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On the Co-originality of Liberalism and Democracy: Rationalist vs. Paradoxicalist Perspectives

Jeffrey Edward Green
University of Pennsylvania, USA

Abstract

When the commitment to liberal rights conflicts with the commitment to democratic procedures, which side ought to prevail? Whereas rights foundationalists hold that rights trump procedures and democratic positivists hold that procedures trump rights, theorists of co-originality affirm both rights and procedures as coeval, equally valid commitments within a liberal democracy. But the notion of co-originality itself can be interpreted in two different ways: either in a rationalist form (as the idea that rights and procedures can be reconciled, so that those rights which limit democratic majorities are understood as being required by the very meaning of democracy itself) or in a paradoxicalist form (as the idea that rights and procedures do inescapably conflict, with neither side having primacy, but such conflicts are understood as conducive to salutary democratic goods like diversity and ongoing activism). Taking Corey Brettschneider and Chantal Mouffe as key exponents of the rationalist and paradoxicalist forms of co-originality, respectively, this article examines how these two renderings of co-originality ought to be understood in relation to each other. After elaborating the implicit critique each account makes of the other, my ultimate point is that one should understand Brettschneider and Mouffe's alternate forms of co-originality as themselves being co-original. On the one hand, I demonstrate how Brettschneider's rationalism and Mouffe's paradoxicalism remain in permanent tension, with each side opposed to – yet nonetheless unable to dispense with – the other. On the other hand, I show how their two divergent notions of co-originality, when viewed not in abstract terms as rival political epistemologies but as practical guides for how actual citizens ought to operate within liberal democracies, can work in tandem with each other without necessarily involving direct conflict.

Keywords

Chantal Mouffe, Corey Brettschneider, co-originality of liberalism and democracy, positivism, rights foundationalism, rationalism, paradoxicalism, liberal rights, democratic procedures, liberal democracy, democracy, rule of law

Corresponding author:
Jeffrey Edward Green, University of Pennsylvania, Political Science, Philadelphia PA 02515, USA.
Email: jegr@sas.upenn.edu

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I. The Idea of Co-Originality

One of the genuine puzzles in the contemporary study of politics is the relationship between democracy (i.e., popular sovereignty via authorship of laws and policies) and liberal rights (i.e., the various liberties in contemporary liberal-democracies, like rights of speech, worship, and assembly, which seem to limit what democratic bodies such as legislatures can enact and accomplish). Liberal democracies, as their very name suggests, are committed to both liberty and democracy, but how ought they make sense of this double loyalty? When the two commitments seem to collide – as, for example, when a court strikes down a democratically enacted law in order to protect individual rights – how should citizens make sense of this apparent tension between liberalism and democracy? And in what fashion, if any, can this tension be resolved?

While such questions have long hovered over efforts to understand the philosophical and moral meaning of democracy, neither of what likely are still the two most dominant responses is fully satisfying. One of these – which might be termed, admittedly not unproblematically, "rights foundationalism" – answers that liberal rights are the primary commitment in liberal democracy. According to this view, individual rights find their grounding in some extra-democratic source – whether Reason, God, Nature, or self-evidence – and democratic institutions, such as referenda and popularly elected legislatures, have their legitimate place in a polity only insofar as they respect and reinforce the status of such rights. The American Declaration of Independence, with its invocation of the "Laws of Nature and of Nature's God" along with truths that are "self evident" as the epistemological sources for the basic rights to "life, liberty, and the pursuit of happiness" is an example of the foundationalist approach to justifying rights. More recently, the United Nations' Universal Declaration of Human Rights, which begins with a "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" extends rights foundationalism to the global context. While it is possible to be a rights foundationalist without being a democrat (e.g., Locke), and while it is also possible to say that rights have their source in some extra-democratic foundation but do not properly overrule democratic bodies (arguably the position of Jefferson[1]), as a solution to the puzzle of how to reconcile liberalism with democracy

1. On the one hand, Jefferson appealed to rights as having a divine or natural source in his unsuccessful advocacy for the freedom of enslaved mixed-race children in *Howell v. Netherland* (1770), in his *A Summary View of the Rights of British America* (1774), and in the *Declaration of Independence* (1776). On the other hand, Jefferson also affirmed the will of the majority as "the fundamental law of every society … to which we are bound to submit" (Thomas Jefferson to David Humphreys, March 18, 1789, *The Writings of Thomas Jefferson*, eds. Andrew A. Lipscomb and Albert Ellery Bergh (20 vols, Washington, D.C., Thomas Jefferson Memorial Association), VII, p. 324). Of course, to the extent Jefferson reformulated natural rights in terms of the will of the majority – e.g., "for the law of the *majority* is the natural law of every society of men" ("Opinion on Residence Bill," 1790, ibid., III, p. 60) – then he should be considered a democratic positivist, rather than a rights foundationalist, but it seems that in the context of his earlier writings, at least, the latter designation holds.

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rights foundationalism means that rights trump majorities when the two commitments conflict and that, therefore, the ultimate purpose of democratic institutions is that they tend to be the most conducive to the protection of rights. As Hayek expresses this view: "democracy [is] essentially a means, an utilitarian device for safeguarding internal peace and individual freedom," which accordingly should not be relied upon when it threatens such peace and freedom.[2] More recent liberal thinkers express a similar idea when, for them, democracy is demoted to junior partner status, instrumentally valuable – perhaps even necessarily so – to the primary goal of supporting liberal rights within a polity.[3] The advantage of the rights foundationalist approach is that it makes sense of the widely held intuition that democratic majorities cannot legitimately do anything they wish, but its drawback is its suspect metaphysics: i.e., its grounding of rights in speculative, hard-to-verify, transcendental sources.

By contrast, it is precisely this drawback that is missing in what I take to be the other main approach to the question of how to reconcile liberal rights and democratic procedures: what might be called *democratic positivism* – i.e., the notion that all law, and with it all rights, derive from the enactments of concrete democratic bodies. If a defining feature of legal positivism in general is the assertion that law derives its validity from *social facts* – whether the social fact of utility (Bentham), an imperative command (Austin), or a rule of recognition (Hart) – what is distinctive about democratic positivism, as a subset of legal positivism, is that it is the law's emanation from a democratic process of decisionmaking that validates it and that therefore grounds and specifies the nature of rights in a democratic society. So, for example, a democratic positivist would say that if the Declaration of Independence is an essential document within the long American project of protecting individual rights, it contributes by *constituting*, rather than by *recognizing*, them: i.e., despite its appeal to natural and divine legal authority, to the extent the Declaration derives rights it does so through the actual *agreement* of the Declaration's signers to construct a polity where such rights will be recognized. Among canonical political philosophers, Rousseau might be seen as a democratic positivist, insofar as his argument in the *Social Contract* locates the legitimacy of any particular system of rights in the General Will of a specific political community.[4] And more recently,

2. F.A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944), p. 52.
3. See, e.g., Judith Shklar, *Political Thought and Political Thinkers* (Chicago: University of Chicago Press, 1998), p. 19: "liberalism is monogamously, faithfully, and permanently married to democracy – but it is a marriage of convenience."
4. Even if the General Will is distinct from the actual "will of all," Rousseau still construes it in volitional terms as the will of citizens when they consider the common good within their particular society rather than their own selfish interests. Further, if the General Will in principle is constrained by the requirement that it involve itself only in those aspects of individuals' lives of concern to the common good of a specific polity, democratic assemblies aiming to realize the General Will themselves determine when this boundary has been breached: "[M]an alienates by the social pact only that part of his power, his goods and his liberty which is the concern of the community; but it must also be admitted that the sovereign alone is the judge of what is of such concern." (Rousseau, *The Social Contract*, trans. Maurice Cranston (London: Penguin, 1968), p. 74).

