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# Interpretative theories as roadmaps to constitutional identity: The case of the United States

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**Abstract:** As long as the American Constitution serves as the focal point of American identity, many constitutional interpretative theories also serve as roadmaps to various visions of American constitutional identity. Using the debate over the constitutionality of the Patient Protection and Affordable Care Act, I expose the identity dimension of various interpretative theories and analyse the differences between the roadmaps offered by them. I argue that according to each of these roadmaps, courts' authority to review legislation is required in order to protect a certain vision of American constitutional identity even at the price of thwarting Americans' freedom to pursue their current desires. The conventional framing of interpretative theories as merely techniques to decipher the constitutional text or justifications for the Supreme Court's countermajoritarian authority to review legislation and the disregard of their identity function is perplexing in view of the centrality of the Constitution to American national identity. I argue that this conventional framing is a result of the current understanding of American constitutional identity in terms of neutrality toward the question of the good. This reading of the Constitution as lacking any form of ideology at its core makes majority preferences the best take of current American identity, leaving constitutional theorists with the mission to justify the Court's authority to diverge from majority preferences.

**Keywords:** constitutional identity; interpretative theories; living constitutionalism; originalism; Patient Protection and Affordable Care Act

## I. Introduction

Various theories that have been used to interpret the American Constitution and confront the countermajoritarian difficulty (hereinafter: CM difficulty) are in fact attempts to sketch roadmaps to American constitutional identity. We only need to understand them properly.

The connection between interpretative theories and constitutional identity is not restricted to the US. Yet, for reasons elaborated below, the American case serves as almost an ideal type through which we can analyse this connection and demonstrate its attributes.

To a large extent, American national identity is currently dependent on the Constitution (Ackerman 1991: 36; Tushnet 1999a: 50). Yet over the years, the discussion of the conflict between constitutionalism and democracy, as captured by the debate over the CM difficulty, has been focused mostly on examining the different aspects of democracy (Whittington 1999: 21–4; Horwitz 1993: 64). Subsequently, interpretative theories have been understood as schemes to justify the anti-democratic nature of judicial review (Bobbitt 1982: 123; Seidman 2012: 31). For example, originalism has been understood as a theory that justifies the Court's authority to review legislation based on the superiority of the original voice of the popular sovereign as fixed in the Constitution over the current passing whims of the public (Colby and Smith 2009: 240). The growing understanding that constitutionalism is often linked to national identity (Jacobsohn 2010; Rosenfeld 2010) has not penetrated the discussion on the choice of an interpretative theory or the analysis of the CM difficulty. While arguments expressing the character of the US as a nation were detected as a distinct type of constitutional argumentation (Bobbit 1982: 93–6), the understanding that the choice of interpretative theory is a choice between roadmaps to the nation's identity has not been suggested. In short, the CM difficulty has not been understood as an identity difficulty, and interpretative theories have not been understood as roadmaps to various visions of American identity.

In this article I offer to rectify this deficiency. I argue that the choice of an interpretative approach necessarily affects national identity in societies where the constitution has come to play a central role in defining the national identity. In the US the Constitution has become central in recent decades to American identity. For this reason, the choice of an interpretative theory has become so contentious. I show that various approaches to constitutional interpretation offer different visions of American identity. These approaches are more than just methods to decipher the indeterminate meaning of the Constitution. Each interpretative approach tries to overcome indeterminacy by offering a vision of national identity that endows each of the Articles of the Constitution with a common direction. Each interpretative theory thus serves as a roadmap to American identity.

In cases that involve judicial review, there is a tension between what makes Americans who they are (the constitutionalism component understood as capturing America's constitutional identity) and their freedom to pursue their current desires by legislating their preferred policies into

laws (the democracy component). I dub this tension the 'identity difficulty'. In the following I aim to conceptualise the idea of an identity difficulty as well as to expose that prominent constitutional interpretative theories have embedded in them schemes to confront this difficulty, as well as other identity questions.

