# DEMOCRACY, LAW, AND COMPARATIVE POLITICS

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**SUMMARY**

The present text is a revision of democratic theory from the perspective of its inadequacies for including into its scope many of the recently democratized countries, as well as some older democracies located outside of the Northwestern quadrant of the world. After warning that it is a first step in a larger and more ambitious endeavor, the paper begins by critically examining various definitions of democracy, especially those that, claiming to follow Schumpeter, are deemed to be 'minimalist,' or 'procesualist.' On this basis, a realistic and restricted, but not minimalist, definition of a democratic regime is proposed. After this step, the connections of this topic with several others are explored, including political, social, and welfare rights; the state, especially in its legal dimension; and some characteristics of the overall social context. The main grounding factor that results from these explorations is the conception of agency, especially as it is expressed in the legal system of existing democracies—although the effectiveness of this system and of its underlying conceptions of agency vary quite widely across cases. The approach of the text emphasizes legal and historical factors, while also tracing, in several comparative excursi, some important differences among various kinds of cases.

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*To my daughter Julia,*
*for the metonymy—and much love*

## A Personal Note

I spent a good part of my academic life studying a theme I detested—authoritarian rule—and, later on, a theme that gave me great joy, the demise of this kind of rule. During those years I read quite a lot about democratic theory and the democracies that by then existed. But I read, as it were, from the outside; i.e., as an important topic but not one directly connected to my central concerns. Based on these readings and, indeed, on the momentous hopes that followed the demise of various kinds of authoritarian rule, I undertook, as many others did, the study of the newly emerged regimes. I concentrated on Latin America, especially its Southern part, although I paid close attention to Southern Europe and did my best, under severe language limitations, to keep reasonably informed about Eastern/Central Europe and some East Asian countries.

At the beginning of these endeavors I made, as most of the literature did, two assumptions. One was that there exists a sufficiently clear and consistent *corpus* of democratic theory; the other that this *corpus* would need marginal modifications, if any, in order to serve as an adequate conceptual tool for the study of the emerging democracies. These are convenient assumptions, with which one can 'travel' comparatively without much previous preparation or theoretical qualms. These assumptions are reflected in much of the literature that studies whether the new democracies would 'consolidate' or not, the relationships of the new regimes with economic adjustment policies, and typical institutions (parliament, executive, parties) of these regimes. I believe that the latter, institutional analyses, are producing much valuable knowledge, although the focus of these works often is too narrowly restricted to the formal characteristics of the respective institutions. As regards studies of 'democratic consolidation', I have expressed my skepticism about the vagueness and teleological bent of this concept, so I need not repeat myself here.[1] As for economic adjustment studies, most have focused exclusively on the political conditions favoring or hindering the adoption of such adjustment. The cost has been making political factors, including the regime, the dependent variable of the former—what in the bad old times would have been dubbed a rather blatant case of 'economicism'. Furthermore, the focus of these studies has been so narrow that until recently it has excluded social and even economic issues that are relevant not only from an equity but also from a developmental perspective.[2]

Like these streams of the literature, my early work on new democracies[3] was based on the two already mentioned assumptions: that there is a clear and consistent *corpus* of democratic theory and it can travel well. The problem—my problem, at least—is that I became convinced that the first assumption is wrong and that, by implication, the second one is impracticable. This was a disturbing conclusion; it deprived me of the

[1] O'Donnell (1996a and 1996b).
[2] I make these criticisms in O'Donnell (1994 and 1995).
[3] O'Donnell (1992). This text, first published in Brazil in 1988, shares many of the views about 'democratic consolidation' that later on I concluded are wrong.

lenses through which I thought I could immediately put myself to the study of new democracies. Instead, I found myself undertaking a long intellectual detour, during which I internalized, so to speak, my readings about democracy; also, for reasons that will be clear below, I went back to old interests of mine in philosophical, moral, and legal theory.

Another part of this detour was to undertake, under the institutional umbrella of the Kellogg Institute for International Studies of the University of Notre Dame, a series of collaborative studies. These studies were geared to topics that I found important for clarifying empirical and theoretical peculiarities of new, and not so new, democracies, especially but not exclusively in Latin America. One of these projects took stock of the overall situation of democracy in the early 1990s, in both North and South America.[4] Another project looked at Latin America in terms of its pervasive poverty and deep inequality.[5] Still another project studied various aspects of the workings of the legal systems in this region; about the conclusions of this study, suffice it to mention that I changed the title of my chapter in the resulting volume[6] from 'The Rule of Law in Latin America…' to 'The (Un)Rule of Law…'

This detour led me to some conclusions, which it may be useful to summarize:

A. An adequate theory of democracy must specify the historical conditions of the emergence of various groups of cases or, equivalently, a theory of democracy must include a historically oriented political sociology of democracy.[7]
B. A theory about any social object should not omit from its scope the linguistic uses of its object. The term 'democracy' since times immemorial has been assigned strong, albeit different, political and moral connotations, all of them grounded in a view of citizens as agents. This opens up democratic theory, including one that is empirically oriented, to complicated but unavoidable issues of political philosophy and moral theory.
C. A theory of democracy, of democracy *tout court*, must also, and very centrally, include various aspects of legal theory, insofar as the legal system enacts and backs fundamental aspects of both agency and democracy.
D. The preceding points imply that democracy should not only be analyzed at the level of the 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.

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[4] I coordinated this project jointly with Abraham Lowenthal. Its main product are papers published in a special series of the Kellogg Institute, where they are available upon request (Castañeda, Conaghan, Dahl, Karl, and Mainwaring, all 1994).

[5] This project, coordinated by Víctor Tokman and myself, resulted in the edited book Tokman and O'Donnell (1998).

[6] Méndez, O'Donnell, and Pinheiro (1999). This project was coordinated by the coeditors of the volume. Other projects of the Kellogg Institute with which I was less directly involved but from which I greatly benefited were: one that studied the situation after democratization of the welfare systems and social policies in Argentina, Brazil, Chile, and Uruguay; another that studied the present situation of children, especially poor ones, in Latin America. These projects will also resulted in books, presently in the process of publication; see, respectively, Ippolito-O'Donnell and Bartell and A. O'Donnell, both forthcoming.

[7] Among works from this perspective that fully or partially focus on Latin America, the excellent contributions of Collier and Collier (1991) and Rueschemeyer, Huber Stephens, and Stephens (1992) stand out. But more remains to be done, both in relation to Latin America and its comparison with other regions of the world.

These conclusions inform texts I wrote during the past ten years, focused on examining characteristics of some new democracies.[8] These characteristics can hardly be deemed transitory or just marginally different from what would be expected from existing theories of democracy. In these texts I criticize studies that uncritically 'export' such theories;[9] however, I tackle a few themes at a time and then go back to broader issues of democratic theory, but without attempting to discuss or reconstruct this theory as such. Now I feel that I must do the latter, by means of a book presently in progress. The present text is a preliminary rendering of the first two chapters of this book. It is about democratic theory *tout court*, aimed at the indispensable goal of clearing conceptual ground for future, more ambitious incursions. However, the intellectual origins of the present text in the study of new democracies will be apparent in some comparative excursus I undertake.

## 1. INTRODUCTION

The recent emergence of countries that are or claim to be democratic has generated important challenges to the comparative study of political regimes[10] and, indeed, although seldom noticed, to democratic theory itself. 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 practical consequences, as nowadays the international system makes the availability of significant benefits contingent upon an assessment of a country's democratic condition.

There is, however, much confusion and disagreement on how to define democracy. We shall see that some of these disagreements are unavoidable. But confusion is not. The need for conceptual clarification is shown by the remarkable proliferation of qualifications and adjectives attached to the term democracy which has been registered and fruitfully analyzed by David Collier and Steven Levitsky.[11] Most of these qualifiers refer to newly emerged democracies, suggesting the vacillations, in the comparative literature as well as in national and regional studies, about the criteria by which given cases may or may not be dubbed democracies. The main reason for these vacillations is that many new democracies, and some older ones, in the South and the East exhibit characteristics that are unexpected or discordant with those that, according to the theory or expectations of each observer, a democracy 'should have'.

We should notice that the logic of attaching qualifiers to 'democracy' implies that this term is taken to have a clear and consistent 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, the core one.[12] This presumption, however, is problematic if the core concept itself is not clear. As H.L. Hart put it, 'a definition which tells us that something is a member of a family cannot help us if we have only a vague or

[8] O'Donnell (1993, 1994, 1996a, 1996b); the first three of these texts are collected in O'Donnell (1999a).
[9] Sartori (1995) has also criticized this procedure; however, our views about how to tackle the resulting problems differ.
[10] See Munck (1998) for an excellent discussion of this matter.
[11] Collier and Levitsky (1997).
[12] For useful discussion of these procedures, see again Collier and Levitsky (1997).

confused idea as to the character of the family."[13] I believe this is the case with the concept of democracy: in addition to the proliferation of potentially relevant cases, another reason for the present confusion lies in the fact that democratic theory is not the firm conceptual anchor it is usually presumed to be. I shall argue that existing definitions of democracy, even those that share a basic structure with which I agree, need clarification and revision.

Adding to this problem, we are faced with a historical/contextual issue. Practically all definitions of democracy are a distillation of the historical trajectory and the present situation of the originating countries.[14] However, the trajectories and situations of other countries that nowadays may be considered democratic differ considerably from the originating ones. Given that this is so, a theory of adequate scope should assess these differences, *per se* and as they may generate specific characteristics and eventually subtypes across the whole universe of relevant cases.

Here I argue that current theories of democracy need revision from an analytical, historical/contextual, and legal perspective, even if this entails some loss of parsimony.[15] This effort may yield conceptual instruments appropriate for achieving a better theory of democracy in its various incarnations. The present text attempts to contribute to this task; it is, however, a first step, aimed at clearing conceptual ground. Consequently, in relation to several important topics (especially the relationship of a democratic regime with some characteristics of the state and of the overall social context, as well as with various issues related to the idea of agency) I limit myself to establishing a first connection with these topics; here these connections serve mainly as pointers to themes to be dealt with in future work.

In the coming section, I examine some influential definitions of democracy and draw conclusions that open the way for further analysis.

## 2. 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,' Joseph Schumpeter[16] 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.' This is the paradigmatic 'minimalist' (or 'processualist') definition of democracy. However, it is usually forgotten[17] 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.' [18] In the same breath, the author introduces a caveat when, after commenting that 'the electoral method is practically the only one available for

[13] Hart (1961, 14); this author discusses definitions of the law, but he might as well have referred to democracy.
[14] I use this term as a shorthand for referring to the early democratizing countries located in the Northwestern quadrant of the world, plus Australia and New Zealand.
[15] For pertinent reflections on the pitfalls of premature or unwarranted parsimony, see King, Keohane, and Verba (1994, 20 and *passim).*
[16] Schumpeter (1975 [1942], 242).
[17] An exception is Nun (1987) who, after noting this omission in the literature (also noted by Held 1987), criticizes Schumpeter for claiming—inconsistently, as we shall see—that his definition is minimalist.
[18] Schumpeter (1975, 217; for a similar formulation, 285).