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Ackerman's "humanistic positivism," which understands the source of all constitutionally protected fundamental rights to reside ultimately in special moments of mass mobilization, might be seen as a contemporary contribution to democratic positivism.[5] The advantage of positivism is its epistemology: it need not appeal to speculative, transcendental sources of value beyond human, social practice. In this it reflects that, from the philosophical perspective, one of the great promises of democratic rule is its metaphysical modesty: the process of democratic lawmaking provides a way for an otherwise temporally, geographically, and culturally contingent polity to inject an immanent form of legitimacy into the world through having citizens themselves define and author the standards of value within their political community. But the alleged weakness of democratic positivism is the degree to which, by virtue of this same epistemology, it cannot recognize any – or any sufficient – limits to what a democratic polity might choose to legislate. If all rights have their ultimate foundation in what a political community agrees to do, what if the community agrees to do something profoundly illiberal? Must any chastened, post-metaphysical account of rights risk insufficiently supporting them by providing an ever-present potential grounds for their cancellation?

But not everyone accepts the terms of this dilemma. Over the last generation, in particular, numerous democratic and legal theorists have argued that the decision about whether to privilege liberalism or democracy is a false choice – that, properly understood, liberalrights are not extrinsic constraints on democratic lawmaking, but an essential and(in the words of Jürgen Habermas) "co-original" feature of the democratic commitment to self-government.[6] Corey Brettschneider's important book, *Democratic Rights: The Substance of Self-Government*, provides what is likely the most sustained and considered defense of the co-originality view.[7] Brettschneider usefully distinguishes two forms of co-originality theories. On the one hand, the most frequent variant is to understand liberal rights as "*procedural preconditions* necessary for citizens to participate as equals … in a legitimate democracy" (13, emphasis added). For such thinkers as John Hart Ely, Alexander Meiklejohn, Frank Michelman, Carole Pateman, and arguably Habermas, basic liberties – like privacy, assembly, speech, and others – are theorized not as checks on what democratic legislatures can enact but as prerequisites that must be in place for citizens to take up effective participation in politics and, specifically, processes

5. Bruce Ackerman, *We the People: Transformations* (Cambridge, MA: Belknap Press of Harvard University Press, 1998), p. 92. Ackerman acknowledges that were he a justice in the Supreme Court and a mass mobilization led to the replacement of the First Amendment with the amendment "Christianity is established as the state religion of the American people, and the public worship of other gods is hereby forbidden," he would be obligated to enforce the new constitution and could resist it only by resigning his post and joining "in a campaign to convince the American people to change their mind" (Ackerman, *We the People: Foundations* (Cambridge, MA: Belknap Press of Harvard University Press, 1991), p. 14).
6. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Boston, MA: The MIT Press, 1996), pp. 314, 408–9, 414.
7. Corey Brettschneider, *Democratic Rights: The Substance of Self-Government* (Princeton, NJ: Princeton University Press, 2007). Citations appear in the main text.

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of popular self-legislation.[8] On the other hand, however, Brettschneider, building off of the work of Ronald Dworkin and John Rawls, puts forward a contrasting "value theory" model according to which liberal rights are best conceived, not as preconditions of effective legislative and deliberative practice, but as moral features bound up with the fact that democracy requires that we treat all citizens as rulers. Because the rights we prize exceed the needs of effective and legitimate lawmaking,[9] Brettschneider argues that we do better to ground liberal rights on procedure-independent democratic values that define what it means to treat citizens as rulers. Importantly, a citizen's status as a ruler is not limited to his or her capacity to help author the laws of the land (as supposed by the precondition theorists), but also includes the citizen's role as the *addressee* of the law, in particular the right to "reasonable treatment" (22, 29, 36). Brettschneider stresses three *core values* of democracy which define what is at stake in the moral norm that a democratic society respect citizens' status as rulers in this double sense: *equality of interests* (each citizen should be counted equally in both the formulation and administration of laws); *political autonomy* (understood as the right not just to participate in processes of lawmaking, but to have "a sphere of intimate decision making free from state coercion and public scrutiny" (71)); and *reciprocity* (the norm that laws not only arise from a process where participants take seriously each other's viewpoints but also are justifiable to nonparticipants as affording them reasonable treatment (4, 25, 33, 42)). Liberal rights and democracy are co-original for Brettschneider, then, because rights are just those things that respect citizens in their capacity as rulers in both senses of being participants and addressees of the law.

But if Brettschneider provides one of the most comprehensive and influential attempts to overcome the debate between rights foundationalists and democratic positivists – and to establish liberal democracy as a single, morally unified regime – his *Democratic Rights* is also illustrative of a broader tendency among theorists of co-originality to ignore the possibility of a *fourth* perspective (beyond rights foundationalism, democratic positivism, and their own efforts to affirm the rational reconcilability of liberalism and democracy): namely, the *paradoxicalist* position that liberalism and democracy inescapably conflict, that they cannot be rationally harmonized, and that acceptance of this fact is both true and politically beneficial. While numerous thinkers have either asserted or intimated the paradoxicalist position (Benjamin Constant, Joseph Schumpeter, Carl Schmitt, and Isaiah Berlin – although sometimes with a bias toward favoring liberalism

8. For example, for Habermas, deliberation is at once the vehicle of democratic processes of collective self-authorship and a practice which requires basic liberal rights as preconditions. See, *Between Facts and Norms*, p. 104; also see Habermas, *The Inclusion of the Other: Studies in Political Theory* (Boston, MA: The MIT Press, 2000), pp. 241–3.

9. Appealing to our intuition that a hypothetical system of government that jailed its elected representatives (forcing them to engage in otherwise effective lawmaking from prison) violates democratic values – and also that democracies owe unique obligations of reasonable treatment even to those who cannot participate in lawmaking (e.g., resident aliens) – Brettschneider argues: "The rights of addressees [of the law] are distinct from, and often irrelevant to, political participation, so it would be a mistake to ground these rights in one's willingness to participate in lawmaking" (*Democratic Rights*, p. 32).

