



Working

**STRENGTHENING DEMOCRATIC QUALITY: REACTIVE
DELIBERATION IN THE CONTEXT OF DIRECT DEMOCRACY**

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STRENGTHENING DEMOCRATIC QUALITY: REACTIVE DELIBERATION IN THE CONTEXT OF DIRECT DEMOCRACY

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ABSTRACT

Acknowledging that mechanisms of direct democracy can fall prey to narrow and egoistic interests (regardless of how legitimate they may be) and that legislatures do not always have the incentives to articulate responses to those narrow interests, I propose a hypothetical reform: any time a popular vote (i.e., initiative, referendum, or authorities' referendum) is held, representative and direct institutions should be supplied with a stratified random sample of eligible voters convened to advance *citizens' counterproposals*. This original institution—which does not exist even in the places where direct democracy is most developed—would discuss, deliberate, and offer an alternative or an improvement to a policy question that is to be decided in the near future; it would refine and enlarge public views on a contentious topic, providing meaningful political choices, and thus strengthening democratic quality. In arguing for this, my research takes insights from two real-world situations—Uruguay's two 2009 initiatives for constitutional reform—in which citizens' counterproposals could have played a crucial role in informing public views on a contentious topic and offered an alternative to both sides of the debate.

RESUMEN

Reconociendo que los mecanismos de democracia directa pueden ser presas de intereses egoístas (sin importar cuán legítimos son), y que las legislaturas no siempre tienen los incentivos para articular respuestas a esas posiciones, propongo una reforma hipotética que complementa a las instituciones representativas y directas con una muestra aleatoria estratificada de votantes convocados para proponer “contrapropuestas cívicas” siempre que una votación popular sea agendada. Esta institución—que no existe siquiera en los lugares donde la democracia directa está más desarrollada—discutirá, deliberará, y ofrecerá una alternativa o una mejora a una cuestión política que será decidida en un futuro próximo. Así, perfeccionará y ampliará la opinión del público sobre un tema polémico, proporcionando opciones políticas significativas, y fortaleciendo la calidad democrática. Con este objetivo, esta investigación toma el ejemplo de dos situaciones reales—dos iniciativas de reforma constitucional en Uruguay en el 2009—donde las contrapropuestas cívicas podrían haber desempeñado un papel crucial en complementar la oferta política sobre un tema polémico y ofrecido alternativas sobre estos contenciosos.

In this paper I first outline the reasons why the functioning of democracy today needs an upgrade. Then I move to study some democratic practices—mechanisms of direct democracy such as initiatives and referendums—that were thought to be the solution to representative government’s problems with its party machines, and big money. Yet, as both representation and direct decision have common problems, I shift to the latest wave advanced by democratic theory: deliberation. I propose a feasible combination of the three streams of democracy and show—with two cases—how my contribution could solve some of the problems of both representative and direct democracy.

WEALTH, REPRESENTATION, PARTICIPATION, AND DIRECT DEMOCRACY

Much of the debate on contemporary democracies hinges on to how to control the plutocratic tendencies of elections, since getting elected (or even nominated for office) often takes a lot of wealth to publicize the candidate and purchase campaign advertisements and materials. If wealth can directly or indirectly buy power, therefore, we are not equal simply because we do not have equal amounts of wealth. This matter goes beyond the famous cases of extremely wealthy democratically elected leaders such as Silvio Berlusconi in Italy or Sebastian Piñera in Chile; the argument can easily be extended to the enormous influence wealth has in our daily political lives. Simply put, “election is a magistrate selection method that directly and indirectly favors the wealthy and keeps political offices from being distributed widely among citizens of all socioeconomic backgrounds” (McCormick 2006: 148).¹

The sometimes immoral distribution of wealth in societies has produced different reactions: from social revolutions to institutional changes.² In the United States the arguments of the Progressive Era have tremendous influence on this contentious issue. Ideally, the Progressives strongly advocated the initiative process because, they claimed, it would foster something we could call an “enlightened citizenship” or, less presumptuously, the “attentive public” that Almond looked for (Dahl 1989). More practically, Progressives argued that

¹ Related, but not exactly the same, is what Lijphart defined as the “unresolved dilemma of unequal participation” (1997), which, of course, cannot be reduced to a simple set of institutional improvements (such as campaign finance reform or compulsory voting).

² Complete libraries of robust scientific words have been written on this topic: starting with the origins of modernization (Lipset 1959), to the reaction to modernization (Moore 1966; Huntington 1968; O’Donnell 1973), to more modern assessments such as those of Boix (2003) and Acemoglu and Robinson (2005).

initiatives and referendums are the means to bypass parties' machines, spurious egotistic interests, and wealth (Tolbert 2003).³

While the European literature on direct democracy has been broadly optimistic (Qvortrup 2002; Setälä 1999; Verhulst and Nijeboer 2007; Kaufmann, Büchi, and Braun 2008), the American literature has tended to be more negative (Magleby 1984; Cronin 1999; Haskell 2000; Dyck and Lascher 2009), and there are reasons for these differing views. For instance, the American literature tends to suggest that, by means of what Magleby calls the "initiative industry" (1984), economic interests or powerful social groups could easily utilize direct democracy for their own particular benefit, making it, in the end, harmful to representative democracy.⁴ As O'Leary bluntly states: "experiments with direct democracy, such as the initiative and recall, are burlesque caricatures of their original purpose" (O'Leary 2006: 4). However, the jury still is out, as there are extremely lucid and methodologically refined works by American scholars showing that, after all, direct democracy is not as damaging to representative institutions as many argue (Matsusaka 2004; Gerber 1999), even the contrary (Tolbert and Bowen 2008).

One crucial aspect that sometimes is overlooked is that direct democracy is here to stay; and this is not wishful thinking: no matter what our assessment of direct democracy is, where it exists, almost certainly it can only be reformed by direct democratic means and consequently—although it possibly could be stopped or discontinued—direct democracy can rarely be eliminated (Auer 2007). In a way, like it or not, direct democracy has a sort of internal life insurance as it is highly implausible that citizens would give up their rights in a democratic context, which produces a political implausibility of constitutional amendments that eliminate direct democracy. Despite the tensions between representative government and direct democracy, "it is highly unlikely that the use and relevance of direct democracy will decrease

³ In the context of some democracies, citizens are armed with certain institutions that allow them to defend the status quo when authorities try to alter it ("referendums"), or to advance political change when authorities want to stick to status quo ("popular initiatives").