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.'[19] 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.' [20] The meaning of these assertions, in contrast to the definition Schumpeter offered shortly before, is rather nebulous. The reason is, I surmise, that the author realized that he is close to opening 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, in 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.' [21] 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 italicizes, 'for all'. Finally, when this author 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].' [22] 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 notice that, in the pages that follow the passages I have quoted, Schumpeter states several 'Conditions for the success of the Democratic Method.' These conditions are: 1) Appropriate 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) There should also exist 'a large measure of tolerance for difference of opinion,' for which, going back to his above 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.'[23]

Once again, these assertions are far from clear, either in themselves or in relation to the consequences foreseen by Schumpeter by the absence of the conditions he states. First, he does not tell us if each of these conditions is sufficient for the 'success of the democratic method' or if, as it seems reasonable to interpret, the joint set of these conditions is needed. Second, he omits to tell us whether 'lack of success' means that

[19] Schumpeter (1975, 271; italics in the original).
[20] Schumpeter (1975, 271, fn. 5).
[21] Schumpeter (1975, 271–2; italics in the original).
[22] Schumpeter (1975, 272; similarly see 269 and 273).
[23] Schumpeter (1975, 289–96).

the 'democratic method' itself would be abolished or that it would lead to some kind of diminished[24] democracy. 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 I have just transcribed, at least as necessary conditions of the object being defined. 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 clarifications, 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.'[25] But an elitist definition of democracy is not necessarily minimalist. By now it should be clear that the various qualifications that Schumpeter introduces entail 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.

Now I will argue that this is also the case, implicitly or explicitly, of all other contemporary definitions that are deemed to be 'Schumpeterian', that is to say minimalist and/or 'processualist'.[26] Among these definitions the one offered by Adam Przeworski 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.'[27] 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].'[28] Notice that, in spite of its 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'[29] imply the existence of additional conditions, *à la* Schumpeter, for this kind of elections to be held at all. At the very least, if the opposition is to have such a chance, some basic freedoms must also exist.

In his turn, asserting that he is 'following in the Schumpeterian tradition,' Samuel Huntington defines democracy '[as a political system that exists] to the extent that its most powerful collective decision makers

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[24] Collier and Levitsky (1997).
[25] Schumpeter (1975, 296).
[26] 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', from now on I will use only the latter term when referring to this kind of definition.
[27] Przeworski (1991, 10).
[28] Przeworski *et al.* (1996, 50–1).
[29] Przeworski *et al.* (1996, 50). 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 transcribe here.

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 this author 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.'[30] Similarly, Giuseppe Di Palma 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.' Larry Diamond,[31]Juan Linz, and Seymour M. Lipset offer a more extended but similar definition: '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.'[32] On his part, even if Giovanni Sartori centers his attention more on 'a system of majority rule limited by minority rights'[33] than on elections, he adds that an 'autonomous public opinion...[and a] polycentric structuring of the media and their competitive interplay' are necessary for democracy to exist.[34] Finally, even though they use a different theoretical perspective, Dietrich Rueschmeyer, Evelyne Huber Stephens, and John Stephens concur: democracy 'entails, first, regular, free, and fair elections of representatives with universal and equal suffrage, second, responsibility of the state apparatus to the elected parliament...and third, the freedoms of expression and association as well as the protection of individual rights against arbitrary state action.'[35]

These definitions are centered on fair elections,[36] to which they add, in most cases explicitly, some surrounding conditions, stated as freedoms or guarantees that are deemed necessary and/or sufficient for the existence of that kind of elections. 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 seems unwarranted. On the other hand, these definitions, whether they claim to be minimalist or not, have the important advantage of being realistic: at least in what refers to elections, they include with reasonable precision attributes whose absence or existence we can assess empirically. To repeat: these definitions do not overlap completely, but all agree on including two kinds of elements.

One is fair elections for most (i.e., high courts and eventually the armed forces and central banks excluded) constitutionally determined top governmental positions. The other element is the above-

[30] Huntington (1991, 7).
[31] Di Palma (1990, 16).
[32] Diamond, Lipset, and Linz (1990, 6–7; italics in the original).
[33] Sartori (1987, 24).
[34] Sartori, (1987, 98 and 110).
[35] Rueschemeyer, Huber Stephens, and Stephens (1992, 43). With the second attribute these authors introduce a new element which refers to the state, not just to a regime. But this need not occupy us at this moment.
[36] I define below what I mean by fair elections.

mentioned freedoms or guarantees. Furthermore, these definitions in fact refer, although often implicitly, to a regime that endures in time, as the elections to which they refer to are not supposed to be one-shot events. I shall return to these observations.

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 the first I include definitions that remain tied to 'etymological democracy' [37] by positing that it is the *demos*, or the people, or a majority that somehow 'rule'.[38] 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.[39] Other definitions attempt to bypass this objection while retaining the basic notion of the *demos* as an agent. For example, Philippe Schmitter and Terry Lynn Karl state that 'Modern political democracy is a system of governance in which rulers are held accountable for their actions in the public realm by citizens, *acting indirectly* through the competition and cooperation of their elected representatives.'[40] The italicized words are the problem: we are not told what is the meaning of 'acting indirectly'.

Realistic definitions stand in contrast to prescriptive ones, those that assert what, in the view of the author, democracy should be. These definitions tell us little about two important matters. One, how to characterize really existing democracies (including if, according to these theories, they are to be considered democracies at all) and, second, how to mediate, in theory if not in practice, the gap between realistically and prescriptively defined democracies. For example, Seyla 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.' [41] Again the crucial words are the italicized ones; 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 objection can be made to the conception of democracy formulated by Jürgen Habermas, as it relies on the existence of an unimpeded deliberative sphere, extremely hard to locate in practice, for characterizing and legitimating democracy and democratic law.[42]

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[37] Sartori, (1987, 21).

[38] Consider, for example, the definitions offered by Barber (1984, 151) 'Strong democracy in the participatory mode resolves conflict in the absence of an independent ground through a participatory process of ongoing, proximate self-legislation and the creation of a political community capable of transforming dependent private individuals into free citizens and partial and private interests into public goods'; Beetham (1993, 61): 'The core meaning of democracy is the popular control of collective decision-making by equal citizens'; and Shapiro (1996, 224): 'Democrats are committed to rule by the people... The people are sovereign; in all matters of collective life they rule over themselves.'

[39] Hansen (1991).

[40] Schmitter and Karl (1993, 40; italics added).

[41] Benhabib (1996, 68; italics added). This definition, as well as other prescriptive ones, does not refer, at least explicitly, to elections. The same is true of some nonprescriptive 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 whatever the respective author's normative assessment of elections, they are clearly an integral part of existing democracies, this omission seriously hinders the usefulness of these definitions.

[42] Habermas (1996, 296): 'the central element of the democratic process resides in the procedure of deliberative politics.' Habermas (107) adds 'Just those action norms [among which are those that "establish a procedure for legitimate lawmaking," 110] are valid to which all possibly affected persons *could agree* as participants in rational discourses' [italics

Now I invoke another realistic definition, Robert Dahl's polyarchy.[43] I prefer this definition to others of its kind because it is usefully detailed and because the term 'polyarchy' allows us to differentiate political democracy from other kinds and sites of democracies. This definition shares the structure of the other realistic ones. First, it stipulates some attributes of elections (clauses 1 to 4). Second, it lists certain freedoms that Dahl dubs 'primary political rights [that] are integral to the democratic process'[44] (clauses 5 to 7),[45] deemed necessary for elections to actually have the stipulated characteristics. At this point I need to stipulate my own definition of elections under a democratic regime.

## 3. ELECTIONS UNDER A DEMOCRATIC REGIME

In a democratic regime, elections are competitive, free, egalitarian, decisive, and inclusive, and those who vote are the same ones who in principle 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; vote in blank; cast an invalid vote; and adopt some random procedure that determines which of the preceding options is effectuated. Furthermore, the (at least two) competing parties must have a reasonable chance to let their views be known to all (potential and actual) voters. In order to be a real choice, the election must also be free, in that citizens are not coerced when making their voting decisions and 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.[46] Finally, elections

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added]. Niklas Luhmann (1998, 164) objects, to my mind decisively, to this and similar definitions: 'Every concept of this maxim is explained carefully 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 subjunctive. 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 reasonable agreement?' [italics in the original]. John Rawls 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: 'Thus when, on a constitutional essential or matter of basic justice, all appropriate governmental officials act from and follow public reason, and when all reasonable citizens think of themselves ideally as if they were legislators following public reason, the legal enactment expressing the opinion of the majority is legitimate law' (Rawls 1996, 770). For balanced assessments of various 'deliberative' theories of democracy, see Maiz (1996), Johnson (1998), and Fearon (1998). To avoid misunderstandings, I hasten to add that I do believe 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.

[43] Of the various, slightly different definitions that Dahl has offered, here I choose the one he presented in 1989 (120). 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*. 3. *Elected officials* are chosen [and peacefully removed, 233] in frequent and fairly conducted elections in which coercion is comparatively uncommon. 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 above, citizens also have a right to form relatively independent associations or organizations, including independent political parties and interest groups.'

[44] Dahl (1989, 170).

[45] Slightly rephrasing Dahl, I shall call these freedoms of expression, freedom of (access to alternative) information, and freedom of association.

[46] 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 that votes cast in certain districts actually weigh more, and in some cases significantly more, than in other

must be decisive, in several senses. One, those who turn out to be the winners attain incumbency of the respective governmental roles. Two, elected officials, based on the authority assigned to these roles, can actually make the binding decisions that a democratic legal/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 Adam Przeworski argues, that governments may lose elections and abide by the result.[47] This kind of election is a specific characteristic of a democratic regime, or polyarchy, or political democracy—three terms that I shall use as equivalent throughout the present text. 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 above mentioned criteria.[48]

Notice that the attributes already specified say nothing about the composition of the electorate. There have been oligarchic democracies, those with restricted suffrage, that 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.[49] For brevity, from now on I will call fair elections those that have the joint condition of being free, competitive, egalitarian, decisive, and inclusive. [50]

## 4. COMPARATIVE EXCURSES (1)

Since decisiveness does not appear in the existing definitions of democracy and democratic elections,[51] we need an explication. In previous work I proposed adding this attribute, arguing that its omission is symptomatic of the degree to which current theories of democracy include unexamined assumptions that should be made explicit for such theories to attain adequate comparative scope. Simply, the literature

districts (in relation to Latin America and the severe overrepresentation of some districts in some of these countries, see Mainwaring 1999, Samuels and Snyder 1998, and Snyder 1999). Obviously, at some point overrepresentation may become so pronounced that any semblance of voting equality is eliminated.

[47] Przeworski (1991, 10).

[48] Sartori (1987, 30)*;* see also Riker (1982, 5).

[49] Another stipulation needs to be made, 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.

[50] Notice that, as with markets, few elections, if any, are fully competitive; there may be, say, important 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. This caveat, however, points to the issue of different degrees of democratization of the regime, a topic with which I cannot deal in the present text. For useful discussion of this and related matters, see Elklit and Svensson (1997).

[51] Exceptions are the discussion of the '*ex post* irreversibility' of democratic elections in Przeworski *et al.* (1996, 51) and Linz's (1998) analysis of democracy as government *pro tempore*, but these authors refer to only some aspects of what I call the decisiveness of such elections (see O'Donnell 1996a, where more extended discussion may be found). In a personal communication, Przeworski (June 1999) has warned me that my usage of the term '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.

assumes that once elections are held and winners declared, they take office and govern with the authority and for the periods constitutionally prescribed.[52] This obviously reflects the experience of the originating democracies. But it is not necessarily the case. In several countries there have been candidates who, after having won elections that partake of the attributes already mentioned, were 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'[53] 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.