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or democracy), it is Chantal Mouffe who stands as the contemporary standard bearer of this tradition and, like Brettschneider with regard to co-originality in the more familiar sense, has reflected on and contributed to it more perhaps than anyone else. Mouffe holds that any alleged rational solution to how to reconcile the two logics of liberalism and democracy is *illusory* (i.e., in truth impossible, though we may delude ourselves into thinking otherwise) – and that, further, such attempts at rational solutions are *dangerous* (insofar as they aim to naturalize hegemonic power relations, thereby blinding us to the exclusionary aspects of any given liberal-democratic society and the vital need for ongoing pluralistic activism within the wider citizenry to contest and reconfigure hegemonic relations[10]). Mouffe argues that rather than impossibly try to reconcile liberalism and democracy, we should instead see any given nexus of these two commitments as a contingent, revisable arrangement which has its roots in power not rationality. Without denying the epistemological pessimism of such a perspective, Mouffe continually returns to the salutary aspects of paradoxicalism, in particular its facilitation of diverse and vigorous forms of political agency – since any particular arrangement of liberal rights and democratic procedures needs to be actively constructed and defended, as well as challenged and opposed, by ongoing political movements. Accordingly, she argues that "it is *vital* for democratic politics to understand that liberal democracy results from the articulation of two logics which are incompatible in the last instance and that there is no way in which they could be perfectly reconciled" (emphasis added).[11]

Insofar as Mouffe's paradoxicalism is itself a kind of co-originality theory – since for her, too, liberalism and democracy are coeval commitments of equal normative value – it deserves to be considered by democratic and legal theorists, like Brettschneider, working within the more familiar, rationalist co-originality tradition. Mouffe is a useful critic of co-originality conventionally conceived, especially in the value theory form advocated by Brettschneider, not just because she provides numerous epistemological and ethical challenges to the notion that liberal rights and democratic procedures can or ought to be fully reconciled – but just as much because drawing Brettschneider and Mouffe into implicit conversation also reveals key ways in which their rival rationalist and paradoxicalist accounts of co-originality can actually work in tandem and in certain respects even be harmonized. If Mouffe exposes and rejects Brettschneider's assumption that the content of liberal rights required by a democracy might be rationally settled in any fixed or final sense (Part II), it turns out that the very logic of her paradoxicalism means that she cannot oppose all philosophical efforts to consider rights in universalist terms nor can she deny the need for any given liberal democracy to operate on the basis of some provisional consensus about the relationship between liberal rights and democratic procedures (Part III). This means that the difference between rationalist and paradoxicalist accounts of co-originality need not be viewed merely in terms of rivalry, nor must it imply that the very notion of co-originality is mired in aporia and controversy. Instead, the difference can be read as

10. Because Mouffe believes in "the hegemonic nature of every kind of social order," including liberal democracies, political activism can only contest, alter, and perhaps improve the hegemonic aspects of political regimes, but such aspects always remain permanent in some form. Chantal Mouffe, *On the Political* (London: Routledge, 2005), p. 17.
11. Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000), p. 5.

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indicating two *complementary* – indeed, co-original – perspectives informing any concrete effort to treat liberalism and democracy as equally valuable moral commitments (Part IV).

II. A Paradoxicalist Critique of Brettschneider's Value Theory

At the heart of the paradoxicalist objection to rationalist co-originality theories is opposition to the goal of defining which liberal rights are necessarily and permanently (and so rationally) required by a democracy. For paradoxicalists like Mouffe, attempts at such definition are triply erroneous: they merely presume, but do not prove, the ultimate reconcilability of liberalism and democracy; they promote a false naturalization of what in fact are contingent and revisable and always exclusionary power relations; and they do not work as a matter of practice. Each of these three concerns can be seen in what I take would be Mouffe's implicit critique of Brettschneider.

First, a paradoxicalist perspective like Mouffe's exposes – and so also challenges – Brettschneider's mere *faith* in the ultimate reconcilability of liberalism and democracy. Brettschneider most clearly reveals this faith when he does not even consider paradoxicalism as a possible, let alone viable, theoretical alternative to his value theory. Brettschneider argues that the very notion of what he calls "constraint" – that liberal rights are irreducible to democracy and so might trump democratically enacted laws that would violate them – is itself indicative of philosophical error: "The common distinction between democracy and substantive individual rights introduces a major normative problem – that of constraint – suggesting that this distinction is flawed" (8). Brettschneider finds it a major achievement of his value theory of democracy, of course, that the problem of constraint is solved (e.g., 10), since for him those rights that rightly constrain legislatures themselves have their basis in the core democratic values. But the paradoxicalist model suggests that if there is a "normative problem" it is not necessarily the conflict between liberalism and democracy but just as possibly the *precipitate assumption* that liberalism and democracy must be capable of ultimate reconciliation and that philosophical efforts to achieve such reconciliation are unambiguously beneficial to the practice of liberal democracy. Closely related to this assumption is Brettschneider's appeal to our *intuitions about what is reasonable* as a legitimate grounds for philosophical argument.[12] While this methodology is widely practiced among both philosophers and jurists, Mouffe's paradoxicalism follows in a tradition of other critics who worry that the appeal to intuition is a kind of pseudo-rationalism.[13] Even if Brettschneider situates his methodology as a variant of Rawls' philosophical procedure of reflective equilibrium

12. See, e.g., Brettschneider, *Democratic Rights*, p. 86: "Any *reasonable* citizen … would recognize that violent action is inconsistent with the desire to reach *universal agreement* because it rules out the security that is the precondition for citizens to pursue their projects as individually autonomous persons … Laws against violent actions therefore are easy for the value theory to accept because they limit acts that clearly conflict with a *reasonable* interpretation of the core values" (emphasis added).
13. See, e.g., Richard Brandt, "The Science of Man and Wide Reflective Equilibrium," *Ethics*, 100 (1990), 259–78; R.M. Hare, "Rawls' Theory of Justice," *Philosophical Quarterly*, 23 (1973), 241–51.

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– and even if the contributions of leading discourse theorists, above all Habermas and Karl-Otto Apel, provide a theoretical defense of the premise of ultimate consensus – a paradoxicalist remains cavalier, though not perhaps altogether unconvincing, in the claim that any premise of universal agreement, and the allegedly reasonable intuitions by which such agreement is reached, are beyond full verification and, so, infused with an extrarational faith in the rational.[14]

Second, however, it is not just the abstract premise of ultimate reconcilability that Mouffe's perspective calls into question, but various particular assertions Brettschneider makes about specific rights being a fixed and permanent feature of any democratic regime. Indeed, Mouffe's paradoxicalism would insist that much of what Brettschneider takes to be settled (and settled in a rationalistic way) is in fact *contingent* and *contestable* and thus *unresolved* and *imperfect*. For example, when Brettschneider treats the secret ballot – "the privacy of the voting booth" (75) – as a permanently established feature of liberal-democratic states, he is in one sense correct (the secret ballot in fact has become standardized, though not entirely so,[15] within liberal democracies over the last 150 years) but in another sense is in danger of treating as rational what is only provisional and justifiably revisable. The point here is not simply to note the long tradition of popular regimes that relied on the open ballot prior to the middle of the nineteenth century, admittedly usually in conjunction with secret balloting as well, but to recognize the possibility of legitimately advocating, as some have done, for the open ballot today: whether because it is more conducive to deliberation, or following Mill because it exposes and therefore checks "a base and mischievous vote," or because it might generate a more participatory form of engagement with liberal democracy than the isolation of a secret vote.[16] Likewise, Brettschneider's apparent acceptance of imprisonment as an intrinsically just form of punishment – "When carried out properly imprisonment balances the need for incapacitation of criminals with a respect for their status as citizens and the maintenance of some rights" (106) – certainly would strike a paradoxicalist like Mouffe as blind both to the genealogy of punishment (e.g., Foucault's claim that prior to the nineteenth century imprisonment was not a standard form of punishment and that Enlightenment prison reformers had objected to such standardization, imagining instead a more diverse set of punishments calibrated to the particular nature of crimes, with imprisonment but one such alternative) as well as to contemporary efforts to challenge the norm of imprisonment on

