Response

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It is a pleasure to respond to such a thoughtful set of comments on my book Democratic Rights: The Substance of Self-Government. Collectively these essays are helpful in thinking about how `the value theory of democracy', or what I will abbreviate as `value democracy', and its framework for thinking about rights, `democratic contractualism', can be clarified and extended. The criticisms in the symposium broadly fall into two categories. The first kind of criticism suggests that value democracy imports too many substantive values into democratic theory. As Alex Zakaras and Eric Beerbohm argue, value democracy deemphasises the centrality of democratic procedure and the views of actual citizens. By contrast, the second kind of criticism agrees with my view that democratic theory should include substantive values, but it argues that these values should be strengthened in various ways. Either they should be more robust in their content, as Loren King and Jim Wilson write, or they should be afforded greater protection by the courts, as Alon Harel argues. The comments from these two flanks are complementary in allowing me to explain why I believe that my theory strikes the proper balance between substantive and procedural rights and values. I begin my response by defending the framework of Democratic Rights from the first, proceduralist set of criticisms. Here I am aided by the extremely helpful and insightful commentary by Anna Stilz. I then defend my account against the second, substantivist flank. Since the proceduralists and the substantivists represent two of the prevailing approaches to democratic theory, answering their criticisms helps to establish value democracy as a distinctive view.

1. Is the Value Theory too Substantive?

Zakaras

Alex Zakaras criticises value democracy for being too insensitive to the role that utilitarian reasoning might properly have in a democracy. In particular, he thinks that utilitarianism might have a large role in democracy when affirmed by actual `persons' as opposed to idealised `citizens'. Imagine, he writes, that a particular society is composed of persons who are predominantly utilitarian. Such a society's democratically legitimate framework for assessing policy would be utilitarian, since a majority endorses the principle of utility. Despite the historical association between utilitarianism and democracy, I am unconvinced that utilitarianism has the role Zakaras suggests for it in democracy, even when it is endorsed by a majority of citizens. The problem is that it can require results that are at odds with the core values of democracy and the entitlements of democratic citizens. For example, I argue in chapters one and two of Democratic Rights that it would be undemocratic for a majority to abandon rights of free speech even when doing so might lead to good overall consequences. Utilitarianism, although distinct from majoritarianism, also might justify revoking core democratic rights. Notoriously, utilitarians have a problem explaining how to maintain rights when violating them would maximise utility. On Zakaras's account, however, a utilitarian democratic majority might choose to abandon core democratic rights if utility would be maximised by doing so. While Zakaras could reply that he would reject restrictions on free speech, utilitarian majorities might endorse them. Despite our tendency to want to defer to the views of actual people in democracy, such a society has endorsed policies that undermine the

political autonomy of citizens and violate their right to debate what is just for society and good for their plans of life. This suggests that even when utilitarianism is widely endorsed, it might be at odds with democracy in some instances. In his comments, Zakaras's wider suggestion is that we should endorse a less substantive and more procedural theory of democracy than I offer. His proposed procedural theory would be, from his perspective, more inclusive of the views of actual people. The difficulty is that since Zakaras takes the views of actual people as the ground of democracy, I am not sure what basis he would offer for preserving democratic procedures if actual people rejected them. For Zakaras to justify limits on enacting the wishes of actual people when they undermine democratic procedures, he needs to turn to an account of the substantive values of democracy. Zakaras could argue here that these substantive values require deferring to the wishes of actual people. I agree with this claim and argue for it in Democratic Rights. My point is, however, that once we identify substantive values as the basis for participatory rights, we also have reason to limit the outcomes of this participation when these values are violated. The substantive values justify protecting individual rights, including the right of democratic participation, even if these rights are rejected by actual people. The first chapters of my book are devoted to showing why, once we acknowledge that even a procedural theory of democracy relies on democratic values, we are on our way to a substantive theory. I call my version of this substantive theory the `value theory of democracy', or to abbreviate, `value democracy'. This theory claims that three values underlie democracy: equality of interests, political autonomy, and reciprocity.