## 5. ON THE COMPONENTS OF A DEMOCRATIC REGIME, OR POLYARCHY, OR POLITICAL DEMOCRACY

Let us remember that realistic definitions of democracy contain two kinds of components. The first consists of assertions of what it takes for elections to be considered (sufficiently) competitive. This is a stipulative definition,[54] no different from 'triangle means a plane figure enclosed by three straight lines'; it asserts that elections are to be considered competitive if each one of the attributes spelled out holds. Instead, the second group lists conditions, designated as freedoms, or guarantees, or 'primary political rights', that surround fair elections. These freedoms are conditions of existence of an object—competitive elections—to which they stand in a causal relationship. The freedoms complement the stipulative definition with a statement of the kind 'In order for X to exist, conditions A…N must exist, too'. As we saw similarly with Schumpeter, as far as I can tell none of the realistic definitions make clear if the conditions they proffer are necessary, and/or jointly sufficient, or simply increase the likelihood of competitive elections. This vagueness points to problems I explore below, after noting a third aspect of these definitions.

Above I noted that an assumption of these definitions of democracy, often implicit, is that they do not refer to a one-shot event but to a series of elections that continue into an indefinite future. In saying this we have run into an institution. The elections to which these definitions refer are institutionalized: practically all actors, political and otherwise, take for granted that competitive elections will continue being held in the indefinite future, at legally preestablished dates (in presidential systems) or according to legally preestablished occasions (in parliamentary systems). This entails that the actors also take for granted that the surrounding freedoms will continue to be effective. In cases where these expectations are widely held, competitive elections are institutionalized.[55] These cases are different, not only from authoritarian ones but also from

[52] Obviously, this possibility is not ignored in country and regional studies. The fact that it has barely found echo in democratic theory says a lot, in my view, about the tenacity with which implicit assumptions that have held (and then, not always correctly) for the originating countries still cling to the contemporary versions of this theory.
[53] On Chile, see Garretón (1987 and 1989) and Valenzuela (1992).
[54] On definitions in general, see Copi and Cohen (1998).
[55] For further argument, see O'Donnell (1994 and 1996a).

those where, even if a given election has been competitive, it is not widely expected that similar elections will continue to occur in the future. Only in the first kind of situation do relevant agents rationally adjust their strategies to the expectation that competitive elections will continue to be held. Normally, the confluence of these expectations increases the likelihood that such elections will continue happening.[56] Otherwise, elections will not be 'the only game in town',[57] and relevant agents will invest in resources other than elections as means to access the highest positions of the regime.[58]

This last term needs specification. Slightly modifying the definition Philippe Schmitter and I proposed,[59] by 'regime' I mean the patterns, formal and 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.[60] When competitive elections are institutionalized they are a central component of a democratic regime as they are the only means of access (with the noted exception of high courts, armed forces, and eventually central banks) to the principal governmental positions.[61] In democracy elections are not only fair, they also are institutionalized. This kind of election is one of the defining elements of a democratic regime, or polyarchy or political democracy.

We must turn to a more complicated matter, the freedoms surrounding these elections.

## 6. A FIRST LOOK AT POLITICAL FREEDOMS

It seems obvious that for the institutionalization of competitive elections, especially as it involves expectations of indefinite endurance, such elections cannot stand alone. Some freedoms or guarantees that surround the elections and—very importantly—continue holding between elections, must also exist. Otherwise, the government in turn could quite easily manipulate or even cancel future elections. Let us remember that for Dahl the relevant freedoms are those of expression, association, and access to information, and that other authors posit, more or less explicitly and in detail, similar freedoms. We first notice that the combined effect of the freedoms listed by Dahl and other authors cannot fully guarantee that

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[56] 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 of these matters, see O'Donnell (1996a and 1996b) as well as the rejoinder by Gunther, Diamandouros, and Puhle (1996).

[57] As stated by Przeworski (1991, 26) and 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.

[58] Even if agents anticipate that elections at t1 will be competitive, if they believe that there is a significant likelihood that elections at t2 will not be competitive, by a regression well explored in prisoner's dilemmas with fixed numbers of iterations, agents will make this kind of extra-electoral investments already at t1.

[59] O'Donnell and Schmitter (1986, 73, fn.1).

[60] Notice that this definition is incomplete: it refers exclusively to patterns of access to governmental authority and says nothing about the modalities of exercise of this authority. The convenience of drawing this distinction—which goes back to Aristotle—is persuasively argued by Mazzuca (1998); however, in the present text I present only a very generic discussion of the modalities of exercising authority, a topic that I shall develop in future work.

[61] Maybe an adequate image is a chain of linked mountains of different heights with a single pathway that leads to the highest ones. The map of these mountains is the map of the state's organizations, each connected to, but relatively independent from, the others. The characteristic of political democracy is that, with the exceptions already noted, only

elections will be competitive. For example, the government might prohibit opposition candidates from traveling 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 are 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 probabilistic judgment: if they hold, then *ceteris paribus* there is a strong likelihood that elections will be competitive.

Let us remember that the attributes of fair elections are stipulated by definition.[62] Instead, the surrounding 'political'[63] freedoms are inductively derived. They are the result of a reasoned empirical assessment of the impact of various freedoms on the likelihood of competitiveness of elections. This judgment is controlled by the obvious intention of finding a core set of 'political' freedoms, in the sense that its listing does not slip into a useless inventory of every freedom that might have some conceivable bearing on the fairness of elections. The problem is that, since the criteria of inclusion of some freedoms and of exclusion of others are an inductive judgment, there cannot exist a theory that establishes a firm and clear line between included (necessary and, ideally, jointly sufficient) conditions, on one hand, and excluded ones, on the other. This is one reason (but we shall see, not the only one) 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 of avoiding the conundrums of undecidability 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.

Up to here I have discussed what may be called the external boundaries of the freedoms, or guarantees, that surround, and make highly likely, competitive elections; i.e., the issue of which freedoms to include and exclude from this set. But there is another problem that reinforces the skeptical conclusion already reached. Let me call it 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.[64] 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 there are cases that fall in a gray area between both poles. The answer to these cases again depends on inductive judgments about the degree to which the feeble, or partial, or intermittent effectiveness of certain freedoms still supports, or not, the likelihood of competitive elections.[65] Once again,

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elected officials occupy the highest mountains, from where they hold legally defined authority over the rest of the configuration.

[62] Although, as noted in footnote 50, the degree to which these elements actually hold is a matter of empirical examination.

[63] The reason I am putting this term in quotation marks will be apparent below.

[64] In contrast, 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.

[65] Even though they are rather gross operationalizations of the underlying concepts, rankings of countries in terms of attributes of the kind I have been discussing, such as the ones proposed by Freedom House, are widely used. Yet, these rankings do not escape the problems of external and internal boundaries I note in the text. Furthermore, other actors

there is no theoretical basis for a firm and clear answer to this issue: the external and the internal boundaries of political freedoms are theoretically undecidable.

A further difficulty is that the internal boundaries of the freedoms listed by Dahl, and of other freedoms that also are potentially relevant to competitive elections, have undergone significant changes over time. Suffice to note that certain restrictions on freedom of expression and of association that in the originating countries were considered quite acceptable not long ago nowadays would be deemed clearly undemocratic.[66] Having this in mind, how demanding should the criteria we apply to newly emerged democracies (and to older ones outside of the Northwestern quadrant of the world) be? 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 competitive 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.

I conclude that there is, and there will continue to be, disagreement in academia and, indeed, in practical politics, concerning where to trace the external and the internal boundaries of the freedoms that surround, and make likely, fair and institutionalized elections. This is not a flaw in the attempts to list these freedoms. These are very important freedoms. They are also crucial factors—necessary conditions for the existence of a regime centered on competitive elections—and as such they are worth listing. It is intuitively obvious, and it can be empirically established, that the lack of some of these freedoms (say, of expression, association, or movement) eliminates the likelihood of competitive elections. On the other hand, the inductive character of these listings, and the related problem of their external and internal boundaries, show their limitations as theoretical statements, *per se* and in their intersubjective persuasiveness. As I shall further substantiate, these limitations make this matter rigorously undecidable. Consequently, 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 conundrum.[67]

Although there is much terrain ahead, with the preceding discussion we have reached a point that is important both in itself and because it places us, so to speak, on a promontory from which other paths to be pursued can be conveniently discerned. A first aspect worth noting is that I have agreed, albeit with some caveats and additions, with the authors who propose realistic definitions of political democracy; actually, in terms of Collier and Levitsky[68] I have 'precised' these definitions by adding some elements that they leave

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use different criteria. For example, the governments of the originating countries often use very lenient criteria (basically, the holding of national elections, without looking too closely at whether they have been fair) for certifying as 'democratic' other countries, especially if the latter have friendly governments. Other actors, in contrast, demand effective and widespread respect of a series of human rights, irrespective of their influence on fair elections (see, for example, the chapters by Juan Méndez and Paulo Sérgio Pinheiro in Méndez, O'Donnell, and Pinheiro, eds., 1999).

[66] 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' (ibid.).

[67] Albeit in a different context (concepts of equality), Amartya Sen (1993, 33–4) 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].

[68] Collier and Levitsky (1997).

implicit. I believe it is convenient to explicitly include in this definition two kinds of components: one, fair and institutionalized elections; and second, despite their undecidability, a set of freedoms that seems reasonably—i.e., inductively derived from careful observation—necessary for supporting a high likelihood of such elections. The second comment is that this criterion is not minimalist. It disagrees with focusing exclusively on competitive elections and ignoring surrounding freedoms; I have argued that an adequate definition of political democracy should focus on a regime that includes, but should not be reduced to, a specific kind of elections. On the other hand, the criterion I am proposing is restricted, in the sense that it disagrees with including a highly detailed, and ultimately inexhaustible and analytically barren, listing of potentially relevant freedoms. The criterion I am proposing is restricted also in the sense that it refuses to introduce prescriptive notions into the definition of a democratic regime.

Although we have yet to see that other factors, not located at the level of the regime, must also be included for reaching an adequate definition of democracy, this realistic and restricted definition of a democratic regime is useful for several reasons. One, conceptual and empirical, is because this allows us to generate a set of cases that are different from the large and varied set of cases that are nondemocracies, whether they are various sorts of openly authoritarian regimes or regimes that hold elections but not ones that are fair and institutionalized.[69] The second reason, also conceptual and empirical, is that 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.[70]

The third reason is both practical and normative: the existence of this kind of regime and of the freedoms surrounding it, in spite of many flaws that may remain in other spheres of social and political life, 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. A fourth reason is that 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 goods that the achievement of political freedoms would bring about, the demand of the latter was at the core of the great mobilizations that often preceded the inauguration of democracy.[71] There is empirical evidence that a large proportion of the population of

[69] However, some cases will 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.

[70] 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 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 restricted 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.

[71] 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.

newly democratized countries recognizes and positively values these freedoms;[72] if we ignore the fact that these freedoms do matter to many, it would be impossible to understand the high level of support that, in spite of often poor governmental performance, democracy presently elicits around the world.[73]

The fifth and final reason also is, like the immediately preceding ones, both practical and normative. The survey data already cited 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, in the language of politicians and journalists 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.[74]

I want to emphasize the preceding arguments because we have reached a point that easily lends itself to misunderstandings. On one hand, I have made clear that a democratic regime is extremely important *per se.* This demands achieving an adequate definition of this regime; with this purpose, I have proposed that a regime that meets the realistic and restricted criteria already enumerated be labeled a *political democracy* or, equivalently, a *polyarchy* or a *democratic regime*—I already noted that I take these three terms to be synonymous. Furthermore, accepting the prevailing uses of the term, both outside and inside academic circles, such a regime may be labeled simply a *democracy;* but in this case we should remember that, as I argue below, the extension[75] of this term is broader than the regime.