14. On Brettschneider's largely unsubstantiated assumption about the validity of "reasonableness" as a compelling form of argument, see Loren King, "A Democratic Right to Privacy: Political or Perfectionist?" *Representation: Journal of Representative Democracy*, 47(1) (2011), 29–32, 37. Mouffe of course rejects "the very possibility of a non-exclusive public sphere of rational argument where a non-coercive consensus could be attained" (*Democratic Paradox*, p. 33).
15. West Virginia, for example, still allows the open ballot. See West Virginia constitution. Art. IV, §2.
16. J.S. Mill, *Considerations on Representative Government*, in *On Liberty and Other Essays*, ed. John Gray (Oxford: Oxford University Press, 2008), p. 357. For a recent defense of the open ballot, see Nicholaus W. Norvell, "Open Ballot Democracy: Deliberation and Accountability," unpublished Wesleyan University Honors Thesis (2007) [available online: http://wesscholar.wesleyan.edu/etd_hon_theses/19/ (accessed 14 September 2012)].

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liberal-democratic grounds.[17] Alternate liberal-democratic arrangements – whether those of the past or the future – are in danger of occlusion when what in reality is only contemporary is upheld as uniquely rational.

Brettschneider likely would respond that his theory is in fact open to future reforms in the electoral and prison systems and, in any case, even if there is more contestation about the rights at stake in these two examples than *Democratic Rights* acknowledges, his overall project of delineating some of the substantive rights necessarily required by democracy remains intact. At the core of Brettschneider's confidence in this regard is his view that most of us already accept that at least some rights are intrinsically required by a democracy and that his project is best understood, first, as an elaboration of the grounds underlying such already-acknowledged, "paradigmatic" democratic rights and then, second, as a considered extension of such rights beyond paradigm cases to include rights like privacy, fair punishment (e.g., a prohibition on capital punishment), and welfare. The key paradigmatic right about which we allegedly already agree is the *rule of law*: "it is a settled judgment that democratic societies must respect the rule of law" (43). Insofar as the rule of law stands for the idea of a fully rationalized kind of power, free from exclusion and hegemony, it of course cannot be embraced by paradoxicalists for whom "any social objectivity is constituted through acts of power."[18] Accordingly, *pace* Brettschneider, a paradoxicalist questions just how well-settled the rule of law actually is. The problem I mean to raise here is not primarily that the rule of law is by itself too vague, and historically subjected to too many different interpretations, to provide a solid foundation for a set of common rights understood to be intrinsic to democracy.[19] Brettschneider after all unpacks the rule of law to involve at least three concrete commitments: prohibitions against ex post laws, bills of attainder, and any normalized practice of jailing political opponents without charge (38–44). Given this, the objection from the paradoxicalist would be to call into question just how well-established these prohibitions in fact are and to point out various ways in which they remain imperfectly fulfilled within democracies both past and present. For example, even if such prohibitions inform the dominant conception of liberal democracy today, must they, as a matter of logic and necessity, be part of any democracy? What about the ancient Athenian case, which according to Aristotle's account often ruled by decree rather than settled laws.[20] Moreover, it seems Athens did not fully

17. See, e.g., Norval Morris and Michael Torry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (Oxford: Oxford University Press, 1991); John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1993); David A. Inniss, "Developments in the Law: Alternatives to Incarceration," *Harvard Law Review*, 111(7) (1998), 1863–990.
18. Mouffe, *Democratic Paradox*, p. 21; also see p. 99.
19. But for a suggestion of skepticism in this regard, see Brian Z. Tamanaha, *On the Rule of Law* (Cambridge: Cambridge University Press, 2004), p. 9.
20. Aristotle says of the Athenian democracy of the fourth century BCE that it has come to be characterized by "ever-increasing power being assumed by the people. They have made themselves supreme in all fields; they run everything by decrees of the *Ekklesia* and by decisions in the *dikasteria* in which the people are supreme." Aristotle, *The Constitution of Athens*, in *The Politics and the Constitution of Athens*, ed. Stephen Everson (Cambridge: Cambridge University Press, 1996), p. 242 [XLI.2].

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respect the prohibitions on ex post fact laws and bills of attainder, insofar as the Athenian court, in which as many as 6,000 citizens formed a jury for cases that would take a single day, could convict citizens for abstract and poorly defined crimes like impiety and insofar as practices like ostracism meant that individual citizens might be punished with exile without having even violated a standing and known law.[21] And in our own time, is it really true that these three prohibitions are fully realized? While electoral opponents are not routinely jailed in contemporary liberal democracies, there are clearly limits to the scope of permissible political dissent. In the United States, the socialist Eugene Debs was jailed under the 1917 Espionage Act for denouncing American participation in World War I and ran for president from jail in 1920 (after having run four previous times unjailed). With the onset and then aftermath of World War II, the U.S. effectively made membership in the Communist Party an illegal base of political opposition, through the 1940 Alien Registration Act (on the basis of which hundreds of Communists and other alleged radicals were arrested until the Supreme Court overturned parts of the act in 1957), the 1949 Foley Square Trial (in which the government successfully prosecuted eleven members of the Communist Party USA's leadership, also imprisoning the defense attorneys in the case for contempt of court), Truman's Loyalty Program, and McCarthy's investigations. In Germany and certain other countries, denial of the Holocaust is a crime punishable by imprisonment, which thereby prevents political opposition connected to such revisionist projects of collective memory. And with respect to the prohibition on bills of attainder as an allegedly well-settled feature of the rule of law as a fundamental feature of democracy, it is not clear that the contemporary United States fully respects this norm. The recently passed National Defense Authorization Act for Fiscal Year 2012, which potentially sanctions the indefinite detention of American citizens without normal due process if they are suspected of being Al Qaeda operatives, has been criticized precisely for seeming to violate the prohibition on bills of attainder.[22] These various examples not only challenge just how well-settled the rule of law is within both the historical and contemporary experience with democracy, but suggest how a rationalist commitment to co-originality – with its focus on an alleged consensus about basic democratic rights – risks inattention to the illiberalities that have always, and paradoxicalists would say *will always*, accompany any actual engagement with democracy.