A final thought is that there is a potential common ground between our views. In his important book, Individuality and Mass Democracy, Zakaras upholds the importance of `democratic individuality'. We are both inspired by George Kateb's (1992) idea of democratic individuality. But I believe that, to think of democracy as properly valuing individuals, we should move beyond procedure to a more substantive model that protects individual rights on the basis of democratic values. This is an issue, however, for another exchange.

Beerbohm

Eric Beerbohm hopes to rescue proceduralism from the substantive aspects of my value theory of democracy. He brings two important criticisms of my view. These criticisms present a case for a procedural theory of democracy, arguing against my principled definition of democracy as both rule `by and for' the people. For Beerbohm, this principle is too thick; he argues instead that democracy should be understood as rule `by' but not `for' the people.

Beerbohm challenges my account of Larry Legislator. As I describe him, Larry is imprisoned but allowed to participate in democratic government. He can receive information from the outside world, vote on legislation, and contribute to public debate. Stilz in her contribution helpfully adds to the hypothetical by asking us to imagine that all citizens are periodically imprisoned. This focuses the example by removing the use of special laws to imprison Larry in particular. What is odd about the situation, I suggest, is that it grants Larry political freedom but arbitrarily denies him personal freedom. I argue that the example helps to draw out why respecting the right to participate also requires

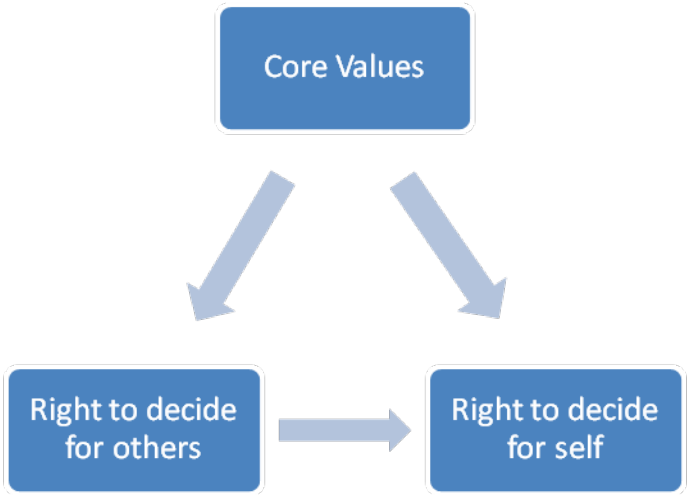
respecting some rights against the kind of arbitrary treatment that violates the core values. In short, the example helps to show why procedural rights are insufficient for democratic rule. There is a problem with a theory that would support Larry's ability to rule others but not himself. On my view, the burden to justify the right to make decisions for oneself is weaker than the burden of justifying the right to make decisions for others. I suggest therefore that values that support the latter also support the former.

Beerbohm thinks, however, that a proceduralist can answer this problem without relying on a substantive theory. What is wrong with the legislator's imprisonment, according to Beerbohm, is that Larry lacks the right to participate in face-to-face politics. While I agree that deliberation is an important part of law making in a democracy, I am not convinced it requires face-to-face law making, and I am less convinced that the lack of personal interaction is what is driving our intuitive discomfort with Larry's predicament. Beerbohm's explanation does not capture what is problematic about Larry's situation. Imagine an altered hypothetical in which Larry and his other imprisoned legislators are able to deliberate using modern video conferencing and they are released for face-to-face meetings on occasion. On Beerbohm's view there is nothing undemocratic now about the hypothetical. But I believe the example retains the same intuitive force. The legislator's confinement still strikes us as odd because he and the others have the ability to rule others through deliberation but they are denied the right to make their own basic decisions.