⁴ This criticism goes beyond direct democracy and takes us back to regular politics where, campaign finance reform is maybe the hottest current political issue on the table (at least in the United States). The involvement of big-money in politics in the United States has been exacerbated since *Citizens United v. Federal Election Commission* [558 U.S. 50 (2010)], a decision by the United States Supreme Court of Justice that holds that corporations' spending cannot be limited under the First Amendment.

because of its theoretical and practical tensions with representative democracy” (Altman 2011: 190).⁵

Nevertheless, it would be naïve to argue that *neither* representative government *nor* direct democratic institutions can be hijacked by narrow, selfish interests (economic, social, or political), as the American experience shows. Certainly, the Californian experience with direct democracy, particularly since Proposition 13 (1978), has shaped much of the current literature on direct democracy. O’Leary even talks about “California’s destructive obsession with initiatives” (2006: 32). In spite of that, extreme caution is needed when taking aim at direct democracy; we must be able to separate the intrinsic nature of direct democracy from the environment where it transpires.

For example, on the one hand, the general animosity towards the direct democratic game in the United States comes from the high frequency with which direct democracy is used by narrow interests that—enjoying a large amount of resources and without any limitation on their spending—utilize these mechanisms for their profit. Yet, there is enough room to ask whether this is a problem of citizens deciding directly on certain topics or a series of questionable decisions of the US Supreme Court in not allowing the limitation of campaign expenses.⁶ Is the fact that paid workers resort to cheating the citizen in the street just to gather as many signatures as they can a problem of citizens deciding directly by themselves or is it a problem with the regulation of these elections?⁷ Note that these two concerns are not necessarily easy to extrapolate into other polities; for example, in Switzerland or Uruguay, there is no evidence that direct democratic campaigns are based on paid workers or that signature gatherers resort to those strategies mentioned above.

Undeniably, on the other hand, mechanisms of direct democracy (hereafter MDDs) bring a high degree of desirability simply because of the legitimacy they carry—“the sovereign has

⁵ In my systematic study (Altman 2011) of more than thirty years of uses of MDDs at the national level in the world (over 1100 cases), fewer than a handful of cases limited the scope of DD (for example, by increasing the number of signatures needed for an initiative to qualify) but never did the citizens give up their essential right to make an initiative: not even one case.

⁶ This resolution is notably inconsistent with similar decisions on regular elections.

⁷ *Buckley v. Valeo* [424 U.S. 1 (1976)]; *First National Bank of Boston v. Bellotti* [435 U.S. 765 (1978)]; and *Citizens against Rent Control v. City of Berkeley* [454 U.S. 290 (1981)]; and particularly, *Citizens United v. Federal Election Commission* [558 U.S. 50 (2010)].

spoken”—particularly if they are citizen initiated (CI-MDDs).⁸ Additionally, by means of the creation of at least two obvious sides (those in favor and those against), MDDs polarize the citizenship and many times, even in the American milieu, force politicians to qualify their positions on the issue of contention.⁹ Consequently, MDDs increase partisan and political identifiability, which are by themselves something the literature rates as intrinsically healthy for democratic institutions (Shugart and Carey 1992; Altman 2011).

There is nothing more erroneous than thinking of these two worlds (representative and direct) as mutually exclusive. Direct popular participation and representative deliberation do interact in the practice of many contemporary democracies (through the intervention of parties, electoral commissions, legislative assemblies, hearings, etc.). Even in the most iconic place on earth of direct democracy, Switzerland, these are two faces of the same democratic coin. Actually, as Papadopoulos contests, in Switzerland the activation of a CI-MDD implies that the much praised *Konkordanz* has already failed (Papadopoulos 1995).¹⁰ Indeed, there is a large portion of research that underlines the positive impact the initiative process has had in the world, not least in the United States where the direct democratic game has been at the eye of the storm. “Citizen-initiated mechanisms of direct democracy are reasonable barometers of society; they

⁸ I do not consider here other forms of direct action that do not belong to the world of direct democracy defined as: “a publicly recognized institution wherein citizens decide or emit their opinion on issues—other than through legislative and executive elections—directly at the ballot box through universal and secret suffrage” (Altman 2011: 7). For example, I do not consider what there are called Legislative Popular Initiatives as they constitute more an agenda power than anything else. An LPI exists when the citizenry forces the legislature to consider a proposed action or a bill (though the legislature will not necessarily accept it), which represents control over the agenda rather than a tool for political change.

⁹ The literature is rather strong in claiming that the more *competitiveness* an election has, the higher the perception that one vote affects the outcome, which increases the expected utility of voting and thereby voter turnout (Downs 1957; Aldrich 1993; Riker and Ordeshook 1968). After all, as Przeworski remarks, “democratization is an act of subjecting all interests to competition, of institutionalizing uncertainty” (1991: 14). Thus, a high level of *competitiveness* is strongly related to the health of a democracy (Diamond and Morlino 2005).

New studies within the US context support the idea that an important ideological divide makes citizens more politically aware and involved (Abramowitz 2010). These findings are also supported outside the US context (Siaroff and Merer 2002; Crepaz 1990; Barnes 1998). Democratic vitality increases not only through high levels of political competition (as there is a perception that a single vote makes the whole difference) but also through ideological polarization (Hill and Leighley 1993) as it generates enthusiasm. Yet, we must be careful when characterizing what can be called “populist mobilizations” of the citizenry by elites. For this enthusiasm to be healthy for democracy, information and awareness are crucial; otherwise, the effervescent citizenry becomes a mob.

¹⁰ The threat of a CI-MDD (a reactive referendum or a proactive popular initiative) plays a crucial role in moderating political decisions and shifting the political course even before the gathering of signatures starts. I have called this the paradox of direct democracy (Altman 2013: 622).

force a finer tuning—a synchronization—between party elites and citizens, and serve as institutionalized intermittent safety valves for political pressure” (Altman 2011: 197).

THE IMPERFECT RELATIONSHIP BETWEEN REPRESENTATION AND DIRECT DEMOCRACY

The interaction between both forms of democracy (representative and direct) is far from perfect. A critical analysis of why this interaction is insufficient goes far beyond the fact that representation is “imperfect,” as we already know.