To the extent Brettschneider anticipates such criticisms, his response is to claim that insofar as polities fail to realize the rule of law, they fail to be democracies. So, on his reading, even if Athens is widely upheld as one of the world's first democracies, its

21. On the practice of ostracism, see Sara Forsdyke, *Exile, Ostracism, and Democracy: The Politics of Expulsion in Ancient Greece* (Princeton, NJ: Princeton University Press, 2005).
22. Section 1021 of the Act – which authorizes indefinite detention of any individual "who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces" – is potentially applicable to U.S. citizens. Accordingly, critics have claimed that the Act violates the constitutional prohibition against bills of attainder: see, e.g., an amicus curiae brief in the journalist Chris Hedges' recent lawsuit against President Obama and Secretary of Defense Panetta: [Available online: http://www.slideshare.net/kynize/chris-hedges-is-suing-barack-obamaover-ndaa (accessed 14 September 2012)].

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failure to adequately guarantee "paradigmatic democratic rights" would render it partially democratic or perhaps not democratic at all (i.e., majoritarian but not democratic, as Brettschneider puts it (38)). But if this semantic strategy is plausible with regard to ancient regimes, it is not altogether satisfying vis-à-vis more contemporary cases, since in these instances any redescription of polities understanding themselves as liberal democracies in non-democratic terms would challenge Brettschneider's basic premise that it is now a "settled judgment that democracy requires the rule of law" (39). With regard to such contemporary examples, therefore, Brettschneider's implicit move is to invoke *security* as a non-democratic but legitimate basis on which present-day democracies sometimes need to suspend themselves on a temporary basis. He acknowledges, for example, that "during war, democracies have suspended elections, revoked habeas corpus, and limited free speech" – and he recognizes that "to suspend elections in a supreme emergency … might be unavoidable" (50). On the one hand, Brettschneider is clear that such security crises undermine democracy: "such drastic measures indicate the suspension of democracy itself … the core values [and the rights they require] must trump security concerns if a society is to be regarded as democratic" (50–51). And yet, on the other hand, Brettschneider also thinks that some instances of security trumping democracy are "understandable" and potentially "justified": "a society might *understandably* suspend elections for reasons of security, but such a society would not be operating as an ideal democracy" (51, emphasis added) – and, likewise: "My view is that these suspensions rightly are regarded as suspensions of democracy itself *regardless of whether they are justified*" (50, emphasis added).

Even if the various examples I have raised as potentially challenging the well-settledness of the rule of law in contemporary liberal democracies are rightly seen as falling under the rubric of security, the question remains whether the logic of security upsets Brettschneider's effort to defend the rational reconcilability of liberalism and democracy. From the paradoxicalist perspective, security is a major reason why any morally unified account of liberal democracy as a single, rather than double, normative commitment cannot be persuasive in the final analysis. For one thing, Mouffe suggests that security is wrongly presented as threatening democratic self-government and liberal rights alike, but in fact is much more targeted against the latter than the former. Following Schmitt, she argues that when security trumps democracy, the *demos'* need to protect its existence trumps the liberal, universalist call to afford equal respect and consideration to all. That is to say, in times of crisis, rights are not suspended unilaterally in neutral fashion, but in light of a particular account of what kinds of speech and activities and platforms need to be prohibited because existentially threatening to a *specific, concrete*, and so ultimately *exclusionary* conception of the *demos*. Moreover, if Brettschneider presents security crises as but "minor instances" (51) which do not upset the normal harmonization of democracy with the rule of law, for a paradoxicalist like Mouffe, security is rather the paradigm case of a larger problem: the need for any particular *demos* to *always* engage in some illiberalism, if not with regard to its own citizens then necessarily with respect to foreigners. For Mouffe, the very enforcement of a border – with the resulting division between a liberal-democratic "us" and a foreign "them" – inscribes the denial of liberal civic protections within the very practice of liberal-democratic community making. Brettschneider thinks that so long as reasonable

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treatment is extended to both legal and illegal aliens, as well as foreign visitors, then a democratic society has successfully married liberalism and democracy with respect to issues of borders and immigration. For Mouffe, though, the border is itself the first instance of democracy's challenge to the sanctity of universal of rights. Because rights are grounded on human equality, they ought in principle to be extended to all persons. But no particular *demos* can do this. Whereas Brettschneider finds no problem in foreigners who are not coerced by a democratic polity's laws being excluded from that polity,[23] Mouffe's analysis is informed by the situation where a liberal-democratic polity borders a regime which contains individuals who would like to be coerced, *and also empowered and protected*, by the liberal-democratic polity yet are not allowed to do so because of border enforcement. For her, rationalists like Brettschneider do not sufficiently confront the constitutive exclusion at the heart of democracy: namely, how the ever-present maintenance of external security in the form of borders and the ever-present possibility of domestic security crises both indicate the *ongoing* presence within the liberal-democratic state of a non-liberal commitment to the existential protection of a particular people.

Beyond these first two points, Mouffe suggests a third line of critique: the commitment to fixed and well-settled democratic rights is not just undesirable (because grounded on an unproven premise about the reconcilability of liberalism and democracy and, with its naturalization of power-relations, corrosive of valuable democratic activism and a respect for pluralism), but *impossible* in ways that Brettschneider's own analysis reflects. In the penultimate chapter of *Democratic Rights*, Brettschneider recognizes that the theory of judicial review implied by his value theory of democracy generates a jurisprudence of "*tension*." Unlike Dworkin who argues that when justices overrule majoritarian decisions in the name of defending the liberal rights required by a democratic society there is "no moral cost" to democracy,[24] Brettschneider takes a more subtle position, claiming that whenever justices overrule democratic majorities there is a "loss to democracy" even when such an action leads to the defense of the very substantive rights required by a democratic regime (136–59). Ideally, Brettschneider explains, democratic bodies, such as electorates and legislatures, would themselves enact and defend the liberal rights intrinsic to the meaning of democracy, since this mode of decisionmaking best respects democratic citizens' status as rulers (142). For a paradoxicalist, not only does this move admit a kind of tension between liberalism and democracy after all (insofar as any counter-majoritarian, judicial enforcement of rights is less than fully satisfying from the perspective of democracy's moral ideals), but it means that judges will have to engage in case-by-case balancing of whether the loss to the democracy in any given instance is outweighed by the benefits of the rights being secured. Brettschneider's model jurist – whom he aptly calls "Justice Tension" – "is left with a choice that requires her to determine which decision least harms democracy by balancing the intrinsic weights of democratic procedures and democratic rights that

23. *Democratic Rights*, p. 60: "Moral citizens are persons *coerced by the law* who are entitled to be treated as sovereign in a manner that accords with the core values".
24. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996), p. 32.

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both reflect the core values and are central to the ideal of self-government … [I]n any given case, a balance might need to be struck either in favor of a particular majoritarian procedure or in defense of a democratic outcome" (140, 148–9). Such a perspective makes judicial decisionmaking "more difficult" (140) than would be the case according to rival theories. While one must be careful not to exaggerate the discretion acknowledged here by Brettschneider – since there is after all a difference between the strong discretion exercised by jurists when they have no legal or moral standards to rely upon when making a decision and the weaker discretion that arises when their decision must be made from a balancing of such standards[25] – that Brettschneider's ideal conception of jurisprudence ultimately requires a significant degree of judicial discretion with regard to the book's central ambition (i.e., the rational harmonization of liberal rights and democratic procedures) indicates important practical limits to his philosophical project of unifying the two logics.