Anna Stilz in her comments nicely clarifies how the Larry Legislator example helps to develop the relationship between procedural and substantive rights in Democratic Rights. As noted earlier, I use the Larry Legislator example for two reasons:

first, it shows why endorsing participatory rights normatively commits us to a theory of substantive rights, and second, it demonstrates why substantive rights and procedural rights are grounded in the same values. Some readers might misinterpret the Larry Legislator example to mean that substantive rights are only valuable as preconditions for democratic procedures. But my claim is not that we need substantive rights solely to enable participation in democracy. After all, Larry Legislator can participate fully in politics. Instead, the example demonstrates that it violates the ideal of self-government to limit substantive rights, even if participatory rights are respected. The take away point from the example is that a right to participate normatively entails substantive rights, a different point from the defence of substantive rights as empirical preconditions of democracy. Moreover, the example is not meant to provide the only argument for substantive rights. The other argument is that both procedural and substantive rights have their foundation in the core values of reciprocity, political autonomy, and equality of interests. Thus, there are two arguments for substantive rights: they are based in the core values, and they are normatively entailed by respect for procedural rights. This gives the value theory of democracy a triangular quality. (diagram)

Co-originality in the value theory of democracy



Beerbohm also criticises the `for' the people aspect of value democracy because he thinks it commits me to the possibility that a dictatorship may be partially democratic. For instance, consider a dictatorship that protects substantive rights such as free speech, conscience, and privacy but that violates the right to vote. Beerbohm argues that this dictatorship would lack any democratic credentials. He criticises value democracy for implying that the dictatorship would contain some democratic elements in its respect for certain substantive rights.

I agree that such a society would not be democratically legitimate. On my view democratic participatory rights are a necessary condition of democratic legitimacy. Rights to participate are a threshold requirement that must be met by any regime that hopes to achieve democratic legitimacy. But while these procedural rights are necessary for democratic legitimacy, they are also not sufficient for democratic legitimacy. Substantive democratic rights are also required for any regime to attain democratic legitimacy. Thus it is not an objection to my view to claim that substantive rights are all that is needed for democratic legitimacy. Do regimes that lack participatory rights but

that have substantive rights have any claim to be acting democratically? I think the answer to this question is no. It does not follow from the claim that a fully legitimate regime must protect substantive rights that any regime that protects substantive rights has democratic credentials. At best such a regime would respect, though in an anaemic way, some aspect of the core values and in this sense would be proto-democratic. For instance, we often refer to Hobbes as a proto-liberal because of his individualism, even though he offers at best a limited account of rights. Similarly, the dictatorship that respects some democratic rights might be thought `proto-democratic'.

Stilz

In her sympathetic comments, Anna Stilz helpfully builds up both the value theory of democracy and democratic contractualism. Her comments are insightful, and I am grateful for the constructive points that she adds to my view of democracy.

In addition to her very helpful discussion of Larry Legislator, I find Stilz's extensive comparison between the value theory of democracy and Habermas's (1996) theory of co-originality to be especially perceptive. Stilz suggests that Habermas is closer to my position than I acknowledge. But she goes on to show why the value theory is a superior theory of co-originality to the one offered by Habermas. In her reading, co-originality in Habermas is not based on an ideal procedure alone, but on the co-originality of procedure and the `form of law'.

Although Stilz is attempting to treat both my view and Habermas's sympathetically, I believe this reading may weaken Habermas's view more than the procedural reading. In particular, as she acknowledges, substantive rights for Habermas

appear to be grounded in a formalist account of the meaning of `law' and an account of an ideal democratic procedure As I understand it, the account of law is meant to serve as a distinct ground for individual liberties; when this account is combined with that of the ideal procedure, the result is a more robust conception of substantive rights. But I believe that the formalist theory of law cannot generate the kind of protection of individual liberty that Habermas claims it can. It therefore adds little if anything to the theory of the ideal procedure when it comes to generating substantive rights. I think formalist theories of law are rightly thought to be too thin to derive a satisfactory account of individual liberty. There are many examples of policies that might qualify as formal law but still violate rights. For instance, draconian criminal measures that are explicitly cruel and unusual might be drafted in the form of law by being public and general rules that apply to all citizens. As Stilz points out, when rights are grounded only in the definition of law rather than in substantive values, they may not offer adequate protection against state actions that follow the legal form of public and general rules. In sum, the `form of law' is too weak to serve as a ground for individual liberty and does little when combined with the ideal procedure to generate substantive rights. In contrast to Habermas, I argue that the notion of the rule of law can help to elucidate the substantive principles that underlie substantive and procedural rights. But my account places these substantive values at the centre of a democratic theory. Rights and procedure are co-original in the specific sense that they are grounded in the same values.