Since CI-MDDs could be hijacked by militant advocates (who could be completely myopic, narrow, egoistic), in some democracies the legislature reserves for itself the right to make counterproposals to be voted on simultaneously with the CI-MDD. In response to a popular initiative in Switzerland, Liechtenstein, or Uruguay, the legislatures are allowed to make counterproposals to the citizen-initiated measure to be voted on simultaneously.¹¹ This vote is held concurrently with the original initiative and implies multiple (at least three) choices for citizens (Measure A [citizens’], Measure \neq A [legislature], and the status quo). In a way, this is quasi–status quo insurance (a legislative weapon to defeat popular initiatives).

In Switzerland, by artificially dividing the “enemy,” legislative counterproposals have sometimes been used to derail popular initiatives. Consequently, the Swiss—perhaps the most well versed on these matters—have approved an improvement to their architecture in order to allow voters to rank their preferences on initiatives and counterproposals. In the latest reform of the Swiss Constitution (1999), Art. 139 (6) stipulates that citizens may vote simultaneously for the popular initiative as well for the counterproposal made by the legislature, against the status quo. In a separate question, citizens may also indicate which drafts they prefer (in case they voted for two of the proposals against the status quo).

But even in the rare context of the existence of legislative counterproposals, it does not mean they will be activated to defend the “median” voter, or a “reasonable” solution for the political contentious brought by the original initiative.¹² If we agree that legislators want to

¹¹ In Switzerland this institution dates already from 1891 (Serdült 2014). For more on Swiss counterproposals see Somer (2013).

¹² This is so even in the context of a ‘close-to-perfection’ system of representation (most likely to be found in countries with strict proportional representation based on a nationwide electoral district—such as Israel, Slovakia, or Uruguay. Also, it is interesting to notice that even in the US, where initiatives are

advance their political careers (Mayhew 1974; Cain, Ferejohn, and Fiorina 1987; Cox 1987) and also may fall prey to strong and narrow interests, they may not necessarily take action in response to an executive's plebiscite, a citizen-initiated popular initiative, or a citizen-initiated rejective referendum. Sometimes legislators simply do not care, sometimes they do not want to take a stance (could be costly), sometimes there are partisan interests that undermine each, other using the excuse of the contentious issue, and sometimes the legislators do not feel a real threat coming from the original proposal.¹³

According to my data, since 1980 the Swiss have voted at the federal level on 113 popular initiatives (only 13 were approved, about 11 percent). There were also 20 legislative counterproposals (11 won). Unlike in other places (such as Uruguay), in Switzerland the group pushing for an initiative has the right to withdrawn its proposal, and sometimes the Swiss are left only with the legislative counterproposal. These data show that at least 82 percent of popular initiatives (93 out of 113) did not face legislative counterproposals. Unpacking the reasons why at least 82 percent of initiatives did not face counterproposals is beyond the scope of this paper. However, taking into consideration the extremely low rate of approval these popular initiatives had, it is highly plausible that the legislature did not perceive an eminent danger of their being approved and therefore did not have the incentives to work costly inter-partisan agreements to trigger legislative counterproposals.

Probably, whether or not we witness a legislative counterproposal depends on a series of factors: (a) the institutional requirements the legislature has to overcome to produce a counterproposal (plurality, special majorities, etc.); (b) the ideological distances among the proposal, the median legislator, and the median voter (if the proposal is closer to the median voter than the status quo, then the chances the legislature would advance a counterproposal is higher); (c) whether legislators consider that the topic under consideration is relevant, which is contingent also on the requirements to trigger a CI-MDD.

Since it is not necessary for the legislature to defend the median voter, nor the best policy when facing a contentious issue, my proposal is to create *Citizens' Commissions* to offer the

allowed, representatives are expected to pass laws that more closely reflect median voter's preference than those where CI-MDDs are not allowed (Gerber 1996).

¹³ Unlike many advocates of direct democracy and deliberation, I welcome and defend the politics of the representative game, which include, but are not limited to, inter-partisan agreements in the legislature. These are reasonable, expected, and even desirable.

citizenry meaningful political choices when a MDD is triggered. Here, I am going beyond whether decisions taken by direct democratic means are reactionary (Gamble 1997; Lewis 2013) or progressive (Donovan and Bowler 1998): I am pointing to the crucial *quality* of the process and how the discussions that arrive at such decisions are conducted. It is precisely here that *deliberation* ingresses as a safety procedure that can shield regular citizens against perverse use of MDDs (from governments or fellow citizens), and enlarge public views on contentious topics, which—by their very natures—are usually hijacked by legitimate but militant points of view.¹⁴

THE PROMISE OF DELIBERATION: DEMOS OR MINIPUBLICS?

Roughly defined, deliberative democracy is “a family of views according to which the public deliberation of free and equal citizens is the core of legitimate political decision making and self-government” (Bohman 1998: 401). It is based on the basic idea that “democratic systems benefit from the regular practice of deliberation among citizens. Such interaction develops political knowledge, the sophistication of public judgments, political efficacy, and stronger habits of civic participation” (Gastil 2000: 359–60). Thus, in one way or another, deliberative arenas are bound to be institutionalized (Gutmann and Thompson 2004)—I will return to this point in due course.

Dryzek (2001: 651) emphasizes that Cohen’s formulation of deliberative democracy encapsulates the core elements of the literature, that is: “outcomes are legitimate to the extent they receive reflective assent through participation in authentic deliberation by all those subject to the decision in question” (Cohen 1989). Nonetheless, the shape, type, and inclusion scope of the deliberative process is still in debate, even among those in favor of the deliberative process. On the one hand, some scholars, such as Benhabib (1996), support the universal aspect of deliberation (“all those subject to the decision in question”), and the fact that the deliberative process should be extended to those realms where political decisions are taken. On the other hand, many others support the idea of “minipublics” as the deliberation by all those to be bound by democratic decisions can be improved. A crucial question is how to select the members of these minipublics, and the direction a deliberation might take (open/closed, hot/cold, etc.).