For a paradoxicalist, such difficulties are a matter of course and they signify how, in practice, rationalist efforts at jurisprudence come to take on the tension and even indeterminacy emphasized by paradoxicalism. However, any such practical convergence between the two co-originality paradigms goes both ways. As I shall now discuss, there are aspects of paradoxicalism that in fact require some rapprochement with the kind of rationalism espoused by Brettschneider.

III. Towards a Rapprochement of Paradoxicalist and Rationalist Approaches

Given Mouffe's strong critique of efforts like Brettschneider's to rationally settle the nature of liberal rights required by a democratic society, it might seem that her paradoxicalism also stands opposed to any universalistic reasoning about rights (i.e., any attempt to define rights beyond how *specific democratic bodies and actors* define them in their necessarily diverse, provisional, and imperfect ways) as well as to any effort within a polity to achieve a consensus about how best to reconcile the logic of liberalism with that of democratic self-rule. However, Mouffe's considered view must be that these two practices are not just condonable but in certain respects absolutely necessary for liberal democracies conceived according to the paradoxicalist model. Mouffe's support for these two practices – in conjunction with her critique I outlined in Part II – suggests a path toward a real, if modest, reconciliation between rationalist and paradoxicalist forms of co-originality.

With regard to the first of these issues, it might seem that Mouffe's repeated emphasis on the contingent and socially-constructed nature of rights means that she stands for the notion that, since all of our democratic and liberal institutions ultimately arise from what specific political communities decide upon, there is no place for universalistic rights discourses, whether the metaphysically ambitious universalism of rights foundationalism or the more chastened universalism of efforts, like Brettschneider's, to define the substantive rights that inhere in very idea of democratic citizenship. However, this view cannot

25. See, e.g., Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), pp. 31–4.

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be Mouffe's, at least not in any simple or straightforward sense – for if it were it would mean that Mouffe was not a paradoxicalist at all, but only a kind of democratic positivist who located the source of all our liberal-democratic norms in specific decisions of democratic bodies. Even if Mouffe does think that only engaged human beings define the nature of their normative commitments, she in fact does acknowledge the essential role for liberal discourses that assert rights as having a universal, intrinsic normative significance. Mouffe suggests that appeal to non-positivistic, universalistic sources of value is simply an inescapable feature of rights advocacy: she refers, for example, to the "liberal 'grammar' of equality, which postulates universality and reference to humanity."[26] Specifically, she argues that competing rights claims are grounded in competing articulations of the nature of appropriate democratic procedures: insofar as there is no perfect procedure of democratic decisionmaking – because each one will include some and exclude others (or exclude some *more* than others) – those who find themselves relatively excluded will challenge that exclusion by invoking a different procedure grounded on a *different conception of fundamental rights*. That is, because no *demos* is ever settled, there is always room for contestation about the relationship between – and content of – rights and procedures. Even if this latter argument in some sense does root liberal rights in democratic procedures (since prevailing rights are still understood as the ones chosen and enforced by prevailing democratic procedures and since efforts to contest rights do so by challenging the form and inclusivity of those procedures[27]), it is also extraprocedural (insofar as the process of contesting procedures is inseparable from contesting the nature of universal rights[28]). Thus, whether because the rhetoric of rights, for Mouffe, always involves an appeal to universal norms no bounded and particular democratic community can fully realize or because any insight into the nature of an allegedly correct democratic procedure stems from alleged insight into a universal source that itself transcends extant procedures, the liberal side of liberal democracy, for Mouffe, generates antipositivist discourses about intrinsic human rights. When Mouffe writes, "What cannot be contestable

26. Mouffe, *Democratic Paradox*, p. 44; also see, pp. 3–4, 8, 10, 45.
27. So, for example, resident and illegal aliens within a democracy might challenge their second-class rights in the political community by proposing an alternate democratic procedure (e.g., elections in which all residents of a territory can vote) which would quite likely lead to a modification, if not cancellation, of their inferior civil and political status.
28. As Mouffe explains: "By constantly challenging the relations of inclusion-exclusion implied by the political constitution of 'the people' – required by the exercise of democracy – the liberal discourse of universal human rights plays an important role in maintaining the democratic contestation alive" (*Democratic Paradox*, p. 10; also see, p. 56). So, to continue with the example in note 27, resident and illegal aliens within a democracy desiring to challenge the procedures by which they are excluded from full membership in the political community would need to invoke an alternate conception of universal rights from the prevailing ones (e.g., the alleged *human* right of all adult *residents* within a territory to participate on equal terms in civil and political life) which is at the same time an alternate account of the proper procedures of democratic decisionmaking (the extension of suffrage to resident and perhaps even illegal aliens).

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in a liberal democracy is the idea that it is legitimate to establish limits to popular sovereignty in the name of liberty. Hence its paradoxical nature" (4) – she recognizes not just *political limits* to what democratic majorities can do but *epistemological limits* to any democratic positivism. Such limits refer both to the fact that in a liberal democracy a democratic majority cannot legislate whatever it likes and to the philosophical circumstance that our articulation of the grounds of these limits must be rooted in something other than a democratic majority's own self-limitation.

This means that even if Mouffe can disagree with Brettschneider's effort to rationally *settle* the nature of rights within a democracy, and while she can insist that any account of rights and democratic procedures will be mutually constraining (rights always limit what democratic majorities can do and democracies always limit the extension of rights according to the specific territorial and procedural parameters of their constitutions), she cannot after all take issue with Brettschneider's effort to discuss rights in an extraprocedural, universalistic manner (i.e., she cannot reject prima facie his philosophical appeal to the idea of fundamental values any liberal society must respect), since her very notion of democratic paradox itself depends on the enduring relevance of such reasoning. If Mouffe is a critic of universalistic modes of philosophical argument, it is only because she thinks no concrete liberal democracy will fully realize (or agree about the precise content of) universal human rights, not because there is no place for universal rights discourses. Such discourses are both intrinsic to the logic of liberalism for Mouffe as well as instrumental to the efforts of democratic activists who aim to challenge and reconfigure the nexus of procedures and rights instantiated in any *concrete, particular*, and so *imperfect* liberal democracy.[29]

Likewise, just as Mouffe's paradoxicalism might seem to reject universalistic rights discourses but in fact must affirm the importance of such reasoning, so too is Mouffe's apparent objection to the possibility of achieving a consensus about how to reconcile liberalism and democracy misunderstood if one fails to recognize that the very logic of paradoxicalism requires that, within any given polity, there be at least partial and temporary reconciliations. Here it is important to note that as much as Mouffe's critique of rationalism in politics borrows from Schmitt – treating any regime's particular configuration of liberalism and democracy as a *political decision*, grounded in power rather than rationality – she departs from Schmitt in one key respect: unlike Schmitt, she does not understand the tension between liberalism and democracy (their irreconcilability in the *ultimate* sense) as being destructive for liberal democracy. Whereas Schmitt interpreted the duality of commitments in liberal democracy as a sign such regimes are doomed to failure and self-cancellation, Mouffe makes the opposite claim: far from threatening the existence of liberal democracy, the tension between its two logics has the beneficial function of enabling activism (recurrent re-articulations of the relationship between liberalism and democracy) and also respecting plurality and difference (insofar as the

29. On this latter phenomenon, see Mouffe, *Democratic Paradox*, pp. 44–5: "[T]he liberal logic allows us constantly to challenge – through reference to 'humanity' and the polemical use of 'human rights' – the forms of exclusion that are necessarily inscribed in the political practice of installing those rights and defining 'the people' which is going to rule."