Habermas's avoidance of substantive values as at the root of procedural and substantive rights can be contrasted with Lon Fuller's (1969) conception of law. Despite his association with formalist theories, Fuller in fact appeals to the independent

substantive value of dignity to ground the rule of law (Waldron 2011, Brettschneider, 2011). Fuller therefore endorses a crucial aspect of the value theory. While Fuller does not expand his account to inquire into the democratic credentials of this value or its implications for more robust substantive rights, at least he sees, unlike Habermas, that the rule of law needs to be grounded in an independent substantive value. This value must reach beyond the form of law or pure procedure if it is to serve as the basis for the rights of due process, such as rights against retroactive laws or bills of attainder. Although Stilz attempts to strengthen Habermas's view, her contribution highlights why a theory of co-originality must ultimately be grounded in a value theory of democracy. I am grateful to her for pointing to the advantages of my theory over Habermas's own descriptions of co-originality in a way I wish I had been able to include in my book.

2. Is the Value Theory not Substantive Enough?

King

Loren King agrees with much of my basic framework, but adds that value democracy should be expanded to embrace some form of perfectionism. It is not enough to protect rights against coercive state intervention, says King. We must also recognise that some actions within the protected sphere of rights are problematic from the perspective of value democracy. I agree with much of King's argument about the need for the core values to apply beyond laws and other acts of state coercion. I disagree, however, that this makes my theory perfectionist.

In a sense, King is bringing a version of what is often thought of as a `paradox of rights' to bear on my view. He ask whether value democracy `says nothing' when rights

protect beliefs that oppose the fundamental values of democracy. For instance, I defend a right to privacy, but what if this right allows for family relationships that undermine the core values? As King puts it, a married couple might vote egalitarian but have a very inegalitarian family life. If democratic values ground rights, what is to be done when protected actions violate the very values that give rise to these rights?

To answer King's question, I think it is first important to distinguish between two kinds of cases that he raises. In one case, the inegalitarian relationship threatens the ideal of free and equal citizenship. For instance, if the parents in King's example are teaching their children that women are always meant to obey men, there does seem to be a puzzle for my theory. The parents may not themselves vote on the basis of this belief in public decision making, but their children cannot be expected to show a similar restraint. But not all impacts on equality or autonomy are similarly problematic. In a second kind of case, a family relationship may be inegalitarian without threatening the ideal of equal citizenship. For instance, a couple might not make all their decisions about where to vacation jointly if they regard that as the proper task of a husband. Similarly, some people might not be autonomous in their decision about what to do on the weekends (they might routinely just watch TV without thinking about it) without undermining political autonomy. On my account, the puzzle only arises when it is the political values of equal citizenship that are threatened in private.

I do think the state has an obligation to address practices and even expressions of belief at odds with the core values when they take place in the `private' spheres of the family and civil society. King rightly notes that the value theory cannot simply be indifferent to these kinds of conflicts with the core values of democracy. But the fact that