Since the times of classical Athens, it is frequently assumed that “[i]t is a widespread but empirically hitherto untested perception that assembly democracy is *the* ideal type form of direct

¹⁴ Of course, there is no consensus on how deliberation makes its way into democratic political theory, nor is there agreement on its necessity (Saward 1998; Shapiro 2003).

democracy but hardly feasible in modern entities” (Schaub 2010). Cohen claims that: “direct democracy is impossible under modern conditions” (Cohen 1989: 30). (Though Cohen talks about direct democracy, his intention is to refer to the demos deliberating rather than to the initiative process as we define it early on.)

Currently there is no political regime in the world that approximates to that Athenian experience. There are, however, many subnational flashes that very much resemble Athens twenty-five hundred years ago. Examples include the Swiss *Landsgemeinde* (Dürst 2004; Reinisch and Parkinson 2007; Schaub 2010; Müller 2007), New England Town Meetings (Bryan 2004; Zimmerman 1999; Zuckerman 1970), or the *kibbutzim* in Israel (Blasi 1980; Oz 1997; Rosner and Tannenbaum 1987; Palgi 2006; Weimann 1991). In these milieus, all members have the right to voice their concerns in face-to-face deliberation, and eventually through a direct vote. What these miscellaneous experiences have in common is “a desire to be inclusive and to discuss all aspects of decisions in a way that stresses equality of participants” (Catt 1999: 39).¹⁵

Unfortunately unequal participation seems endemic to contemporary societies, even within the *Landsgemeinde*, the *Kibbutzim*, or the New England Town Meetings. Actually, “(n)early all forms of political participation exhibit participation patterns favoring high-status persons, and more demanding forms tend to exacerbate that bias” (Fung 2003: 342). Not in vain, in his seminal book Manin reminds us that there was a time where *elections* and *democracy* were clearly at odds (1997).

As convening the entire citizenry to discuss its matters in the town hall becomes unworkable nowadays, the idea of randomly appointing representative groups of citizens has gathered steam. Even Robert Dahl argued in favor of amalgamating stratified randomly selected bodies—a representative sample of the population—into the functioning of contemporary democracies: the “mini-populous” in his words (Dahl 1989: 340–42; 1987). Lottery, like it or not, provides equal opportunities to all members of the demos. But, there is no need to encapsulate ourselves within the borders of Goodwin’s *Aleatoria*, the imaginary nation where absolutely all aspects of life were governed by lot (Goodwin 1992). Lot is just one of the

¹⁵ In recent years, democratic experiments—“innovations” in the words of Smith (2009) or Goodin (2008)—have attracted massive attention. Some of these experiments are quite new, others centuries old—but for some reason forgotten or, at least, considered “outliers.” This list of examples could be extended to include workers’ co-operatives (Pateman 1970; Mansbridge 1980), the Bolivian Municipalities (Goudsmit and Blackburn 2001; Grindle 2000), and the Porto Alegre’s participatory budgeting process (Goldfrank 2006; Cabannes 2004).

potential democratic traditions at hand to invigorate democracy. To tell the truth, lotteries have been around for centuries, from Pericles's Athens to the Renaissance city-states of Florence and Venice and, in our times, from (former) conscription in Argentina to juries in the United States and other countries.¹⁶

There are theoretical and practical concerns regarding these deliberative forums (whatever shape they take). One concern rests on the assumption that consensus is the ultimate objective after a process of deliberation among reasonable people. In a way, the assumption behind this claim is that there is one truth, one right path to follow, and one right solution to pursue (Sanders 1997), and that with all required information, reason, and good-will this solution is going to be found. Whatever the shape the deliberation forum takes, the prototypical ideal decision rule is consensus, and as Reinisch and Parkinson observe "(t)he reason is simple: anything short of consensus means that decisions are carried not by the 'force of the better argument' (Habermas 1975) but by the force of numerical superiority of particular interests" (Reinisch and Parkinson 2007). Of course, as arriving at a consensus becomes virtually unattainable for practical and theoretical reasons, this literature has relaxed this dream towards what some colleagues have called "working agreements" (Steiner et al. 2004; Dryzek 2000, 1990), or "incomplete theorized agreements" (Sustein 1995).

A second concern is that some distortion of representation is perhaps inevitable at these forums, and therefore whatever statement this body makes is bound to be biased. Still, this bias could be the perfect means to a greater goal, such as over-representing certain groups in society (usually the weaker) as a way to equilibrate their disadvantages in other representative institutions. McCormick, for example, explicitly excludes elites—those at the top 10 percent of income—from eligibility for his tribunals (2006: 160). Other scholars look for these forums to be the best mirrors of society possible but take care to ensure certain quotas for particular sectors of society (Dahl, Zakarias, etc.), hoping that with properly designed selection procedures, distortion will be minimized.

A related, but different, point is that participation per se is a complex phenomenon and connects with the nature of human kind and humans' notable differences; e.g. some people are shy while others have self-confidence about speaking in public. Furthermore, there are engrained

¹⁶ On sortition, see Dowlen (2009), Zakaras (2010), Pettit (2010), McCormick (2006). For a detailed analysis of sortition in Renaissance Florence, see Sintomer (2010).

“epistemological” differences among human beings (Elster 1998; Sanders 1997). No matter the milieu, usually those who participate tend to be better educated, richer, and have greater cognitive abilities.¹⁷ It seems that no matter how well intentioned and regulated institutions are, they tend to replicate social inequalities almost universally. High standards of deliberation are needed (Gastil and Richards 2013).

Critics and advocates of deliberative models have advanced a wide array of arguments to strengthen their positions. Depending on the shape and design of deliberative forums (for example, citizen juries, citizen assemblies, deliberative polls), in general, “experience with these processes suggests that, on average, participants develop thoughtful, well-founded judgments that compare favorably not only with general public opinion but also with expert judgment” (Warren 2009).

Within the world of the minipublics, two broad kinds could be identified. First, there are those who advocate for a randomly selected group of citizens who would check, discuss, and complement the existing representative institutions on a constant basis. The second group is composed of those who defend the idea of choosing the same type of randomly selected individuals but on an ad hoc basis (i.e., for particular purposes).

Within those in the first group, they either intend to build a brand new and independent chamber of congress (Leib 2004, “A Popular Branch of Government”; McCormick 2006, “The Tribune Assembly”; O’Leary 2006, “The Assembly and the People’s House”), or transform one of the existing ones (Brighouse and Olin-Wright 2006, “The House of the Lords into Citizens’ Assembly”). Those in the second group, tend to advocate the idea of “flashes” of deliberation when a contentious issue arises. Maybe, one of the most renowned experiences comes at the hand of Fishkin’s *deliberative polls* (1991), but this group is not limited to those polls as we will see.

