

26. The crisp conclusion that Klingeman and Hofferbert (1998: 23) reach in their study of survey data on postcommunist countries also applies elsewhere: "It was not for groceries that people in Central and Eastern Europe took to the streets in 1989 and 1991. It was for freedom." Welzel and Inglehart (1999), on the basis of another study of a broad set of survey data, conclude that "liberty aspirations" are central for a majority of respondents in new democracies.
27. Even though lately the value of democracy has increased in the world market of political ideologies, its positive normative connotations were also evinced by the self-qualification by communist regimes as "peoples' democracies," by the wonderful oxymoron that Chile's Pinochet invented to name his regime ("authoritarian democracy"), and by the contortions that many authoritarian leaders, past and present, make to hold some kind of elections in the hope that they will legitimize their rule.
28. There is an obvious exception: when democracies emerge there is a moment of choice. Rights and obligations are established that, insofar as they are sanctioned by fairly elected constitution-making bodies or are ratified by fair referenda, may be construed as expressing majoritarian—and hence sufficient—agreement for the institutionalization of the democratic wager. After this moment, consecutive generations find themselves *ab initio* embraced, and constituted in and by, the legally defined relationships entailed by the democratic wager.
29. We shall see, however, that in the originating countries this risk was tempered by various institutional arrangements.
30. In some countries these *egos* may be legion, even though they are legally constrained to accept the wager. In a survey I applied in the metropolitan area of São Paulo, Brazil (December 1991/January 1992, n: 800), an astounding 79 percent responded "No" to the question "Do Brazilians know how to vote?"; this percent rose to 84 among respondents with secondary education and higher (in the context it was clear to respondents that the question referred not to the mechanics of voting but to their evaluation of the choices other voters make among competing parties and candidates).
31. In spite of frequent assertions to the contrary, not even in terms of universal male suffrage is the United States an exception to this. The early existence of this suffrage at the federal level was made purely nominal by the severe restrictions imposed on blacks and Indians, especially in the south. Due to this, some authors date the achievement in this country of inclusive political democracy to War World II or as late as the 1960s, in the aftermath of the civil rights movement; see Hill (1994), Bense (1990), Griffin (1996), as well as the seminal book by Key (1949).
32. On these resistances, see Goldstein (1983), Hirschman (1991), Hermet (1983), and Rosanvallon (1992). As a British politician opposing the Reform Act of 1867 put it, "Because I am a liberal ... I regard as one of the greatest dangers a proposal ... to transfer power from the hands of property and intelligence, and to place it in the hands of men whose whole life is necessarily occupied in daily struggles for existence" (Robert Lowe, cited in Hirschman 1991: 94).
33. As Dahl (1989: 108) puts it "The burden of proof [of lack of autonomy] would always lie with a claim to an exception, and no exception would be admissible, either morally or legally, in the absence of a very compelling showing."
34. A more detailed historical and theoretical account of the pre-political construction of agency can be found in my working paper (2000) of the same title as the present article, which can be requested from the Kellogg Institute of the University of Notre Dame (219 Hesburgh Center, Notre Dame IN. 46556), or by emailing the author (ODonnell.1@nd.edu).
35. From now on, when I refer to "options" I mean both the subjective capability of actually making reasonably autonomous choices and the range of choice that the individual actually confronts. For apposite discussion of options and their connection to agency, see Raz (1986).
36. As stated in Section 138 of the German Civil Code.
37. For arguments in this direction, see Da Matta (1987), Fox (1994a, 1994b), Neves (1994), Schaffer (1998), and O'Donnell (1993, 1996a, 1999b).

38. For further explication of the concept of subjective rights and its origins, see footnote 35.
39. At this point it should not be surprising that in their review of definitions of democracy Collier and Levitsky (1997, 443) conclude that “[T]here is disagreement about which attributes are needed for the definition [of democracy] to be viable.”
40. This is what some German legal theorists have labeled the “indisponibility” of the legal system for the ruler; see especially Preuss (1996) and Habermas (1986 and 1988). I discuss this theme under the rubric of horizontal accountability in O’Donnell (1999b and forthcoming).
41. On this matter, from various but in this respect convergent perspectives see Alchourrón and Bulygin (1971), Fuller (1964), Habermas (1996), Hart (1961), Ingram (1985), and Kelsen (1962), as well as O’Donnell (1992b).
42. In all other political types, there is always somebody (a dictator, a king, a vanguard party, a military junta, a theocracy, etc.) who may unilaterally void or suspend whatever legal rules exist, including those that regulate their roles.
43. A related theme, which I cannot discuss here, is the effectiveness of the legal system, the degree to which it actually regulates social relations. See O’Donnell (1993, 1999b).
44. I speak of effective state legality because these “brown areas” (see O’Donnell 1993) are territorially based systems of rule in which mafia-like legal systems complexly mix with state legality. Some of these areas, where state officials rarely even dare to enter, may be, as in Brazil, as large as 70,000 square kilometers (*Veja* 1997, reporting on an area in the state of Pernambuco which, significantly, is known as the “Marijuana Polygon”). For details, see Méndez, O’Donnell, and Pinheiro (1999) and the works cited therein.
45. It has been estimated that in 1995, 55.7 percent of the urban working-age population in Latin America were in the informal sector; furthermore, this percentage has been growing consistently: it was 40.2 in 1980, 47.0 in 1985, and 52.1 in 1990 (Thorp 1998: 221). Referring to a previous period, 1950-1980, Portes (1994: 121) notes that “contrary to its course in the advanced countries, self-employment did not decline with industrialization but remained essentially constant during this thirty-year period.” On the informal sector in Latin America, see Portes and Schauflier (1993), Portes, Castells, and Benton (1989), Rakowski (1994), and Tokman (1992, 1994). Furthermore, by the early 1990s, 46 percent of the Latin American population lived in poverty (a total of 195 million), and approximately half were indigents, defined as lacking the means for minimally necessary food intake; by 1990 the number of poor in Latin America in relation to 1970 had increased by 76 million (data in O’Donnell 1998, for further detail see Altimir 1998).
46. There is an important issue about which I can only leave a succinct pointer: the matter of what options actually enable agency. As we saw concerning other topics and for equivalent reasons, this issue is undecidable. Where and on the basis of what criteria do we draw a line above which agency may be construed as enabled? We can—again, inductively—determine conditions of such deprivation that there can be little doubt concerning the denial of agency. Yet this determination is purely negative: establishing dimensions that, alone or concurrently, deny agency does not tell us at what point, or line, the options for agency may be deemed to be basically satisfied. Furthermore, as we saw with various kinds of rights or freedoms, the relevant criteria have changed during the history of the originating countries (among which, in addition, nowadays there are important variations in this matter). It is an even harder question to establish criteria to be reasonably applied in countries that command far fewer resources than the former ones.

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