The reason for the preceding caveat is that, even if the regime is an important part of the story, it is far from its end. Here I part company with scholars who prefer to keep the concept of democracy exclusively at the level of the regime. In the rest of this text I discuss some connections of the regime with other topics that, I argue, also belong to the *problématique* of democracy. But first I include some propositions that recapitulate the main arguments made up to now:

**I. A realistic and restricted definition of a democratic regime (or polyarchy, or political democracy) consists of fair and institutionalized elections, jointly with some surrounding 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**

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[72] On this point, see especially Rose and Mishler (1996).

[73] For survey data on support for democracy 'as a form of government' in the old and many new democracies, see Klingeman (1998); the regional means of support reported by Klingeman are: Western Europe, 90 percent; Eastern Europe, 81; Asia, 82; Africa, 86; Northern and Central America, 84; South America, 86; and Australia/Oceania, 83.

[74] 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.

[75] Extension means 'The several objects to which a term may correctly be applied; its denotation' (Copi and Cohen 1998, 690).

**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 claim to be.**

III. **The surrounding freedoms of competitive 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.**[76]

IV. **In spite of their undecidability, since some surrounding freedoms can be construed as generating a high likelihood of fair elections, it is convenient to spell them out, both for reasons of definitional adequacy and because it helps clarify the disagreements that are deemed to ensue on this matter.**

V. **A realistic and restricted definition of polyarchy, or political democracy, or a democratic regime delimits an empirical and analytical space that allows distinguishing this kind of regime, with important normative, practical, and theoretical consequences, from other types of political rule.**

Now we change perspective, although we will continue with the same goal in mind, the discussion and clarification of some aspects of democratic theory and its comparative implications.

## 7. AN INSTITUTIONAL WAGER

We saw that, in a democratic regime, each voter has at least six options. We must also recall that this is not the only right assigned by democracy to practically all adults in the territory of a state. Each voter also has the right to try to get elected. The fact that she may or may not want to exercise this right is irrelevant in relation to the fact that, by having the right to be elected, each adult carries with her the potential authority of participating in governmental decisions. Voters do not only vote; they may, as legally defined in relation to the governmental roles for which they gain incumbency, share in the responsibility of making collectively binding decisions, and eventually in the application of state coercion. The important point with respect to the participatory rights of voting and gaining access to elected roles, is that they define an *agent*. This definition is a legal one; these rights are assigned by the legal system to most adults in the territory of a state, with exceptions that are themselves legally defined. This assignment is universalistic; it is attached to all adults irrespective of their social condition and of adscriptive characteristics other than age and nationality. Agency entails the attribution, apart from narrowly defined exceptions, of the capacity to make choices that are deemed sufficiently reasonable as to have significant consequences, in terms of the aggregation of votes and of the incumbency of 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 directly related to a regime based on

[76] I state one kind of reason, epistemic, for the undecidability of this matter. There are other, concurrent reasons that I cannot discuss at this moment.

fair elections. Perhaps because this attribution of agency has become so commonplace in the originating countries, we tend to forget what an extraordinary and recent achievement it is.

Seen from this angle, democracy is not the result of some kind of consensus, or individual choice, or social contract, or deliberative process. Democracy is the result of an institutionalized wager. The legal system assigns to every individual manifold rights and obligations. Individuals do not choose these rights and obligations; at their birth (and in several senses, before) they find themselves 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 also is, I take it, abundantly obvious, and it has important consequences. Yet it is overlooked by existing theories of democracy.

The attribution of rights and obligations is universalistic:[77] 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—a democratic one—of making collectively binding decisions, by means of individuals chosen in fair and institutionalized elections.

What is the wager? It is that, in a democracy, every *ego* must accept that practically every other adult participates—by voting and eventually by being elected—in the act, fair elections, that determines who will govern them for some time. It is an institutionalized wager because it is imposed on every *ego* independently of his will: *ego* must accept it even if he believes that allowing certain individuals to vote or be elected is very wrong. *Ego* has no option but to take the chance that the 'wrong' people and policies are chosen as the result of competitive elections. *Ego* has to take this risk[78] because it is entailed, and backed, by the legal system of a democracy. *Ego* may dislike or even strongly object[79] to the fact that *alter* is assigned the same rights of voting and being elected that he has. Yet for *ego* this is not a matter of choice. Along her life *ego* can choose many aspects of her social being, but she cannot avoid being assigned, well before and beyond her own will, a bundle of rights and obligations. *Ego* is immersed in a legal system that establishes those same rights for *alter* and prohibits *ego* to ignore, curtail, or deny them. By birth or nationalization, and in many respects by sheer residence in a given country, *ego* acquires her rights and obligations toward both *alter* and the state. I insist that this is not a matter of choice; *ego* is a social being embraced and constituted by rights and obligations enacted and backed, if necessary with coercion, by the state.

There is an obvious exception to the preceding: when democracies emerge. In these cases 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,

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[77] This statement merits qualification in terms of civil and welfare legislation enacted having in view various kinds of disadvantaged sectors. I discuss this matter below.

[78] We shall see, however, that in the originating countries this risk was tempered by various institutional arrangements.

[79] 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).

consecutive generations find themselves *ab initio* embraced and constituted in and by the legally defined relationships entailed by the democratic wager.

The preceding discussion is, of course, far from the whole story. But it is important because we have found another characteristic specific to contemporary political democracy: it 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. I insist: the wager is institutionalized.[80] It does not depend on the preferences of the carriers of the attached rights, or on the aggregation of their preferences,[81] or on some mythical social contract or deliberative process. The wager is a legally enacted and backed institution to which everyone is expected to acquiesce within the territory delimited by a state. By itself, this expectation does not support the moral obligation to accept a democratic regime and obey its incumbents,[82] but it is nonetheless a demanding expectation, textured in the legal system and backed by the coercive power of the state.

This legally backed wager defines broad but operationally important parameters for individual rationality: normally, ignoring, curtailing, or denying the rights that the wager assigns to *alter* 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.

Let us now notice two important points we have reached through the preceding discussion. One is that 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. The second point is that in reaching 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;[83] second, as a legal system that enacts and backs the universalistic and inclusive assignment of

[80] Ernesto Garzón Valdés (conversation, Bonn, May 1999) made me aware that I am invoking two not exactly equivalent kinds of institutionalization. One, of competitive elections, even though it is backed by the legal (including constitutional) rules that enact this kind of election, is contingent on its effectiveness on the subjective expectations of relevant actors. Instead, as the Brazilian example of the preceding footnote makes clear, the institutionalization of the wager is directly dependent on those rules and relatively independent of the views of concrete individuals, even a majority of them.

[81] Although the durability and, presumably, the expansion of these rights is helped by their generalized acceptance. But

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.

The preceding remarwbse eEntroducheFSE FJPNTcmtMEtions FJOUEwtMEtths FJOUEwhichs FJOUEwheFSE F sbeEusefulNtosincludse thefollowdingproppoitEionsFzqg*LcQPNq*VKVSMMVKVSSRKMNRSVKMTPqã*JM

Everywhere, the history of democracy is the history of the reluctant acceptance of the wager. The history of the originating countries is punctuated by the catastrophic predictions,[85] and sometimes the violent resistance,[86] of privileged sectors opposing the extension of their political rights to other, 'undeserving' or 'untrustworthy' sectors. 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 supposed 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, or participating in the making of, 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, noninclusive democratic regimes for themselves and political exclusion for the rest.

As we glimpsed in the preceding section, there is a central idea underlying all this: agency. This idea involves complicated philosophical, moral, and psychological issues.[87] For the purpose of the present text, however, it suffices to assert 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 and of her goals, of which, barring conclusive proof to the contrary, she is deemed to be the best judge.[88] This capacity makes the agent a moral one, in the sense that normally she will feel, and will be construed by relevant others as, responsible for her choices and for at least the direct consequences that ensue from these choices. Surely, the literatures that deal from various angles with this topic offer various qualifications to what I have just stated. Although this is important, it does not prevent us from advancing further, by means of raising another point that has been neglected by democratic theory.

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[85] See on these resistances 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).

[86] See especially Goldstein (1983).

[87] I have found particularly useful some works that pay explicit attention to the linkages between the moral and philosophical issues entailed by agency, on one hand, and legal and political theory, on the other, such as Raz (1986 and 1994), Waldron (1991), Gewirth (1978 and 1996), and Dagger (1997). But in the broad terms in which I have stated it, many authors from varied theoretical perspectives share this view of agency (or autonomy); see Benn (1975/76), Crittenden (1992), Dahl (1989), Dworkin (1988), Fitzmaurice (1993), Garzón Valdés (1993a), Habermas (1996), Held (1987), Kuflik (1994), Rawls (1971 and 1993), Taylor (1985), and Waldron (1984), and, of course, Weber (1968). Interestingly, from their own standpoint the developmental psychologies of, among others, Piaget (1932 and 1965; see also Reis 1984) and Kohlberg (1981 and 1984; see also the interesting discussion of this author and other developmental psychologists in Habermas 1996, 116–94) concur. Furthermore, not few of the most influential theories of personality, beyond important differences among themselves and various terminologies, also emphasize the concept and the development of agency as a core of their respective conceptions (see Hall, Lindzey, and Campbell 1998).

[88] 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.'

## 9. THE LEGAL, PREPOLITICAL CONSTRUCTION OF AGENCY

The presumption of agency[89] is another institutionalized fact, one that in the originating countries is older and more entrenched than the democratic wager and competitive elections. This presumption is not just a moral, philosophical, or psychological concept; it is a legally enacted and backed one. The presumption of agency constitutes every individual as a legal person, a carrier of subjective rights. The legal person makes choices, and is assigned responsibility for them, because the legal system presupposes that she is autonomous, responsible, and reasonable—she is an agent.

I find it important to stress that this view of agency became the core of the legal systems of the originating countries well before democracy. The institutionalized (i.e., legally enacted and backed, and widely taken for granted) recognition of an agent carrier of subjective rights took a long and convoluted process. This process had its forerunners in some of the sophists, Cicero, and the stoics.[90] Later on it received crucial contributions from the painstaking work on legal theory done in the medieval Church and universities and from the nominalism of William of Ockam,[91] and at the end of this period it was given highly influential formulation, first by the sixteenth-century Spanish scholastics and, later on, by Grotius (1583–1645), Pufendorf (1632–94), and other natural rights theorists.[92] At this time, what came to be called the 'will (or consensus) theory of contract', and the view of agency it entailed, reached mature elaboration; as James Gordley puts it, 'The late scholastics and the natural law lawyers had recognized as fundamental the principle that contracts are entered into by the will or consent of the parties… [In contrast to Aristotelian/Thomist conceptions] making a contract was regarded simply as an act of will, not as exercise of a moral virtue. The parties were bound simply to what they willed, not to obligations that followed from the essence or nature of the contract.'[93]

At this time, the argument that included a highly elaborated theory of agency grounded in subjective rights, and transposed it to the political realm, was made by Hobbes. This same view of agency permeated the worldview of the Enlightenment[94] and, after Hobbes, in spite of their differences on other matters, was pursued and reelaborated by Locke, Rousseau, J.S. Mill, Kant, and others. In addition, and importantly for the present discussion, this view was inserted at the core of legal theory by jurists such as Jean Domat

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[89] From here on I will use the term agency to indicate the presumption and/or, depending on the context, the attribution, of individual autonomy, responsibility, and reasonableness.

[90] See especially Villey (1968).

[91] See especially Berman (1993) and, again, Villey (1968).