the value theory cannot be silent about these matters does not mean the state is entitled to coerce. Democratic substantive rights such as privacy protect even practices and beliefs at odds with the core values from coercion. I argue elsewhere, however, that the state has a role in its expressive capacity in seeking to convince persons to change their minds when they express values at odds with the core values of democracy (Brettschneider 2010a and 2010b). Although the state sometimes coerces, it does not always act in this capacity. It sometimes attempts to express its own values. For instance, the United States federal government expresses civil rights values when it declares public holidays such as Martin Luther King Day or proclaims Black History Month. When it encounters practices and beliefs at odds with these values, the state might attempt to persuade on behalf of free and equal citizenship. At the same time, two limits to what I call `democratic persuasion' are essential to respect. First, democratic persuasion should be expressive and not coercive. Second, it should aim at protecting free and equal citizenship, and not at promoting sectarian or comprehensive doctrines. In the articles I have mentioned, as well as a book in progress, I outline how the state might seek to persuade citizens to change viewpoints that are at odds with the core values, especially those that are hateful, misogynistic, or racist. In pursuing democratic persuasion, the state should use its expressive capacities, including its spending power, while respecting rights of free expression, association, and conscience.

I take it that King would point out that the value theory of democracy shares much with liberal perfectionist concerns to promote equality and autonomy. But my account is not perfectionist in its conception of these values. Democratic persuasion aims to protect the values that underlie rights, not a perfectionist conception of the good or of

excellence. Democratic persuasion promotes the ideal of free and equal citizenship while respecting the rights of citizens. In addition, while certain perfectionist theories might be used to limit rights, I aim to demonstrate how the reasons for rights can be promoted even when rights protections are extended in the most robust sense (Brettschneider 2010a and 2010b).

Harel

In their contributions, Zakaras and Beerbohm claim that the value theory places too little weight on the importance of democratic procedure and too much on substantive rights. By contrast, King argues that my account of democracy should be made more robust, to the extent of embracing a form of perfectionism. Similarly, Alon Harel suggests that my account gives too much weight to democratic procedures. But whereas King wants to make democratic values more perfectionist, Harel seeks to bolster the role of courts in democracy. Focusing on my final chapter, Harel thinks, contrary to my view, that there is no loss to democracy when majoritarian legislation is overturned in the name of protecting the core values. While we agree that in some instances judicial review is justified, Harel resists my view that in many cases concerning rights this action must be balanced against the loss to the core values that comes from overriding majoritarian legislation. Harel also argues, contrary to my view, that the court is a uniquely privileged institution in protecting democratic rights.

Harel starts with an intriguing thought experiment. Imagine that I have a private contract with him entitling me to payment of $100. The state then passes a law that arbitrarily invalidates the contract. On Harel's view, there is no reason to think that there

is any loss to democracy that would come from overturning the law, since it violates my rights and does not serve any of the core values. I agree with Harel about this specific example, but the ad hoc character of special laws makes it a distinct kind of rights violation. I argue in Democratic Rights that special laws violate the most basic democratic requirements of the rule of law. Therefore such a policy has no weight because it does not respect even the most basic principles of the rule of law.

Harel anticipates this objection, but he thinks that, even when a statute satisfies the basic elements of the rule of law, there is still no loss to democracy when a supreme court overturns it for violating rights. Indeed, as I read him, if a basic right is violated by a majoritarian democratic procedure, the legitimacy of that procedure is entirely undercut. I think, however, that not all rights violations are of this kind. The procedural legitimacy of the decision may not be entirely undercut if the rights violations respect basic precepts of the rule of law. Although I acknowledge in the final chapter of my book that a supreme court should sometimes strike down the results of democratic procedures that threaten democratic substantive rights, I also argue that such cases still involve some loss to democracy. Laws passed through democratic procedures require widespread debate and discussion and substantial democratic engagement from many people. Democracy asks that citizens participate with a strong but defeasible presumption that the results of their deliberations will stand. But the recognition that this presumption can be defeated does not mean that there is no loss to the value of their participation when laws are overridden. This loss to democracy when judicial protection of rights is necessary can be contrasted with the ideal case where democratic majorities protect rather than violate substantive rights. In sum, unlike Harel, I would distinguish between two cases: the

justifiable overturning of policies that do not respect the most basic precepts of the rule of law, and the justifiable overturning of policies that do have the status of law. I agree with Harel that the former case need not involve a loss to democracy, but I think that the latter does entail a loss to the democratic ideal by undermining the political autonomy exercised by the wider citizenry in majoritarian decision making, which is one of the core values of democracy.