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limitless possibilities for institutionalizing liberal-democratic institutions ought to underline the propriety, and inevitability, of political opposition along ideological lines).[30]

Mouffe's departure from Schmitt – her view that liberal democracy is paradoxical rather than contradictory or otherwise non-viable – leads her to posit the possibility that liberalism and democracy can in fact be reconciled: not to be sure in the fixed and settled form favored by the rationalists, but in diverse, always-evolving formulations that manage to marry liberal and democratic commitments without propelling their regimes toward violence and instability. The point here is not simply that the critical, provocative notion Mouffe employs to conceptualize any particular reconciliation of liberalism and democracy – *hegemony* – is at the same time a term for a semi-stable arrangement which comes to gain the adherence of wide segments of the population, suggesting that liberalism and democracy can be harmonized in at least a temporary, power-laden manner.[31] What is also key is that Mouffe believes that while a liberal democracy, conceived in paradoxicalist terms, will need to confront endless contestation about how to balance and define its two distinct, constitutive logics, it is nonetheless possible to domesticate this contestation: to avoid "antagonism" (the struggle between enemies) and instead have political conflict shaped merely by "agonism" (a respectful contestation between adversaries).[32] Schmitt's mistake, in Mouffe's view, is that while he correctly understood the impossibility of rationally reconciling liberalism and democracy into a single set of institutional and normative commitments, he failed to see that this circumstance might be resolved in a politics of agonism rather than antagonism. Mouffe's proposed model of democratic politics – what she calls *agonistic pluralism* – is meant as an alternative to both the rationalist and Schmittian perspectives.

Agonism, however, is not something given: it must be cultivated over and against the threat of antagonism: "antagonism … can never be eliminated and it constitutes an ever-present possibility in politics."[33] How, then, do liberal democracies have their interminable debates about the relationship between rights and procedures not devolve into violence and instability? How do they achieve temporary hegemonic arrangements over and against chaos and disorder? On the one hand, Mouffe thinks an appreciation for the paradoxical character of liberal democracy itself generates agonism over antagonism: the more it is understood that there are two competing logics at the heart of liberal democracy, the more opponents of a particular hegemonic formulation of liberal democracy will enjoy respect and toleration.[34] This is why efforts to rationally fix the nature of liberal rights required by a democracy are not only illusory for Mouffe, but hazardous: they threaten "a dangerous utopia of reconciliation" which "can lead to violence being unrecognized and hidden behind appeals to 'rationality.'"[35] On the other hand, though,

30. Mouffe, *On the Political*, pp. 8–34, 82–3; *Democratic Paradox*, p. 93.
31. See Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy* (London: Verso, 1985), pp. 149–94.
32. Chantal Mouffe, *The Challenge of Carl Schmitt* (London: Verso, 1999), pp. 4–5; *On the Political*, p. 20; *Democratic Paradox*, pp. 102–3.
33. Mouffe, *Democratic Paradox*, p. 13.
34. Chantal Mouffe, *The Return of the Political* (London: Verso, 1993), 102–34; also see, *Democratic Paradox*, pp. 44–5, 51–4.
35. Mouffe, *Democratic Paradox*, pp. 22, 29.

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Mouffe thinks that because political opponents in a liberal democracy can make their competing appeals with reference to the *same underlying set of core political values*, agonistic pluralism revolves around a kind of commonality, however vague and inchoate – what she calls a "conflictual consensus": a shared set of basic normative commitments whose particular articulations bring agonists into adversarial, but not hostile, conflict.[36] As Mouffe explains:

> An adversary is an enemy, but a legitimate enemy, one with whom we have some common ground because we have *a shared adhesion to the ethico-political principles of liberal democracy*: liberty and equality. But we disagree concerning the meaning and implementation of those principles, and such disagreement is not one that could be resolved through deliberation and rational discussion.[37] (emphasis added)

Viewed in light of Brettschneider's value theory of democracy, Mouffe's acknowledgement of such a consensus is a key admission, for it seems to recognize the philosophical integrity of projects like Brettschneider's committed to uncovering the "core values" underlying any normatively compelling account of liberal democracy. True, Mouffe says that the underlying core is too thin to be relied upon as a grounds for establishing the precise contours of liberal rights within a democratic society. Yet, Brettschneider might respond that not only is his own project not reducible to deriving concrete rights (insofar as it is as much about a general framework for conceptualizing rights claims as it is about arguing for specific rights) but that, once we admit the relevance and benefits of an underlying core of shared values, even paradoxicalists must recognize the societal need for at least some philosophers to attend to the consensus, gain conceptual clarity about it, and at least in certain circumstances seek to strengthen it. That is to say, because the healthy agonism of paradoxicalism depends upon a "shared adhesion to the ethico-political principles of liberal democracy," paradoxicalism cannot mean embracing tension and opposition in all circumstances, but is at least potentially open to philosophical efforts to name and elaborate such shared principles – especially at moments when there seems to be no such common ground underlying partisan contestation and agonism is therefore in danger of succumbing to outright antagonism.

IV. The Co-Originality of Paradoxicalist and Rationalist Co-Originality Theories

These reflections lead me to the following conclusion: that, in considering the relationship between liberalism and democracy, not only should we recognize that there are in fact two forms of co-originality theories – a rationalist form of the type expounded by

36. Mouffe, *Democratic Paradox*, p. 104. As Mouffe elaborates, "Consensus is needed on the institutions constitutive of democracy and on the 'ethico-political' values informing the political association – liberty and equality for all – but there will always be disagreement concerning their meaning and the way they should be implemented (*On the Political*, p. 31).