[92] See Caenegem (1992), Gordley (1991), and Berman (1993).

[93] Gordley (1991, 7); see also Lieberman, (1998). Although there is, to my knowledge, agreement among legal historians that in civil law countries the will theory of contract became highly influential during the sixteenth and seventeenth centuries, there is disagreement concerning the common law countries. Hamburguer (1989), who defends in a thorough review of this topic the view that in the latter this influence was strongly felt already in the seventeenth century, transcribes from a book written in 1603 by the English jurist William Fulbecke a passage that nicely summarizes this theory: 'The chief ground of contracts is consent so that the persons which contract must be able to consent, so consent growth out of knowledge and from a man's free will, directly by sufficient understanding…' (257).

[94] The influence exercised on these conceptions during this period by the new scientific ideas of Bacon, Galileo, Descartes, and especially Newton deserves more than the passing reference that I can make here. After noting the revolution against Aristotelianism that the new analytical and experimental scientific methods entailed, von Wright (1993, 177) comments that as a consequence 'Nature is *object,* man is *subject* and *agent'* [italics in the original]. On the general topic of the emergence in this period of ideas of agency, see the important contributions of Schneewind (1998) and Taylor (1989); also, Cassirer (1951) and Gay (1966a and 1966b) are still indispensable sources.

(1625–95) and Robert Pothier (1699–1772), whose work profoundly influenced Blackstone, Bentham, and other jurists in the common law tradition, as well as the French and German codifications of the first half of the nineteenth century.[95]

These views of individual agency and its corollary of the will theory of contract run counter to another conception of the law, which can be traced from Aristotle to Saint Thomas Aquinas and which, indeed, in its organicistic outline nowadays is highly influential in quite a few non-Northwestern countries.[96] For this view the law is about the just ordering of the *polis*, within which every part is to be assigned its proper, proportional, place. The maxim *suum cuique jus tribuere* expresses this architectonic conception of justice, and of the law as its instrument: there are no properly individual rights but rights and duties that are assigned, for the sake of the just ordering of the whole, to each of the categories, or status, that compose an organically conceived society (citizens, foreigners, and slaves or, in other contexts, kings, lords, burgers, commoners, and the like).[97]

The emergence of the idea of agency and its subjective rights meant a Copernican inversion: the law does not any longer conceive its mission as properly assigning the parts of the societal whole, nor consequently does it aim at effecting overall social justice. Instead, as the nominalism of Ockam and later on of Hobbes implied, the law refers to the only truly existing entities, individuals. The mission of the law is to enact and protect the *potestas* of individuals, their capacity to exercise their will in spheres that are not prohibited by those same laws. The individual, construed as a carrier of the subjective rights that support his *potestas,* is the object and the purpose of the law[98]—in this view, if eventually a good social order results, it is (as later on, congenially with this same view, would be asserted in relation to the market) a by-product of the aggregate consequences of the effectiveness of subjective rights.

Of course, what I have mentioned is a chapter in the history of liberalism. Many authors have observed that as a political doctrine liberalism distilled the cruel lessons of the religious wars of the sixteenth and seventeenth centuries. But we should add that a good part of the work of construction of the individual that Hobbes, Locke, Kant, and others portrayed had already been done by the philosophical and especially the legal theories I have mentioned. The agent carrier of subjective rights was already drawn in these theories, almost ready to be transposed, by those great liberal authors, from the legal to the political realm.

Even though the preceding reflections may look rather distant from a theory of contemporary democracy, this is not the case. To show this, there is nothing better than invoking Max Weber and the colossal effort he undertook to explain the emergence and unique characteristics of capitalism in the

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[95] On these influences, see especially Gordley (1991), and Lieberman (1998).

[96] For discussion of these organicistic conceptions with reference to Latin America, see Stepan (1978).

[97] As Saint Thomas puts it: 'Since every part bears the same relation to its whole as the imperfect to the perfect, and since one man is a part of that perfect whole which is the community, it follows that the law must have as its proper object the well-being of the whole community… Law, strictly understood, has as its first and principal object the ordering of the common good' (cited in Kelly 1992, 136).

[98] Referring to Hobbes's (and Spinoza's) conception of subjective rights, Kriegel (1995, 38/9) puts it well: 'Such a definition, which ties rights to individuals and to their *libertas*, breaks decisively with Aristotelianism and with ancient natural law, which conceived of rights and law as *relations* of equity within a natural political society, or as a legalized expression of the most just distribution according to the order of things. Hobbes, by contrast, thinks of rights as the attributes of an individual, a manifestation of his potentialities in the state of nature. In lieu of a realist and objectivist theory of law, we are confronted with a subjectivist and naturalist view' [italics in the original].

Northwest. We know that Weber did not assign privileged explanatory status to any of the dimensions he used. His view is particularly relevant in the present context because, in contrast to much of contemporary political science, he paid close attention to legal factors, seeing them as acting in a contrapuntal fashion with the emergence of states, capitalism, classes, and types of political authority. Weber made the important point that the emergence of what he called formal-rational law (a repository, I hasten to add, of subjective rights) cannot be mainly attributed to demands or interests of the bourgeoisie since, as Weber points out, a modern, fully capitalist bourgeoisie barely existed at the onset of that process.[99] Rather, this emergence must be accounted for by the centuries' work I have sketched, the corporate interests of the legal professionals who took up this work and, especially, the interests of the main employers of these professionals: rulers engaged in state-making and consequently interested in improving their credit and tax revenues, as well as in directly subjecting to their control the population of the territories they aimed to rule. For these purposes it was crucial to eliminate organically conceived status orders (especially feudal ones and autonomous cities, as well as the broad jurisdiction that canon law claimed) and with them Aristotelian/Thomist views of the law.[100] These rulers found in the universalizing character of subjective rights an effective conduit for the assertion of their sovereignty over all individuals in their territory.[101]

The process of legal construction of individual agency was anything but linear and peaceful and unfolded in a mutually dynamizing relationship with another process. This was the emergence and development of capitalism. As Weber and Marx as well remind us, the mutual reinforcements of state-formation, development of capitalism, and expansion of formal-rational law had, among other consequences, the abolition of serfdom[102] and the availability of 'free' labor. This freedom is the subjective right to enter into contracts whereby individuals dispossessed of means of production sell their labor force. The worker of capitalist social relations is an early legal person, carrier of the rights (few, initially) and the obligations that he, as fits an individual legally construed as an agent, has 'freely' agreed with the employer. This is also true of criminal responsibilities, which ceased to be collectively attributed to the clan, the family, or the village, and were transferred, as again fitted agency, to the respective individuals.[103]

I want to emphasize that the early construction of subjective rights, especially in the law of property and of contract for the exchange of goods and services, is the legacy of capitalism and of state-making, not of liberalism or political democracy, both of which emerged after these constructions had become, in the

[99] Weber (1968, 847 and *passim*).
[100] As Weber (1968, 852) puts it, 'The political interest in the unification of the legal system played a dominant role [in the adoption and expansion of rational-formal law].' See also Bendix (1964), Dyson (1980), Poggi (1978), Spruyt (1994), and Tilly (1975, 1985, and 1990).
[101] At this time, the dictum *cuius regio eius religio*, which had propelled the wars of religion, was replaced by the principle 'one state, one [legal] code' (Caenegem, 1992, 125).
[102] But only in these countries and even among them with the important exception of slavery in the South of the United States. Later on, in other parts of the world, state-making and the expansion of capitalism were far from having these, by and large, beneficial characteristics and consequences.
[103] This is another important theme of the Enlightenment that was transposed to legislation by the influence of Bentham, Montesquieu, Voltaire and, especially, Beccaria.

originating countries, widely diffused and highly elaborated legal doctrines.[104] The same is true of the construction of property as individual, exclusive, and marketable.[105] Looking at this story from a convergent angle, we should remember that states and capitalism generated territorially bound markets and by so doing they further added to a dense texture of subjective rights, including a network of courts, before liberalism and democracy came to the fore.[106] On the other hand, as many have argued, the legal construction of an agent carrier of subjective rights, as it omitted the actual conditions of their exercise and as it excluded other rights, backed and helped to reproduce extremely unequal relationships between capitalists and workers.[107] But this construction contained potentially explosive corollaries. First, if *ego* is attributed legally enacted agency in certain spheres of life that are, for him and in the aggregate for the whole of society, extremely important, a question that naturally follows is: why should this attribution be denied in other spheres and, at any event, who should have the authority to decide it? A second corollary proved no less explosive, even if until today it is much less settled than the previous one: if agency entails choice, which actual options may be considered to be reasonably consistent with *ego's* condition as an agent?

The answer to the first question is the history of the further expansion of subjective rights, including the right of suffrage up to its present inclusiveness. This history was written by manifold conflicts at the end of which, after having accepted massive death in war for their respective countries[108] and exchanging revolution for the welfare state,[109] the *classes dangereux* were finally admitted as participants in the democratic wager—they gained political citizenship.[110] While this happened, other processes continued in the originating

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[104] Tilly (1997, 87) notes that during this early modern period 'strict wage labor displaced the arrangements of indenture, apprenticeship, slavery, and household incorporation under which most subordinate workers had previously labored.' See also Habermas (1996), Rosanvallon (1992), Steinfeld (1991), Tilly (1990), and Tomlins (1993).

[105] Janowski (1998, 200) says that '[In the seventeenth and eighteenth centuries] universalistic legal rights for men's claims to property are protected by courts well before political and social rights.' It bears mentioning that the origins of the modern law of property go back to Roman law, which had defined property as exclusive and disposable. In fact, Orth (1998) argues that the historical relationship between labor and the laws of property and contract in the common law countries was more complicated than I have rendered here; but these complications do not detract from the fact that the new labor relations, whether they were conceived as springing from the law of property or of contract, were construed as resulting from the free will of the respective individuals.

[106] As Alford and Friedland (1986, 240) note, 'The rise of the state progressively constituted the individual as an abstract legal subject with rights—specified independently of social structure—before the law, responsible for his or her actions.' Rosanvallon (1992) concurs: 'The history of the emergence of the individual may be understood as part of the history of civil rights' (107) '…[before the French revolution] the notion of [individual] autonomy…had been already legally formulated in the civil law.' (111) [my translation from French].

[107] 'The result of contractual freedom, then, is in the first place the opening of the opportunity to use, by clever utilization of property ownership in the market, these resources without legal restraints as means for the achievement of power over others. The parties interested in power in the market thus are also interested in such a legal order…coercion is exercised to a considerable extent by the private owners of the means of production and acquisition, to whom the law guarantees their property… In the labor market, it is left to the "free" discretion of the parties to accept the conditions imposed by those who are economically stronger by virtue of the legal guarantee of their property.' The author of these lines is Weber (1968h, 730–1), not Marx.

[108] See especially Levi (1997) and Skocpol (1994).

[109] This generalization ignores important country variations that are not central to my present discussion. From among the vast literature on this subject, see Esping-Andersen (1985 and 1990); Przeworski (1985); Przeworski and Sprague (1988); Rothstein (1998); Rueschmeyer, Huber Stephens, and Stephens (1992); and Offe and Preuss (1991).