My view that the right to participate can be overridden but that in such cases there is a loss to our participatory rights has two implications. First, we should give at least some deference to mistakes by democratic majorities if they do not violate rights or if it is unclear what remedies might come from overturning democratic majorities. Furthermore, not all violations of substantive rights are sufficient to justify judicial intervention. Second, even when we do override democratic majorities, we must at minimum recognise that something is lost when we overturn their decisions. If the core values give citizens a right to decide for themselves, it follows that they might use this right to make bad decisions.

My exchange with Harel again brings out a similarity between my own view and Jeremy Waldron's (1999) position, which is suggested by Stilz's comments. Although Waldron and I disagree about the limits of deference to democratic procedures—he is adamantly opposed to overturning majority decisions through judicial review—I agree with him that there should be some deference even to the bad decisions of democratic majorities as a way of respecting the value of political autonomy, which is exercised in majority voting and deliberation. Where I differ with Waldron, however, is in recognising the harm from upholding laws that violate the core democratic values might outweigh the

loss to democracy of overturning legislation. But when such laws are overturned, we must acknowledge the loss that comes from denying citizens the right to decide and placing those decisions in the hands of courts. A theory of judicial review should have some modesty about overturning laws passed by majorities. The balancing approach in Democratic Rights grants such modesty.

Harel asks whether my chapter offers a distinct role for a supreme court in democracy. I want to note that my chapter on judicial review begins with a question of non-ideal theory rather than one of institutional design. It assumes the existence of a supreme court with the power of judicial review. The court then asks on solely democratic grounds whether it should strike down a law that was enacted by procedural democracy but that violates substantive democratic rights. But a supreme court faces other questions aside from the question of what is the most democratic decision, and I agree with Harel that there might be other values the court should consider in its ruling. My hypothetical is stylised to get us to think about whether there might be democratic reasons for a court to overturn majoritarian legislation in defence of substantive rights.

Harel also worries that the logic of protecting democratic values against procedurally enacted laws could be applied to other branches of government, such as the executive branch. He would restrict his approach to a right to hearing only to courts. I do not, however, share his reluctance to apply the logic that might justify judicial review to other branches of government. In fact, I would go a step further. A question arises as to whether non-governmental actors, such as in civil society, might have claims to advance democratic values by using civil disobedience to resist procedurally enacted laws. I am not embarrassed by these implications, which are also found in the

Jeffersonian view of `departmental' constitutional interpretation. On this view, no one branch of government or `department' has a monopoly on constitutional interpretation. All of the branches of government have a right to interpret the constitution. What I find attractive about this view is that it suggests that the core values of a constitutional democracy cannot be realised by any one institution. In Democratic Rights, I similarly embrace the idea that there are democratic rights independent of democratic procedure, and that no single institutional actor has a monopoly on recognising when these rights have been violated. For example, an executive may veto legislation that violates democratic rights both because the veto is part of the democratic procedure and also because it upholds substantive democratic rights. Such cases, like judicial review, might involve balancing substantive and procedural rights. More radically, though I do not make this argument in the book, I also think that all citizens, not just those with official power, can appeal to procedure-independent democratic values as the ground for civil disobedience against laws that violate democratic rights. In short, the defence I present of judicial review that aims to protect rights is compatible not only with the notion of departmentalism but also with a version of popular constitutionalism. Because the core values serve as the standard for evaluating rights violations, and because these values are independent of any particular institution, no single political actor has a monopoly on discerning when the core values and the ideals of democracy have been violated. I therefore resist Harel's call for an institution-specific defence of judicial review.