In general, all these scholars tend to neglect direct democracy or to reduce its scope of action. Such is the case where Leib’s fourth branch of government is thought to “replace the initiative and the referendum; its institution would be established to address many of the shortcomings of those forms of direct democracy” (2004: 12). Yet, McCormick’s tribunes have

¹⁷ See the already classics by Verba and Nie (1972) and Brady, Verba, and Scholzman (1995), among others.

their direct democratic rights limited as they may call just one referendum in the course of their one-year term (2006: 160).

As there are no hard-and-fast rules as to how deliberation operates (Catt 1999) and certainly, it will be highly contingent upon the details of its institutional architecture (Fung 2003), current generalizations on deliberation have necessarily shaky empirical support. Deliberation is still a promise: maybe just a “real utopia” as Olin-Wright (2010) sharply describes. In any case, systematization of the miscellaneous previous experiences is needed more than ever. Yet, previous flashes of deliberative forums provide insight on what to expect if deliberation is well designed, as well as lessons on what to avoid.

FUSING DIRECT AND DELIBERATIVE INSTITUTIONS INTO A COHERENT AND FEASIBLE SETTING

I propose the creation of a “Citizens’ Commission,” a stratified random sample of eligible voters, convened for the purpose of discussing, deliberating, and offering an alternative for a policy question that will be decided in a future popular vote (e.g., initiative, referendum, or authorities’ referendum). This group, through a deliberative process—understood as a free, equal, and open-minded dialogue about a matter of public concern among those affected by the issue (Mendelberg and Myers 2013)—will refine and enlarge public views on a contentious topic and will offer an alternative or an amendment to both sides of the popular vote, whose views tend to be taken prisoner by the militants’ views. Its proposal—the *citizens’ counterproposal*—will be voted simultaneously against the original ballot, similar to the Swiss legislative counterproposal: Citizens will vote on any of the proposals defying the status quo and, in a separate question they may also indicate which drafts they prefer; the draft that obtains the majority of the people’s vote becomes law.¹⁸

The closest example of the proposed Citizens’ Commission is the Oregon Citizens’ Initiative Review (CIR) enabled by Oregon’s House Bill 2895 in 2009.¹⁹ These CIRs are panels that consist of a representative sample of between 18 and 24 registered Oregon voters whose

¹⁸ Of course, in case any of the alternatives receives more than 50 percent of the valid vote, it is the winner.

¹⁹ <http://www.oregon.gov/circ/Pages/index.asbette07>

work materializes into statements included at the official Oregon voters' pamphlet.²⁰ "The Citizens' Statements would complement information found in other parts of the voting guide, such as the explanatory and fiscal impact statements, and provide a nonpartisan alternative to campaign advertisements" (Gastil, Richards, and Knobloch 2014: 64).

However, these CIRs are not intended to offer an alternative to an MDD under consideration. Though Oregon's CIRs broaden public discourse and enrich citizens' understanding of the contentious under consideration, they do not provide an alternative voting option. At most, they offer "statements in favor of and opposed to the measure, each written by the subset of panelists who supported or opposed the measure, and a Shared Agreement statement adopted by a majority of the panelists (14), which ultimately contained a brief comment on the CIR process" (Gastil, Richards, and Knobloch 2014: 64–65).²¹

The Citizens' Commission is to serve as a proxy for society, as juries do (Thomas and Pollack 1992).²² Citizens' presence at the Commission would be compulsory if allotted and, as with the military reserve system of Switzerland, they would be fully paid and legally protected in their regular obligations. They would serve just once in their lives. Thus, unlike Oregon's CIRs, which are funded entirely by charitable contributions,²³ with Citizens' Commissions the state has a crucial role in financing all their work.

Whenever we consign to a group the role of decision making, we obligate ourselves to make choices concerning at least two structural features of that group: its size and its decision rules (Saks 1977). In regard to the latter, most deliberative democrats agree that deliberation must at some point end with a vote; therefore it is critical to have clear idea on the decision rules before the group convenes. Being aware that not every decision rule is innocuous for the results and the process itself (Karpowitz, Mendelberg, and Shaker 2012), the Commission's decisions would proceed using majority rule through secret voting (Mendelberg, Karpowitz, and Goedert 2014).

In regard to size, this deliberative body should be small enough to allow a truly healthy deliberation but large enough to ensure that most relevant views in society will be reflected in

²⁰ Voters' pamphlets are a common practice in other states and countries but are still far from a universal practice (Brien 2002).

²¹ On the quality of deliberation of CIRs, see Knobloch et al. (2013).

²² Note that there is a literature that claims that juries are not greatly representative of society in terms of political preferences (see Huitema, van der Kerkhof, and Pesch 2007)

²³ <http://healthydemocracy.org/citizens-initiative-review/2012-cir-results/>.

it.²⁴ Nonetheless, there is no consensus about the optimal number of people a deliberative body should include in order to optimize decision making. The common numbers in formal decision-making settings including committees and juries vary from 6 to 12. Actually, it is in the jury literature where the effect of size is better analyzed; and size matters, as is shown by the meta-analysis of Saks and Marti (1997).

While a precise number is still elusive and probably will need to vary from place to place, an odd number of members would be preferable—optimally about 21 members for purposes of manageability of group size while still being representative (this figure resembles the size of Oregon’s CIR, Grand Juries in the United States, Canada, and other countries). Also, the number 21 allows for the creation of three parallel seven-member working groups—a number that has been pointed out as the optimal size of a group in order for each member to receive, process, and remember information (Miller 1956).²⁵

As even the purest random selection process could under-represent some groups in society, I mentioned the necessity of intentionally introducing some biases to ensure representation of certain otherwise under-represented interests in the process (e.g., women, indigenous people, ethnic minorities). This is the basis for a *stratified* random sample of citizens.²⁶ It is not intended, however, to give preferential treatment to those who have a closer relationship to the issue. For example, if we were debating affirmative action or women’s reproductive rights, say, we would not over-represent racial minorities and women, respectively. Those particular voices will find their echoes in the policy change defended by the correspondent MDD. The idea of the commission is to ensure the broadest interests of society and not to necessarily support or erode the intentions of those behind a particular MDD.