[110] Not without, in addition, launching vigorous educational efforts for making sure that these sectors would become 'truly deserving citizens'. This had in the long run important democratizing effects, but for an account of the initial defensiveness of these efforts in France (which to my knowledge were not different from the other originating countries), see Rosanvallon (1992). In this respect the close attention that Condorcet, Locke, Rousseau, Adam Smith,

countries. One was that the map of Western Europe and North America was quite firmly drawn, as a consequence of successful, and often cruel, state-making.[111] Another was the further expansion of rights in the civil sphere, in the double sense that already recognized rights and duties were further specified and that new ones were added.[112]

These processes meant that, when sometime in the nineteenth century most countries of the Northwest adopted noninclusive democracy, an overwhelming part of their male population (and, albeit to a limited extent, females, too) had been already assigned a series of subjective rights that regulated numerous parts of their lives.[113] These were not—not yet—the participatory rights of the democratic wager. They were civil rights, rights that pertained to 'private' social and economic activities. These rights have been summed-up as 'civil citizenship' by T.H. Marshall and, more recently, as 'bourgeois rights' by Habermas.[114] I have discussed this matter, including my reservations about the developmental typologies proposed by these authors, in previous work.[115] Here I want to stress that, when full political inclusion became an issue, in the originating countries there already existed a rich repertoire of legally enacted and elaborated criteria concerning the attribution of agency to a vast number of individuals. Truly, the scope of these rights belonging to the 'private' sphere was, for our contemporary standards, limited. But it is also true that, by this process of expanding assignment of subjective rights, the ground was prepared for the extension of concepts, legislation, jurisprudence, and ideologies originating in civil citizenship to political citizenship.[116]

At this point in time we can only artificially separate liberalism as a political doctrine from the legal history I have sketched. Many of the rights that from its inception liberalism has sought to protect are the same subjective rights that previously had detailed elaboration and extensive legal implantation. Of course, over time liberalism expanded these rights, but every time it did so, consistently with its own premises, it defined these rights as subjective ones. It was as advocates of this kind of rights, too, that liberals demanded

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and other towering members of the Enlightenment paid to education as a crucial medium for enabling agency in the political realm is significant.

[111] Tilly (1985 and 1990).

[112] As Marshall (1950, 18) noted: 'The story of civil rights in their formative period is one of the gradual addition of new rights to a status that already existed and was held to appertain to all adult members of the community.' These were 'The rights necessary for individual freedom—liberty of person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and right to justice' (1950, 10–11).

[113] As Tilly (1994, 7) says in relation to France, 'With the Revolution, virtually all French people acquired access to state courts. During the nineteenth century, rights…expanded, in company with obligations to attend school, serve in the military, reply to censuses, pay individually assessed taxes, and fulfill other now-standard duties of citizens.' This also became true, somewhat later or earlier, in the other originating countries. Neo-institutionalist analyses such as North (1991), and North and Weingast (1989) pay close attention to this juridification in the civil and economic sphere.

[114] Referring to these rights, Habermas (1996, 28) notes that 'Since Hobbes, the prototype for law in general has been the norms of bourgeois private law, which is based on the freedom to enter into contracts and to own property.'

[115] O'Donnell (1999c).

[116] Rehg (1996, xxi–ii) comments: 'In the social-contract tradition going back to Thomas Hobbes…the legal constitution of society on the basis of individual rights appeared as a plausible extension of the contract relationship that governed the bourgeois economy. The economic institutions of contract and ownership already entailed a view of legal persons as free and equal, and thus as bearers of equal rights.' Commenting on Weber, Kronman (1983, 144) adds: 'The concept of free labor and the idea of purposive contractual exchange thus both rest upon a similar understanding of what it means to be a legal person, a being with the power to create rights and own property. Each presupposes that an individual's legal personality, his status as a bearer and creator of rights, depends entirely upon his possession of a faculty that may be variously described as the capacity for purposeful action, for voluntary self-regulation or for action in accordance with the conception of a rule.'

and obtained constitutions—whatever else they do, constitutions protect subjective rights.[117] These were the constitutions that first institutionalized the wager, albeit on the basis of a restricted suffrage.

These developments meant that, in the originating countries, when the inclusive wager was finally accepted, many (but by no means all) could feel that this decision was not a jump in the void. By then governments were already constrained by highly elaborated and widely extended subjective rights, some of which were enshrined as constitutional rules.[118] These were, in addition, representative systems, the practice of which tempered the fear, raised by experiences that spanned from Athens to the French Revolution, of direct democracy and mob rule. Also, other liberal safeguards that have roots in the past (although their history differs from the one I tell here) had been already adopted or gained wide currency, especially the imposition of time limits on elected officers and the division of powers within the regime.[119]

These institutional arrangements converged to shape the core principle of liberalism: government must be limited, because it refers to carriers of rights enacted and backed by the very legal system that the government itself must obey and from which it derives its authority. I insist that this foundational idea of agents as carriers of subjective rights that generate an individual's *potestas,* which cannot be invaded or denied except by carefully considered and legally defined reasons, had highly developed roots in some legal theories. These theories first preceded and later on interacted contrapuntally with capitalism, with state-making and, even later on, before the advent of inclusive political democracy, with liberalism. As a result of this long and complex historical trajectory, contemporary democracy is based on the idea of agency as legally enacted and backed. The resulting government, regime, and state exist with reference to and for individuals who are carriers of subjective rights.[120]

This is, in a nutshell, the legal and institutional architecture of the democratic state. The fact that in the originating countries this architecture was basically in place when the inclusive wager was adopted mitigated the perceived risks of this decision. As Sartori has noted, 'It is certainly not fortuitous that democracy came back to life as a good polity (after millennia of condemnations) in the wake of liberalism';[121] in the same vein, John Dunn has commented that by these processes democracy was made 'friendly' to the state (and, I add, to capitalism).[122] We see, then, that the democratic wager, in addition to being inclusive and universalistic, is a tempered wager: the entrenchment of subjective rights (including the constitutionalization of many of them), the time limitation of incumbency at the top of the regime, the division of powers, and the periodicity of fair elections diminish the stakes of every election.

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[117] Here I cannot discuss other—power-enabling—aspects of constitutions; on this matter see Hardin (1985), Holmes (1995), Bellamy (1996), Habermas (1996), and Preuss (1996).

[118] Once again, I am summarily presenting a complicated story. Work by Alexander (forthcoming) and Gould (2000) deal in useful detail with the various patterns and rhythms of these processes in Western Europe.

[119] For discussion of these institutional developments, see Manin (1995).

[120] Jones (1994, 88) puts it well: 'Political authority is authority wielded over, and on behalf of, human individuals with rights.'

[121] Sartori (1987, 389).

[122] Dunn (1992, 248).

## 10. COMPARATIVE EXCURSUS (2)

I have presented in an extremely compact way some historical processes in the originating countries, leading up to their adoption of the inclusive, universalistic, and tempered wager. As Weber never tired of insisting, these were historically unique circumstances that profoundly impressed the characteristics of these 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 far less completeness and fewer homogenizing consequences than in the originating countries. These differences, abundantly attested by the respective historical records, have also profoundly impressed the contemporary characteristics of the latter countries, including their states and regimes. Yet the ahistorical bent and the narrow focus on the formal aspects of the regime of many existing theories of democracy hinder 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.

Pending the research that will overcome this omission, here I offer some preliminary remarks, to which I return below, in another comparative excursus. In many new democracies, even if (by definition of such democratic regimes) 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 continued not being in place, 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 popular alienation and eventually radicalization—which further eroded the extension of participatory, 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.[123]

## 11. POLITICAL CITIZENSHIP AND ITS CORRELATES

We saw that political citizenship is a legally defined status, assigned by a state in its territory, as part and consequence of the democratic wager, to individuals construed as carriers of subjective rights referred to a regime consisting of fair and institutionalized elections and some surrounding freedoms. This status is a mix It is adscriptive[124] in that (excepting naturalization) it pertains to individuals by the sheer fact of their being born in a given territory (*ius solis)* or lineage (*ius sanguinis).* It is universalistic in that within the jurisdiction delimited by a state, it is assigned in the same terms to all adults who meet the nationality criterion. It is also a formal status, as it results from legal rules that in their content, enactment, and adjudication have to satisfy criteria that are specified, in turn, by other legal rules. Finally, political citizenship is public. By this I mean, first, that it is the result of laws that must satisfy carefully spelled out requisites of publicity and, second, that the rights and obligations it assigns to every *ego* imply, and legally demand, a system of mutual recognition among all individuals, irrespective of their social position, as carriers of such rights and obligations.

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[123] I have discussed this matter in several works, especially O'Donnell (1973 and 1988).
[124] See Brubaker (1992) and Preuss (1996b) for concurrent arguments.

These characteristics of political citizenship are homologous to—more precisely, they are part of—the 'private', or civil, subjective rights that I have discussed above. It is important to recognize this. In their origin, their conception of agency, and their legal definition, the political freedoms that we noted when examining various definitions of democracy are part and parcel of civil rights; the historically originary and the most frequent sites of exercise of freedoms such as expression, religious belief, association, and movement are in the daily transactions of society, not in the political realm. This means that civil and political citizenship have a historical, legal, and conceptual connection that is much more intimate than is recognized by many theories of democracy, realistic or otherwise.[125]

I shall return to the preceding remarks in the context of a further discussion of the already noted undecidability of political freedoms. Now I just want to note that these remarks have empirical implications. Some democracies may be conceived as having a central set of political rights that are surrounded, supported, and strengthened by a dense web of civil rights. Other democracies, in contrast, may exhibit (by definition of a democratic regime) these political rights, but the surrounding texture of civil rights may be tiny and/or unevenly distributed among different kinds of individuals, social categories, and regions. It seems to me that the differences that may be mapped along these dimensions across cases and time have a strong bearing on what we might call the depth, or the degree of civil and legal democratization, or the overall quality of democracy in each case or period.

We should also remember that another issue raised by the presumption of agency refers to the options available to each one, both in terms of the capabilities of each individual and of her actual range of choice.[126] In the originating countries, 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 and jurisprudential criteria were elaborated for voiding, redressing, or preventing situations in which there exists a 'manifestly disproportionate'[127] relationship among the parts and/or where one of the parts may not be reasonably construed—because of duress, fraud, mental incapacity, etc.—as having lent autonomous consent to the contract.[128] These tutelary measures rest on a basic criterion of fairness, which in turn is a corollary of the idea of agency: agents are supposed to relate to each other as such agents, i.e., without suffering degrees of inequality, or for whatever reason lack of capabilities, that cancel their autonomy and/or the availability of a reasonable range of choice. 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.

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[125] An exception is Habermas (1986, 1988, and 1996), although as noted I disagree with his overall approach. Other works that are usefully aware of the close relationship between legal and political factors are Bobbio (1989 and 1990), Garzón Valdés (1993), Linz (1998), Preuss (1986 and 1996b), Raz (1986 and 1994), Sartori (1987), and Waldron (1991).

[126] From now on, when I refer to 'options' I mean the subjective capability of actually making reasonably autonomous choices and the range of choice that the individual actually confronts. In the present text my discussion of this complex matter is rudimentary but I hope sufficient for the piece of legal history I want to highlight; for apposite discussion of options and their connection to agency, see Raz (1986).

[127] As stated in Section 138 of the German Civil Code.

[128] This was another long and complex evolution, which in the originating countries had quite significant variations, especially in its timing. See Atiya (1979), Caenegem (1992), and Trebicock (1993); the seminal discussion is again in Weber (1968). It bears noting that, accompanying and supporting this evolution, the individualistic conception of the will theory of contract (and of rights in general) was revised toward a more relational view of rights; see Dagger (1997, 21 and *passim*).