37. Mouffe, *Democratic Paradox*, p. 102 (emphasis added); also see, p. 104; *On the Political*, pp. 31–2.

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Brettschneider and a paradoxicalist form of the type expounded by Mouffe – but that these two forms should themselves be seen as co-original in the sense of each having a vital, irreducible role to play within any considered examination of what the commitment to the co-originality of liberalism and democracy must mean. Now, given that I have just shown the notion of co-originality to have two meanings – rationalist unity and paradoxicalist tension – to say that rationalism and paradoxicalism are themselves co-original is to make *two* distinct sets of claims. First, I mean to say that there is a sense in which Brettschneider's rationalism and Mouffe's paradoxicalism remain in permanent tension, with each side opposed to – yet nonetheless unable to dispense with – the other. This is seen most clearly in what I take to be the genuine and unbridgeable difference between Mouffe's paradoxicalism and Brettschneider's rationalism with regard to the metaphysical question of whether liberalism and democracy can be rationally unified in the form of fixed and settled democratic rights, such that it would be possible for citizens to accept the judicial and legislative efforts of a state to protect those rights on the basis of rational insight into their propriety, rather than only on the basis of coercion.[38] Mouffe rejects this possibility and yet, as I have demonstrated, rather than seek the elimination of all universalizing modes of political philosophy, she recognizes that universalism is implicit within the very grammar of the rights discourses whose active articulation must be a permanent part of any healthy liberal-democratic regime. Brettschneider affirms the idea that rights might be accepted not as constraints on what democratic legislatures can accomplish but as rational features of the democratic process itself, but, insofar as no society has yet to fully achieve such a rational synthesis of liberal rights and democratic procedures (due either to the inexorable concerns of security which legitimate curtailing liberties to protect a specific *demos* or disagreement and uncertainty about the precise requirements of such a synthesis in numerous concrete cases when judges must engage in difficult, discretionary balancing of whether the "loss to democracy" is worth the judicial intervention to protect rights), it would seem that rationalists supporting his framework must still acknowledge the tension of liberalism and democracy as an empirical and all-too-familiar, if not categorical and absolute, feature of liberal democracy as it has always been experienced so far. On this question of the possibility of an ultimate rational unification of liberal rights and democratic procedures, then, there is direct and fundamental philosophical difference between Brettschneider's rationalism and Mouffe's paradoxicalism, but since the difference includes each side's implicit acknowledgment of enduringly relevant aspects of the other, it would seem that this debate cannot be fully resolved and, instead, ought to be seen as maintaining an important element of ongoing tension.

But it would be a mistake only to emphasize the divergences between the two co-originality traditions, especially when they are approached, not merely in abstract terms as rival political epistemologies, but as practical guides for how concrete citizens might make sense of the commitments of liberalism and democracy within their specific liberal-democratic regimes. This is what I mean by the *second* respect in which the co-originality theories of Brettschneider and Mouffe might themselves be seen as co-original: namely, they can be seen as working in tandem with each other in ways that are not in fact in absolute conflict. For one thing, as I have tried to demonstrate, both

38. For Brettschneider's subscription to this ideal, see *Democratic Rights*, p. 33.

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paradigms coalesce around the idea of the existence of a common core of values underlying liberal democracy. True, Brettschneider aims to systematize and expand the core, so as to derive from it substantive democratic rights, whereas Mouffe, by contrast, seeks to limit its normative reach, insisting that it can only inform – but not replace – the effort of actual citizens to define rights in contingent, provisional, pluralistic, arational ways. However much this difference reflects alternate metaphysical commitments regarding the potency of human reason, it also stems from something less foundational and categorical: namely, whether the task of political philosophy should be to expand or contract the reach of the "ethico-political" consensus underlying any given liberal democracy. And it would seem that when framed in this latter fashion, the debate between Brettschneider and Mouffe is no longer absolute, but largely dependent on empirical circumstances. If social conflict becomes too severe – so that there is antagonism rather than agonism and not even a provisional *modus vivendi* regarding the relationship of liberal rights and democratic procedures can take root – even paradoxicalists will acknowledge the importance of efforts like Brettschneider's that aim to render the common core of liberal-democratic values more robust. At the same time, whenever complacency and conformism undermine democratic citizens' responsibility to think for themselves and take advantage of otherwise available opportunities to author the conditions of public life, even rationalists will recognize the potential threat of hegemony. What I mean to suggest, in other words, is that implicit in the debate between the two co-originality traditions is a debate about which threat is more urgent within contemporary liberal democracies – disorder or hegemony – and that this issue, unlike the question of whether there are in principle such things as liberal rights inherent in the idea of democracy, is not a matter of *absolute* disagreement, as each side can contemplate circumstances when it might accept the concern of the other as a valid and urgent problem.

Likewise, it would seem that in privileging competing understandings of which threat is most pressing, the differences between the two co-originality traditions stem as much from divergent practical perspectives as from alternate philosophical commitments, with Brettschneider emphasizing the outlook of *judges* and Mouffe the outlook of *ordinary citizens*. Insofar as courts in a liberal democracy necessarily must sometimes overrule the enactments of democratic legislatures – something Mouffe does not appear to question – then justices require at least an implicit theory of judicial review on the basis of which they can explain to themselves and the broader citizenry the basis of their counter-majoritarian actions. To the extent this is so, what to the paradoxicalist is the most suspect feature of Brettschneider's value theory – his appeal to the ultimate reconcilability of liberalism and democracy – can be seen less as a metaphysical commitment to rationalism than as a pragmatic presupposition required for a jurisprudence that takes seriously the double commitment to liberalism and democracy and that aims to be as internally consistent, non-arbitrary, and widely acceptable as possible. At the same time, insofar as Brettschneider nowhere claims that justices have a monopoly on the enforcement of the core values of democracy – so that it is fully conceivable that ordinary citizens and informal groups, especially in a context of gross injustice, might invoke the core values to contest existing political arrangements – he can understand Mouffe's paradoxicalism in a practical light: less as the abstract assertion that liberalism and democracy always will conflict than as an exhortation to ordinary citizens to take an active concern

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in the status, extent, and nature of rights currently protected within their regimes. To the extent, then, that the differences between Brettschneider and Mouffe are less about metaphysics than about target audience – and to the extent that each thinker understands the primary constituency of the other as having a vital role to play within in a liberal democracy – then it is possible to endorse both perspectives simultaneously.

Finally, since both Brettschneider's rationalism and Mouffe's paradoxicalism are species of co-originality theories, they share a common allegiance against forms of jurisprudence uncommitted to treating liberalism and democracy as co-equal normative commitments. And this feature, too, has practical implications, insofar as it signals a common concern of both thinkers to reject not just the ideas, but the politics, of democratic positivists, rights foundationalists, and any others who would privilege either the liberal or democratic aspect of liberal democracy.

Thus, while Brettschneider would affirm and Mouffe would deny the *ultimate reconcilability* of liberalism and democracy, this difference does not in itself mean that rationalist and paradoxicalist co-originality theories are themselves irreconcilable. Not only does it seem impossible to resolve the question of the ultimate unification of liberalism and democracy fully in the direction of either thinker (as even Mouffe acknowledges a place for universalism and Brettschneider one for tension), but the practical implications of these two approaches need not yield mutually exclusive concerns. Especially with regard to questions of how to tend to the common core of values underlying liberal democracy (maximize vs. minimize) and who should be the target audience of legal theory (jurists vs. everyday citizens), it would seem that one can could pursue both perspectives simultaneously. For these reasons, I think one ought to speak of the co-originality of rationalist and paradoxicalist theories of co-originality.

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