As soon as the competent authority provides the “green light” to an initiative, referendum or an authority’s referendum, the Citizens’ Commission will be convened. The Commission will

²⁴ Though as a general postulate I, like Fishkin, assert that this group should be “a large enough sample for the responses to be statistically meaningful, but small enough to be practical” (Fishkin 2006), evidently, for the type of work to which the Commission aspires, the statistically meaningful aspect should be relaxed. There is no statistically representative group of any modern society (at least with standard levels of confidence) with fewer than 350–400 individuals.

²⁵ See also Báles et al. (1951).

²⁶ A similar process was applied at the British Columbia Citizens’ Assembly, where one female and male from each electoral district plus two citizens with aboriginal backgrounds were selected. The Final Report of the British Columbia Citizens’ Assembly can be downloaded from http://www.citizensassembly.bc.ca/resources/final_report.pdf. A similar experience was demonstrated by Australia’s Citizens Parliament, <http://www.citizensparliament.org.au>. See also Lang (2007) and Warren and Pears (2008).

have all required backing (staff, including well-trained moderators) and funds to bring in experts and interest groups. It would begin its duties immediately, and it would publicize its recommendation as soon as the official electoral campaign starts.

These deliberative commissions would better distill citizens' opinion, as they are free from partisan or other interests. This is so because the probability of being chosen is similar for all citizens. As these members were not elected and will not participate again in the same commission, they will have no political "debts" nor worries about financing their future political career.²⁷ Nonetheless, an aspect frequently omitted by the literature is what happens if a highly charismatic, well-spoken individual arises from the forum and is seduced by a party machine to run as a candidate in the next election. Though no universal rules apply, members of this commission will not be allowed to run for office during a determinate period of time (which in the United States could be at least five years in order to skip two complete electoral cycles). It does not mean, however, that they will be not allowed to continue with political activities, as one of the aims of the whole idea is to invigorate and refresh representative institutions.

My idea of fusing current democratic institutions with deliberative forums is not new at all; rather it constitutes just a modest improvement on previous exercises. For instance, inspired by the British Columbia Citizens' Assembly, John Ferejohn proposes a new institutional arrangement that has illuminated my reasoning. He advocates for an automatically convened citizen assembly anytime an initiative is proposed "to deliberate about and possibly amend the proposal" (Ferejohn 2008: 212). This citizen assembly will have all needed support and funds, and "It would be expected to take the time necessary to build a level of expertise adequate to allow it to draft an informed proposal for the electorate to consider at a referendum." As the members of this citizen assembly mirror the whole electorate, Ferejohn claims, their amendment will be closer to the median voter. Thus, it is expected that the proposal increases its chances of being approved, and also that it will provide a clear signal that it has not been kidnapped by narrow interests (Ferejohn 2008: 212–13). Gastil and Richards go even further; for them, the deliberative bodies will not only "set policy priorities, draft and fine-tune ballot initiatives, evaluate such initiatives" but also "approve or reject such initiatives" (2013: 255).

²⁷ Even if there is no political or electoral benefit, since they are not "politicians" in the traditional sense, there are still the individual citizen's interests and political leanings. It would be naïve to ignore this fact.

Despite my profound respect for all their proposals, I have some legal and normative concerns with them. In the context of a democracy none has the right to alter the substance of a CI-MDD if it complies with the formal and legal requirements, no matter how abominable the proposal may be.

When someone advances an initiative and turns to citizens' endorsement, it has to be done, almost universally, on the grounds of a clear and explicit proposal. Once the formalities are fulfilled, changing or even slightly altering the contents of the initiative proposal—no matter how narrow or even disgusting the proposal might be—means betraying all those citizens who have endorsed (signed) such an initiative. Let's put it in this way: when we elect a political party or representative, we usually do it based on a somewhat diffuse set of ideas and party platforms that, for sure, have certain flavor or tendency (leaning conservative, leaning liberal, etc.); if I sign a petition for lowering the VAT to 3 percent, the petition says three points, not one or five. I might have substantial reasons why I agree to three points and no other percentage. To make the significance of one number rather than another clearer, we can replace the previously mentioned VAT example with another policy, say pregnancy interruption. There is a substantial difference between allowing it up to three months rather than just one or as much as five months.

Allow me to make an analogy: we know that sometimes party leaders cheat—they get elected through a series of false statements, and once in office they betray the principles they used to get elected (Stokes 2001, 1996; Weyland 1998, 2002; Maravall 1999). Let's assume, for the time being, that we know precisely who the cheaters are and how they are going to advance their narrow and selfish concerns. Is this fact enough to justify creating an authoritative body to reassign the votes these cheaters receive to the other "sincere" candidates because we know the cheater is going to cheat? There is no place for interpretation when the sovereign acts directly. As former Uruguayan president José Batlle y Ordóñez (1903–1907 and 1911–1915) once said: "It is not that the people will never be wrong, but they are the only ones who have the right to be wrong."²⁸

Unlike Gastil and Richards, I do not intend "to *bury* direct democracy" (2013: 261, italics mine) but to strengthen it. Though Gastil and Richards pretend, at the end, to replace direct democracy with deliberative institutions (believing that high-standard deliberation would resolve political conflicts), I do not believe that there is a single truth attainable through deliberation for

²⁸ "No es que el pueblo nunca se equivoque, sino que es el único que tiene el derecho de equivocarse."

all concerns; at most—and if we are lucky—we could reach only “working agreements.” Thus, there is a democratic reason for MDDs to exist.

TWO CASES WHERE CITIZENS’ COMMISSION WOULD HAVE PROVIDED FEASIBLE ALTERNATIVES

At this point the question is whether I should remain on the speculative level (trying merely to promote in-depth discussion), or whether I should risk some connection to reality. Despite all the risk associated with it, I go with the second scenario, trying to bridge some connection to reality. Of course, the reader has to bear with me, as the evidence in favor of the proposal is weak and controversial—not only because it is based on events that never happened (citizens’ counterproposals) but also because I have to provide a clear argument of why a citizen’s commission would have provided a better alternative to the electorate.²⁹

In the following paragraphs I show how citizens’ counterproposals might have helped to pass the legislation and broaden citizens’ views on two contentions that arose in Uruguay concurrently with the national elections of 2009. I have chosen to work with Uruguay because, as previously mentioned, it is one of the very few countries that enable legislative counterproposals. Further, among those, it is a country with more strict standards of proportional representation and, as such, one should expect legislators, *ceteris paribus*, to better represent their constituents (all citizenry).