Consequently, to the prior—prior historically and analytically—legal imprinting of universalistic conceptions of agency, there were added numerous substantive legislative and jurisprudential considerations of fairness. These additions contradicted the earlier constructions of agency in that they introduced nonuniversalistic 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 in 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 is better known to political scientists and sociologists. I refer to the emergence and development of welfare legislation. 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 that I need not detail here,[129] the newly accepted participants in the wager exchanged their acceptance of political democracy—including the tempering of the wager by the safeguards I have noted—for a share in the benefits of the welfare state. These benefits 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 Marx and others had pointedly denounced behind the universalism of the existing legal systems. By means of welfare legislation, and with ups and downs in terms of the respective power relationships,[130] some basic and quite widely shared 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 referred to collectively defined classes of agents, welfare legislation expressed the view that, if agents are to be reasonably presumed to be such agents, then society, and especially the state and its legal system, should not be indifferent to the options everyone actually faces. Preventive and remedial actions were consequently mandated, ranging from supporting basic levels of material conditions to various mechanisms of collective representation for those who otherwise would be too weak to be presumed to have truly autonomous will and adequate choices. Although they have not been an unmixed blessing,[131] these developments, imprinted in private and public

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[129] See the works cited in footnote 109. Perhaps I should clarify that this literature shows that the initial motivation of various welfare policies was preempting popular challenges or attaining narrowly defined sectorial benefits. But these very initiatives would not have existed had they not appealed or responded to widespread, intense, and amply documented feelings about the unfairness of sharp inequalities and of severe risks along the lifecourse and in the workplace. As, in the paradigmatic case of social welfare initiation from above, Bismarck put it, 'If there had been no Social Democracy and if many people had not feared it, even the modest progress which we have now achieved in the field of social reform would not have been made' (quoted in Goldstein 1983, 346).

[130] For example, the contemporary neoconservative offensive aims, precisely, at eroding these partially equalizing measures. In most of contemporary Latin America, shaken by severe economic crises and endowed with weak legal and welfare systems, the consequences of this offensive have been particularly devastating; in relation to Brazil and the Southern Cone of Latin America, discussion of this and related matters may be found in Ippolito-O'Donnell (forthcoming).

[131] Weber (1968) dubbed these processes of 'materialization' of the law, insofar as they introduced nonuniversalistic rules and criteria of substantive justice on formal-rational law. Recently, criticisms of the 'legal pollution' (Teubner 1986 and Preuss 1986) produced by these legal developments became widespread from many quarters of both right and left. This is a well-known literature that is not central to my present analysis. I note, however, that these criticisms seriously neglect the equalizing advances achieved in many respects by these developments. The counterfactual that should

law, were democratizing changes. They further densified the legal texture that enacts and backs the very same agency that is presupposed by democracy.

We have seen that in the originating countries there existed a long and complex process which, mainly through legal rules, encompassed society, economy, and state by means of a universalistic conception of agency, which afterwards was partially transformed by values of fairness grounded on that same conception of agency. Further on I discuss some implications of this process. For the time being I note that, at least on logical grounds, the relationship between agency and options in the political sphere bears close relationship with this same issue as referred to in private law and welfare legislation. Put differently, posing this issue in the political sphere involves going beyond the universalistic assignment of political rights we examined in preceding sections: it leads to asking about the conditions that may, or may not, allow the effective exercise of the participatory rights of political citizenship.

We saw that, in relation to civil and social rights, the issue of the conditions that enable agency could not be ignored by private law and by welfare legislation; it is not clear to me on what grounds it is permissible to ignore this same issue in relation to political rights. Because there is, as I have shown, such a close connection between civil and political rights (and, more recently, social rights, too), it seems to me inconsistent to omit, as most political science theories of democracy do, the question of the effectiveness of political citizenship when referred to individuals who are deprived of many civil and social rights and, consequently, of minimally reasonable options. Truly, in a democratic regime these same individuals are assigned the universalistic political rights we have examined. Truly, too, this assignment implies, by itself, great progress in relation to authoritarian rule. Yet looking exclusively at this side of the matter means eliding from democratic theory the very issue of actual agency and options that private law and welfare legislation could not ignore. This seems to me an undue, and deeply sterilizing, restriction. Instead, democratic theory should come to terms with some central facts: one, since Athens, albeit restricted to a few, and up to today, when attributed to many, democracy is premised on agency; two, this attribution was inscribed, long before contemporary democratic regimes, in manifold aspects of the legal system and its concomitant value of the fairness due to agents; and three, the homology between civil and political rights and the historical, legal, and conceptual origins of political on civil rights. These facts account for the stubborn reemergence, in theory and in practice, of the issue concerning the effectiveness of the agency entailed by political citizenship, as a practical moral, and a theoretical concern.

We see now the root reason of the boundary problems of political rights, and of their undecidability. Agency has direct, and concurrent, implications in the civil, the social, and the political spheres because it is the legally enacted aspect of a moral conception of the human being as an autonomous, reasonable, and responsible individual—an agent.[132] This view, or presumption, cannot be validly elided—logically, morally,

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temper these criticisms is the much more unfavorable situation of countries where welfare policies were very partially adopted or implemented.

[132] This same view was memorably inscribed in the French Revolution's Universal Declaration of the Rights of Man and in the First Amendment to the Constitution of the United States. Later on, starting with the 1948 United Nations Declaration of Human Rights and following with numerous international conventions and declarations, this same view has been inscribed in international law, creating a kind of contemporary Grotian *ius gentium* to which most governments at least nominally must abide.

or legally—from the issue of the options available to each one, both in terms of capabilities and of range of choice. In turn, insofar as democracy entails agency (something that we also saw, from a different but convergent angle, when discussing the wager), there is no way to exorcise from the theory and practice of democracy the questions referring to the effectiveness 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, for which I continue the numbering begun in the preceding sections.

**VIII. A democratic regime, or political democracy, or polyarchy 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 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 logically 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 (i.e., actual capability and range of choice) of each agent was recognized. As a consequence, manifold 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, albeit not without trade-offs, further overall democratization.**

In the following section I turn to some comparative issues.

## 12. COMPARATIVE EXCURSUS (3)

When nonoriginating 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 are premised on, and enact in manifold rules, 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.[133] When this is the case,

[133] For the innumerable discussions that this disjunction has generated, in the East and in the South, around the *pays réel* and the *pays légal*, see O'Donnell (1993). This is another extremely complex historical process to which I can only make very brief reference here. In some colonial or semicolonial countries, legal anthropologists have studied the fascinating ambiguities that surrounded the adoption of European legal systems and their interrelationships with preexisting ones

the adoption of democracy and its surrounding freedoms generates a severe disjunction between these rights and the general texture of society, including the ways in which rights and obligations, political and otherwise, 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 welfare rights.

These cases may still be polyarchies or political democracies as defined above, 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.[134] At least, we may surmise that the extension and, so to speak, 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 often remain implicit in democratic theory. There is another issue that is closely related to the preceding one, insofar as it points to another serious gap in the functioning of the legal system. This issue refers to what I have termed the deficiency in 'horizontal accountability' of many of these democracies, expressed in executives that try to sidestep, if not eliminate, many of the institutional safeguards I mentioned above. Since I have discussed this matter in a recently published text,[135] I will not dwell on it here.

## 13. 'POLITICAL' FREEDOMS?

We have not yet concluded the discussion of what until now I have called, rather loosely, political freedoms. We saw that there are some freedoms—more properly defined as rights—that pertain to the effectuation of competitive elections: the right to vote and to be elected as well as, generally, participating in actions related to the holding of fair elections. These are positive rights, protected by the surrounding freedoms that I have discussed and to which we must now return. Again taking up the freedoms proposed by Dahl, we note a difference among them. One, the availability of alternative—i.e., free and pluralistic—information, is a characteristic of the social context, independent of the decisions of single individuals. Instead, the other two freedoms, of expression and association, are subjective rights. They are part of *ego's potestas*, her right to undertake, or not, the actions of expressing herself or associating. Notice that these rights have two sides: first, they are obviously valuable per se; second, they have an instrumental relationship with respect to the above-mentioned participatory rights—we saw that the rights of expression and of association, and the like, are necessary conditions for the effectiveness of the participatory rights enacted by a democratic regime and its wager.

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(on Egypt, for example, see Brown 1995); however, much work remains to be done on this important topic. Jaksic's (forthcoming) book on Andrés Bello and the crucial influence he exercised on the adoption and adaptation of various strands of European legislation in several nineteenth-century Latin American countries is also apposite.

[134] For arguments in this direction, see DaMatta (1987), Fox (1994a and 1994b), Neves (1994 and forthcoming), Schaffer (1998), and O'Donnell (1993, 1996a, and 1999c).

[135] O'Donnell (1999b). In this text I discuss the weakness of the liberal component of these democracies as well as of what I term their republican dimension.

Once again we find a boundary problem: it is undecidable which acts of expressing or associating are 'political' or not. The reason, already noted, is that the rights of expression and of association, and others relevant to democracy, are part of the civil rights I discussed above. Obviously, 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 without apparent awareness, 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.[136] 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 I have commented upon, 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. Political rights shade off into a broader set of civil rights because, as I have argued, they have most of their actual practice, their historical origin, and their primary legal formulation in the latter. Expressing and associating are typical civil freedoms; they became legally enacted rights long before they were also recognized as 'political' rights relevant to a democratic regime. 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 reencountered the boundary problems noted in Section 6.[137]

## 14. ON THE STATE AND ITS LEGAL DIMENSION

There is another conclusion that I want to draw at this point. This conclusion derives from the fact that in contemporary societies most rights—civil, political, and social—are enacted and backed by a legal system both by statute and by jurisprudence. 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. The implication is that, since we have seen (proposition VII, above) that 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 other works[138] I argue that the state should not only be conceived as a set of bureaucracies. The state also includes a legal dimension, the legal system that it enacts and normally backs with its supremacy of coercion over the territory that it delimits.[139] 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 competitive elections and 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

[136] For a concurrent argument, see Flathman (1972).
[137] At this point it should not surprise us that in their careful review of many definitions of democracy Collier and Levitsky (1997, 433) conclude that '[T]here is disagreement about which attributes are needed for the definition [of democracy] to be viable.'
[138] I discuss this matter in O'Donnell (1993 and 1999c).
[139] For a concurrent view, see Bobbio (1989, 47).

only of the regime. This state is a Democratic *Rechtsstaat,* an *Estado Democrático de Derecho***,** in that it enacts and backs the legal rules referring to the existence and persistence of a democratic regime.[140]

I noted above a difference between the right of access 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.[141] One way or the other, there is at least one right, implied by the former, that is clearly positive. I refer to 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 above-mentioned rights as well as others.[142] The denial of this expectation would mean that these rights are purely nominal. With this assertion we have again run into the state *qua* legal system that enacts and backs rights that, in spite of differences among authors as to which to list specifically, are widely agreed to be basic components of democracy. The point at the present stage of my discussion is that, in addition to the legal rules already discussed, we have just identified some institutions of the state, courts prominently. This allows me to complete the picture of a legal system: it 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 above, 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*. In a democratic *Rechtsstaat* or *Estado Democrático de Derecho*—all powers are subject to the legal authority of other powers[143]—this legal system 'closes', in the sense that nobody is supposed to be above or beyond its rules.[144]

We have reached another conclusion. Before I noted that there are two specific characteristics of political democracy not shared by any other regime: fair and institutionalized elections, an inclusive and universalistic wager. Now we have just 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; second, the rounding of the legal system so that no person, role, or institution is *de legibus solutus.*[145] 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 state—again we see that an exclusive focus on the regime is insufficient for an adequate characterization of democracy.

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[140] For further discussion, see O'Donnell (1999b).

[141] See Holmes and Sunstein (1999), Raz (1986), Shue (1980), Skinner (1984), and Taylor (1993).