Nothing, however, in my defence of departmental review to protect constitutional rights suggests that the other departments of government cannot make mistakes when they seek to protect basic rights. I take it that, just as the court can make undemocratic

decisions, so too can the other branches of government. The value theory of democracy places the legitimacy of either departmental or judicial review not in the hands of any single institutional actor, but in the substance of decision making and whether it respects the democratic values.

Wilson

Jim Wilson raises an interesting question about how to characterise my account of punishment in Democratic Rights. Specifically, he asks whether my own account is retributivist. In my chapter on punishment, I am concerned to distinguish my approach from traditional retributivism, which justifies punishment on the basis of moral guilt and desert. By contrast, I propose a democratic theory of punishment that focuses on the conditions for the government to have the legitimate right to punish. I emphasise the need to justify who is doing the punishing as much as who is being punished. I thus offer a political theory of punishment, instead of a traditional jurisprudential account of the morality of punishment.

With these caveats, I am sympathetic to the suggestion that my account can be characterised as a distinctly political conception of retributivism. The political concept of the person, or in my terms democratic `citizenship', might be thought to entail an account of responsibility and desert that helps specify the rights of the criminal as a citizen. But value democracy would have to offer a distinct account of desert and responsibility from the perspective of democratic values, not morality as a whole; it would ask what `citizens' were owed or deserved, not what human beings generally deserve. Such a democratic theory of punishment, if further developed, would differ from traditional

retributivism in stressing why certain rights are retained in virtue of the criminal's status as a citizen, and not in virtue of his or her particular character traits or status as a human being. Even when persons are properly regarded as morally reprehensible because they have committed crimes, on my view they still retain rights as citizens. It is a strength of the value theory of democracy that it can insulate the rights of citizenship from moral disapprobation. Unlike traditional retributivism, the value theory can thus make sense of our intuition that even those who have committed the worst crimes cannot be treated in a cruel or unusual manner, because they retain some basic rights as citizens.

Given the previous set of caveats, I agree with Wilson that my theory might be characterised as a form of retributivism, albeit a non-traditional one. My account is distinct from some retributivist accounts in that it does not appeal to a notion of desert based on a comprehensive notion of personhood. This makes my theory distinct from accounts of retributivism that go beyond a political conception and proceed to justify punishment from morality more generally, rather than from political morality. To the extent that Wilson's reading of me as a retributivist avoids a comprehensive conception, an ambition he acknowledges, I am sympathetic to his characterisation.

A response to Wilson's views regarding my contention about the incompatibility of democratic contractualism and capital punishment is also in order. Wilson attempts to draw on Rousseau's argument about the legitimacy of capital punishment to argue against my account of the death penalty. As Wilson sees it, Rousseau believes that the criminal can consent to die ex ante at the moment of the contract for crimes he or she may commit ex post. Regardless of Rousseau's view, however, democratic contractualism does not offer such an ex ante/ex post understanding of justification. In contrast, I argue that

justification to citizens is not meant to be an activity that can occur at a particular time or in a position of an initial contract. Instead, the notion of justification to citizens is informed by my account of democracy's public reason and the inclusion principle. But these principles are not time bound. I argue from these principles that citizenship can never be revoked as punishment. I suggest, moreover, that if citizenship can never be revoked as punishment, the death penalty cannot be justified because continued citizenship requires continued life. Given that it is impossible to execute a defendant without denying his or her status as a citizen, capital punishment cannot be justified. In making this argument I draw from Justice Brennan's contention in Furman v. Georgia that the Court's prohibition on stripping citizenship as a punishment also commits it to striking down capital punishment.

This argument against capital punishment is distinctly one from political morality, proceeding from a political idea of citizenship to a robust substantive right against capital punishment. It exemplifies value democracy's theory of punishment. Unlike traditional retributivism, the argument is not grounded in a comprehensive doctrine, and unlike deterrence theory, it is not based on preventing future crime or increasing utility. Value democracy thus offers a third approach to punishment that retains retributivism's advantage of rejecting the punishment of the innocent at a principled level, while basing that rejection on one's status as citizen.

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