Concurrent with voting in the general election, Uruguayans also cast ballots in two popular votes on constitutional reforms. One of these votes, triggered by support from within the legislature, concerned the possible extension of voting rights to the enormous Uruguayan Diaspora (that, depending on how it is counted, could constitute up to 20 percent of the electorate). The other was a popular initiative for constitutional reform. The proposed reform would repeal the Expiration Act of 1986 (Law 15,848, or *Ley de Caducidad Punitiva del Estado*). This act, which prohibited state punishment for crimes connected to political activities committed by the authorities during the 1973–1985 dictatorship, had been ratified in a national referendum in 1989. Neither of these two constitutional reforms was approved by the citizens, winning 38 percent and 48 percent support respectively.

²⁹ On counterfactuals, see Fearon (1991), Levy (2008), and Tetlock and Belkin (1996).

Though it is not my intention to get into a detailed analysis of either of these popular votes, it is clear that a very likely reason for their defeat was that both just provided maximalist views on their respective topics: 1) allowing postal voting instead of consulate voting and for all elections instead of some of them; 2) declaring the Expiration Act void, instead of its derogation. Although the proposals would have been, from a purist perspective, the correct thing to do, it was not necessarily the best in political terms.

Voting Rights for the Uruguayan Diaspora

Just three days after the inauguration of the brand new government of the leftist party, Frente Amplio, in 2005, the Executive Power sent a bill to the General Assembly regulating the right to vote for Uruguayans living overseas.³⁰ After the introduction of the bill to the legislature, a legislator from the major opposition force, the National Party, asserted that they would support the idea of Uruguayans abroad choosing from two to three representatives in the House of Representatives, as in Italy, but not the president nor mayors. Others claimed to firmly support the idea of the participation of Uruguayans living abroad, but the implementation of postal votes raised serious doubts and mistrust regarding the secrecy and authenticity of the vote, while others—a minority from the minority—emphasized that Uruguayans abroad will not suffer “the consequences” of the government they choose and many are steeped in the local reality of where they actually live.

After two years in the correspondent legislative committee of the Chamber of Deputies, two reports were addressed to the whole chamber for its deliberation (one from the majority, one from the minority) and revealed profound differences in regard to the topic (August 22, 2007). On October 2, 2007, the bill was finally voted in the Chamber of Deputies, and despite gathering great support (52 out of 62 present in the Chamber of 99), the bill was derailed because—based on Art. 77(7) of the Constitution—it needed a qualified quorum. (Any new electoral law needs two thirds of each parliamentary chamber for its approval.)

As the relationship with the Diaspora has been an entrenched topic in the leftist coalition, legislators of the governing party decided to activate Article 331 (b) for a constitutional reform

³⁰ Uruguay has been preoccupied with its Diaspora since the transition to democracy. Nonetheless, it was only after the economic crisis of early 2000, when thousands of Uruguayans left the country, which already had a significant part of its population overseas, that the Diaspora and its concomitant right to vote became a salient topic (Taks 2006).

on this topic by the citizens' final decision. In order for this measure to pass, 52 votes of the General Assembly (two-fifths of the entire legislature) were required. The governing coalition had at that moment, 69 representatives and senators altogether—many more than the minimum required. On April 1, 2009, the legislators of the governing party, Frente Amplio, passed the motion. In this way, the plebiscite aimed for an addendum to Constitutional Article 77, specifying that Uruguayans eligible to vote are entitled to vote by postal mail in elections, plebiscites, or referendums from any country in “which they reside or are found.”

Most legislators from the opposition were sympathizers with some electoral involvement from the Diaspora at the National Parliament. It seemed that the road was open for a concurrent and milder *counterproposal* on the topic triggered by a legislative minority. An agreement was reached among the largest faction of the National Party (“National Unity”), led by Senator Lacalle, the engine behind the pact, and the other two parties in Congress (the Colorado Party and the Independent Party). The aim of Lacalle and his fellow legislators was to add an intermediate option between the maximalist official stand and the “no”-vote. The “National Alliance” faction of the National Party had purview here as they were the ones who would have provided the votes to reach the required 52 legislators' signatures, and they were the group that derailed an initiative of their copartisan faction, National Unity (UNA), to include a second ballot in the October popular vote on voting rights for the Uruguayan Diaspora.

It is crucial to note that when the faction National Unity finally decided to oppose the second ballot, opinion polls in favor of extending voting rights to the Diaspora reached almost 60 percent of the electorate (and, of course, about 88 percent of parliament, counting both officialist and opposition legislators in favor of some extension of electoral rights for the Uruguayan Diaspora). Yet, had a Citizens' Commission existed for advancing a *citizens' counterproposal*, it would most likely have drafted an alternative located more or less between the maximalist Frente Amplio's position and the somewhat moderate Partido Nacional's positions.

During the very last days of the campaign, strong opponents of the proposal succeeded in shifting the discussion from Uruguayans' right to vote from overseas to how to make sure that these eventual postal votes would remain secret (in a country where secrecy of the vote has been sacrosanct since 1916 and where the postal services are far from perfection). On Election Day of 2009, the popular vote was endorsed by a slim 37.7 percent of the national electorate; it failed. After the strenuous defeat, in 2013 the parliament approved a new multiparty legislative

commission to design a system of “consular” voting for Uruguayan living overseas (bypassing the concerns regarding the secrecy of the vote).

Popular Initiative on the Nullification of the Expiration Law of 1986

The Uruguayan way of dealing with human rights violations during the authoritarian regime (1973–1985) is indisputably one of the best-known cases of transitional justice. This does not mean, however, that it is highly regarded by the international community; rather the contrary. It is, nonetheless, the quintessential worldwide example of the extreme tensions that exist between legitimate and democratic popular sovereignty, on the one hand, and the fundamental principles of human rights justice, on the other.³¹

As soon as the new democratic government took office in 1985, a whole debate on what to do with human rights violators during the military regime gained headlines. The *Ley de Caducidad Punitiva del Estado* (Law 15.848) of December 22, 1986, established that the state inhibit itself from applying its sanctioning faculty to the crimes committed during the dictatorship in connection with political repression (1973–1985). If the Expiration Act was not such an unusual law within the context of transitional justice,³² its future developments certainly were, as it faced a rejective referendum in 1989. The referendum was unsuccessful for the organizers, but it managed to gather 41.3 percent of the vote.