[142] For discussion of this matter, see Fábre (1998).

[143] This is what some German theorists have labeled the 'indisponibility' of the legal system for the rulers; see especially Preuss (1996a) and Habermas (1986 and 1988). I discuss this aspect, under the rubric of horizontal accountability, in O'Donnell (1999b). As may be obvious, this characteristic is closely related to the safeguard of the rights I discuss above; otherwise, there would exist some ultimately uncontrollable power(s) that may unilaterally cancel these rights and freedoms. This topic has interesting ramifications that I cannot pursue here; furthermore, I gloss over the fact, not directly relevant to my present discussion, that in some countries this rounding up of the legal system was achieved under noninclusive, oligarchic democracies.

[144] On this matter see, from various but in this aspect concurrent perspectives, Alchourrón and Bulygin (1971), Fuller (1964), Habermas (1996), Hart (1961), Ingram (1985), and Kelsen (1962). For elaboration of my own views, see O'Donnell (1999c).

[145] 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.

These conclusions may be stated as a proposition:

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

Another aspect of a legal system is its effectiveness (or, according to the terminology employed by some authors, its validity), i.e., the degree to which it actually orders social relations. The effectiveness of a legal system is a function of its interlacing. At one level, which we might call vertical, of, say, a judge dealing with a criminal case, her authority would be nil if it were not joined, at several stages of the process, by the police, prosecutors, defenders, etc., as well as by, eventually, higher courts and prisons.[146] Horizontally, I noted that, in terms of relations internal to the regime and the state, a democratic legal system entails that no public officer can escape from legal controls as to the lawfulness and appropriateness of his actions, as defined by agencies that are legally enabled to exercise these controls. In both dimensions, vertical and horizontal, the legal system presupposes what Linz and Stepan[147] call an 'effective state'; in my own terms, it is not just a matter of legislation but also of a vast and complex network of state institutions that operate in the direction of ensuring the effectiveness of a legal system that is itself democratic, as above defined. As we shall see, the weakness of this kind of state is one of the most puzzling, and disturbing, characteristic of many new democracies.

## 15. A LOOK AT THE OVERALL SOCIAL CONTEXT

Now we turn to freedom of information, the availability, as we saw Dahl proposes, of 'alternative sources of information [that] exist and are protected by law.' [148] Enjoying this availability is a social given, independent of the will of any single individual. This is a public good, characterized as such by being indivisible, nonexcludable, and nonrival.[149] The availability of alternative (and, I add, by implication reasonably free and pluralistic) 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 access to alternative 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, life-styles, and opinions entailed by the rights of expression and association. The other condition is a legal system that effectively

[146] To come back to a contrasting comparison, in Méndez, O'Donnell, and Pinheiro (1999), chapters by Chevigny (on the police), Brody (on prisons), and Garro and Correa Sutil (both on access to courts) conclusively show how in Latin America this interlacing is repeatedly interrupted and the law, consequently, no less repeatedly rendered ineffective; see also Domingo (1999).
[147] Linz and Stepan (1996, 37).
[148] Dahl (1989, 221).
[149] See Raz (1986 and 1994) an for excellent discussion of this freedom as a 'generally beneficial feature of society.'

backs these rights and, more generally, a reasonably plural and tolerant social context. 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—once more—into the state and its legal system. We have also run into some general features of the overall social context.

Here, surely not surprisingly at this stage of my discussion, we find another boundary problem: 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, in a given case, quite open discussion might be allowed about political issues, but these issues may be narrowly defined. 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 sufficiently satisfied. On the other hand, in the not-distant past of the originating countries these restrictions were not considered problematic. As we saw with the boundary problems of other freedoms, this one also presents 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 more restrictive criteria such as those applied by the latter decades ago—or is there another alternative? I cannot deal with this question in the present text. I just want to point out that by posing this kind of question we are referring to a certain degree, or quality, of democraticness of the overall social context, not just of the regime and the state. At least, it seems to me that it is appropriate to assert that countries where the ability to express opinions and access the information media has been gained by groups such as the ones I have exemplified 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 it mainly characterizes the overall social context, not just the regime or the state.

Now we can include some propositions:

**XIV. In the realistic definitions of democracy, the 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.**[150]

**XV. The freedoms listed by Dahl, and in more or less detail by other authors, turn out to be of different natures. Some are positive rights of participation in various ways in competitive 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.**

[150] Remember, however, that I have argued that this fact does not detract from the usefulness of listing these political freedoms.

## 16. COMPARATIVE EXCURSUS (4)

I have discussed the freedoms, or rights, that many definitions of democracy list and noticed 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 and 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*, the right to unionize; 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 etc.[151] 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 only a truncated or intermittent civil citizenship. Simply, but importantly enough to be taken into account as something more than a nontheorized observation, 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, as we saw, 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 also enacted. This difference is closely related to another. I mentioned that in the originating countries the process of state-making and of emergence of capitalism had been successfully undertaken—by and large and with exceptions that pale in importance when compared to the history of many new democracies—before the inclusive democratic wager was made. In the originating countries, successful state-making and expansion of capitalism meant that a legal system based on conceptions of individual agency actually ruled across the territory of the state. By contrast, in many democracies in the East and the South (let alone countries that do not qualify as such democracies), 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 cities, where in their peripheries (and everywhere for some discriminated against sectors) there is also little effective state legality.[152] 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

[151] For a quite detailed (and dismal) inventory and discussion of these and related problems in contemporary Latin America, see Méndez, O'Donnell, and Pinheiro (1999).

[152] I speak of effective state legality because these 'brown areas' (as I call them in 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 further discussion of these matters, see Holston (1991), Pásara (1998), and O'Donnell (1993), and for detail, again see Méndez, O'Donnell, and Pinheiro (1999). In several works, Alain Touraine (especially 1988) has insisted on these characteristics of Latin America.

there exists a complex mix of capital/labor relations; in particular, huge, and growing, informal markets are a depository, not only of deep poverty but also of pre- and protocapitalist, even servile, social relations.[153]

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 this. 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 for 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.[154] For others, like myself, who believe that in spite of its limitations a democratic regime is a very valuable achievement, these views are worrisome. It is even more worrisome if we consider that in many countries democratically elected governments have been unable to ameliorate, and in some cases have worsened this—it has to be admitted—morally repugnant situation. On the other hand, the answer of other observers about the relevance of this situation is 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.

However, the intimate connection I have drawn among civil, social, and political rights, and their common grounding on 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' (this is the graphic term used in the relevant literature) by malnutrition and diseases typical of extreme poverty.[155] The other issue is life under constant fear of violence, about which Shklar[156] has so

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[153] It has been estimated that in 1995, 55.7 percent of the urban working-age population in Latin America were in the informal market; 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 and data cited therein). Referring to a previous period, 1950–80, Portes (1993, 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 market in Latin America, see also Portes and Schauffler (1993), Portes, Castells, and Benton (1989), Rakowski (1994), Roberts (1994), and Tokman (1992 and 1994). Furthermore, by the early 1990s, 46 percent of the Latin American population lived in poverty (a total of 195 million), and approximately half of these were indigents, defined as lacking 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 from O'Donnell 1998; for further detail, see Altimir 1998).

[154] Collier and Levitsky (1997).

[155] See the excellent discussion and data in Dasgupta (1993), who concludes that extreme poverty even affects the sheer capacity to work: 'It is often said that even when a person owns no physical assets she owns one asset that is inalienable, namely *labour power*. [I have] revealed the important truth that this is false… Conversion of potential into actual labor power can be realized if the person finds the means for making the conversion, not otherwise. Nutrition and health-care are the necessary means to this' [italics in the original]. On this matter, see also the influential works of Sen (especially 1992 and 1993). For data and discussion about Latin America, see Borón (1995) and, from a medical/biological

eloquently written and which in these countries plagues the lives of many, especially those who inhabit brown areas and/or are discriminated against. Apart from truly exceptional individuals, both problems, destitution and constant fear, inhibit basic aspects of agency, including the availability of a range of options minimally consistent with the latter; this 'life of coerced choices' is intrinsically opposed to agency.[157]

These issues are ignored by most theories of democracy.[158] 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 to be researched—arguably the most important one raised from the perspective I have adopted—is to what extent and under what conditions poor sectors and 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.[159]

## 17. SOME FINAL PROPOSITIONS

We have undertaken a rather long, albeit in many aspects preliminary, incursion into democratic theory. Since I have left many topics pending for discussion in future texts, it may be useful to present some final propositions.

**XVI. In agreement with common parlance, I believe that 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 nondemocratic character of the regime.**

**XIX. Still at the level of the regime, a high degree of effectiveness of these political rights, together with various measures enhancing the participation of citizens as well as the**

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standpoint, Alejandro O'Donnell (forthcoming). About a relatively wealthy country, Argentina, that nevertheless suffers to a high extent these ills, see Stillwagon (1998). An anthropological study that details the devastating consequences, physical and psychological, of extreme poverty in a Brazilian city is Scheper-Hughes (1992).

[156] Shklar (1989).

[157] Raz (1986, 123).

[158] This is not true of all brands of democratic theory. However, in most cases, to my knowledge works that take this kind of situation into account do not go much beyond its rhetorical denunciation, often joined by the blanket denial of the democraticness of the regime.

[159] For some speculations on this matter, see O'Donnell (1998). The abundant, varied, and uneven literature on social movements that was spawned by the transitions from authoritarian rule contains a wealth of information relevant to this matter. I am not aware, however, of studies that have specifically focused on the question I am posing.

**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 justify assessments as to the various degrees of *civil* and *social* democratization of each country.**

**XXI. The conception of human beings as agents insolubly 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.**

## 18. A FINAL POINTER

There is a topic at which I have barely hinted, because it is too broad to be dealt with here. I want, however, as I have done with other themes, to leave a pointer on this matter. It is that, as we saw concerning other topics and for equivalent reasons, the issue of which options actually enable agency 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 positively satisfied. Furthermore, and as we saw with various kinds of rights and freedoms, the relevant criteria have greatly changed in 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 less resources than the former ones.

In synthesis, 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 welfare 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. Truly, many of the rules of this play are determined by the regime, but the struggles for limiting and expanding rights and for defining if there should be, and at what levels, agency-enabling conditions are political and, indeed, moral struggles that take place both inside and well beyond the regime. In this sense, a fact I mentioned earlier acquires particular relevance: the universalistic assignment of political rights and the inclusive wager generate at least the nutshell of a public sphere. This sphere, with varying (from country to country and from period to period) connections with social and political struggles, may be used as a springboard for the deliberations, debates, pressures, and protests that nurture the expansion of rights.

## CODA

I have dealt with various aspects contained or entailed in definitions of a democratic regime (or polyarchy or political democracy), especially in realistic ones with which in general I agree although I have found it

necessary to 'precise' them. In proposing a realistic and restricted definition of a democratic regime, I pursued the logical and some of the empirical implications of its attributes and components and noted aspects that spill over, with undecidable boundaries, into broader issues. These issues I attached, first, to the regime, then, even if in a very cursory way, to some moral themes, later to the state (especially the legal system that is part of it), and finally to some characteristics of the overall social context. Through these explorations we discovered a common underlying theme, agency.

As I warned in the introduction, in the present text these connections are just pointers to topics to be pursued in future texts. 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.

Meanwhile, I may summarize my argument by recalling that the promontory we have reached—a realistic and restricted definition of a democratic regime—is metonymically applied to whole countries. This suggests the importance of the regime; it also suggests that various important paths remain to be pursued.

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