During the subsequent administrations, little progress was made in clarifying cases of disappearance and death, since virtually all complaints were blocked by the executive power of the day.³³ However, as expected, it was not until the 2005 inauguration of the center-left government headed by Tabaré Vázquez (Frente Amplio) that the complaints were beginning to increase in pace. As one of the main icons of the Uruguayan left, Tabaré Vázquez accelerated the search for remains and the clarification of historical facts. The dilemma for the government of the Frente Amplio was either to effectively do away with the law (either by its derogation or its

³¹ See Albon (1995), Méndez (1997) and Zalaquett (1995).

³² The list of countries that passed amnesty laws is quite large. However, there are some emblematic cases, such as Spain, Argentina, El Salvador, or South Africa, that captured the attention of the scholarly community and human rights organizations.

³³ Article 3 of the Expiration Act provides that when a judge receives a complaint concerning the topic, he or she must send a query to the Executive, which has to determine whether or not the complaint is excluded from the law’s realm and to file the case.

nullification) or to keep mitigating and even eliminating its effects (by its interpretation); this last option was the executive's stance.³⁴

Yet, ignoring the recommendations of the Executive, on April 2006, a small but rather radical group within the Frente Amplio (the Partido por la Victoria del Pueblo—the People's Victory Party or PVP) advanced the idea of making a popular initiative a constitutional reform on the completely upfront voiding of the Expiration Law, twisting the arms of majority sectors of the Frente Amplio and the government itself. The Communist Party and the Nuevo Espacio were the first forces within the Frente Amplio to adhere. This position was also backed by other social organizations, such as the national labor organization, but not by the majority of the Frente Amplio. A campaign to collect about 250,000 signatures (10 percent of citizens enrolled in the civic electoral registry) began.

The campaign was based on a slogan “For the annulment of the *Ley de Caducidad* and to end the impunity embodied in the law. No more State terrorism.” Evidently, this wording was not broad enough to allow for concessions and political bargaining; on the contrary, it turned it into a stark black-and-white choice. Thus, pushing for the maximalist position resembles what Manweller call the “strategic error ideological purists make. Purist groups tend to suffer from the *Iron Law of Oligarchy* (Michels 1999 [1911]), which pushes the core leadership of an initiative campaign farther from the values of the group they supposedly represent” (Manweller 2005: 13).

At the apex of the debate, at least four very different positions were in the public compass: 1) status quo, 2) interpretation, 3) derogation, and 4) annulment of the Law. All kinds of legal arguments were under consideration. Maybe the most crucial was that, for many, laws could not be annulled, since all the effects produced by that particular law would be considered void, which could foster the loss of rights and legal uncertainty.

Although the voidance of the Act would have been, from a purist perspective, the correct thing to do, it was not necessarily the best in political and legal terms. Regardless of the Expiration Act's glaring defects, approving the initiative would have generated enormous tensions: criminals in prison could be eligible to be freed simply because the Expiration Act was

³⁴ In general, the new government of the Frente Amplio interpreted the scope of the *Ley de Caducidad* as only limited to violations of human rights committed by the military government after the coup of June 1973 and within the national territory. This interpretation opened the possibility of legal action against some members of the armed forces in connection with crimes committed before the coup or beyond borders, even though they were committed between 1973 and 1985. Thus, many cases earlier rejected got the “green light” from the Executive and were re-opened, and dozens were incarcerated.

indeed used and taken into consideration by the judges for their incarceration. Ironically, they claimed that if the popular initiative was approved, it would potentially benefit exactly those whom it sought to punish. This did not happen.

On Sunday October 25, the popular initiative for the voiding of the Expiration Act received 1,090,859 votes within a voting universe of 2,303,336 votes (48 percent). Had a citizens' commission existed and been convened for advancing a *citizens' counterproposal*, it would possibly have advanced an alternative to the ballot. Probably it would have advanced a milder proposal, closer to the median voter, such as *derogation* of the Expiration Act instead of its annulment.

CONCLUSION

Acknowledging that MDDs could fall prey to narrow and egoistic interests (regardless how legitimate they may be) and that legislatures do not always have the incentives to articulate responses to these interests, I propose a hypothetical reform: any time a popular vote (e.g., initiative, referendum, or authorities' referendum) is held, representative and direct institutions should be supplied with a stratified random sample of eligible voters convened to advance *citizens' counterproposals*. This original institution would discuss, deliberate, and offer an alternative for a policy question that is to be decided in the near future; it would refine and enlarge public views on a contentious topic, providing meaningful political choices and strengthening democratic quality—"improving the quality of public sphere," as Fung puts it (2003).

Though for many scholars the three streams of democratic theory (representative, direct, and deliberative) seem, *prima facie*, to be at odds, I do not attempt to justify the replacement of either representative or direct democracy or even to dilute them at all—on the contrary. Along these lines, I fully endorse O'Donnell's words: "in contrast to what some proponents of 'deliberative democracy' argue, I do not think it is a good idea to propose it as a substitute for the institutional mechanisms [...], nor as normative model which to judge the latter" (O'Donnell 2010: 137–38). Yet, both representative and direct democracy have shown enormous weaknesses, and this proposal was aimed as a modest contribution to ameliorating those shortcomings.

Intuitively, someone could perfectly well think that creating a separate body with the power to produce counterproposals to a MDD, could be confusing for the electorate and a waste of effort. In this paper, I have explained why strong legal and normative concerns should be raised when it is proposed that a nonelected body would make alterations to the original proposals.

The two Uruguayan cases show that no matter how proportional or well-represented citizens are in the legislature, legislators do not always pursue the public good or the moderate policy, and—certainly—citizens' proposals are not always reasonable. There is always a good chance that, for various reasons, the menu offered to the citizens will be unpalatable. There is more than enough room to equilibrate direct and representative models of democracy with a deliberative body.

I claim that *citizens' counterproposals* are a way to fuse these diverse visions into a coherent setting that will help to invigorate citizen awareness, involvement, information, and participation. If this is correct, then, the proposal will also strengthen both representative and direct democratic institutions.

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