I begin the article by presenting the connection between American constitutional identity and constitutional interpretation. In the third section, I expose how various interpretative theories offer different ways of understanding America's constitutional identity. In the fourth section, I explain that the portrayal of these interpretative theories as attempts to confront the CM difficulty is a manifestation of a deeper phenomenon: the current controlling understanding that majority rule is the main ingredient of American constitutional identity. Within this controlling understanding, roadmaps to American identity are viewed as theories that aim to justify thwarting majority preferences, since the roadmaps' 'destination' is a thin identity of which the main ingredient is majority rule. For this reason, rather than view them as roadmaps to American identity, these interpretative approaches have been understood as merely theories that aim to justify countering majority preferences.

Throughout the article, I demonstrate my claims using the debate over the constitutionality of the individual mandate anchored in the Patient Protection and Affordable Care Act (ACA).[1] This act aims to create almost universal health-care coverage in the US by compelling citizens who earn a certain income to purchase private health insurance or pay a fine. The ACA is an attempt to 'change the relationship of the Federal Government to the individual',[2] and thus also to rewrite the social contract between Americans (Super 2014: 875). Because of its potential effect on American constitutional identity, examining the constitutionality of the mandate using each of the various interpretative approaches is a good way to distinguish between them in terms of the different roadmaps to American Constitutional identity they offer. My claim is not that a certain roadmap inevitably leads to a conclusion that the ACA is unconstitutional, or that another roadmap necessarily shows that the Act is constitutional. Rather, I argue that in this context, the choice of which interpretative theory to use for reading the Constitution should not be made in terms of which theory best deciphers the Constitution's meaning. The decision should be made in

[1] Patient Protection and Affordable Care Act, Pub L No 111–148, 124 Stat 119 (2010).

[2] See Transcript of Oral Argument at 31, *Nat'l Fed'n of Indep Bus v Sebelius*, 132 SCt 2566 (2012) (No 11–398) (Justice Kennedy); see also *Nat'l Fed'n of Indep Bus v Sebelius*, 132 SCt 2566, 2589 (2012) (Roberts, CJ) (explaining that 'to regulate what we do not do' would 'fundamentally chang[e] the relation between the citizen and the Federal Government').

terms of which theory best captures the road to current American identity. My line of argument is very different than the one offered by the justices in *Sebelius* and by most scholars who have analysed the debate over the ACA without examining its effects on American identity (Bassok 2014: 44). For example, David Super recently concluded his article *Health Care Reform and Popular Constitutionalism* by arguing that each of the various drastic changes embedded in the ACA 'would survive only to the extent that it could be justified in terms of efficiency and rationality' (Super 2014: 949). In this article I argue that the major changes embedded in the ACA will survive only to the extent that they authentically reflect current American identity since questions of solidarity cannot be resolved in terms of efficiency.

## II. The connection between America's constitutional identity and constitutional interpretation

In recent decades, American national identity has by and large been dependent on the American Constitution (Bickel 1962: 31; Jacobsohn 2006: 368; Amar 2012: 480). The Constitution serves as a means by which the American people mark themselves as Americans, connect themselves together, and carve out their distinctive identity as a nation (Rosenfeld 2010: 76; Goldford 2005: 3). This is a rather unique American phenomenon; in other countries, the focal point of national identity has more to do with narratives that do not emanate from their constitution (Ackerman 1991: 36; Kahn 2005a: 206–7). In these countries, national identity is sometimes based on imagined pre-political bonds between the people. Such ties can arise from imagined shared ethnicity, religion or shared ethos originating from non-legal, political sources (Rosenfeld 2010: 152–6; Jacobsohn 2010: 96).

America thus has a constitutional identity in the sense that the Constitution is the focal point of its national identity (Strong 2008: 448; Rosenfeld 2010: 113). However, there is another meaning for the concept 'constitutional identity'. According to this alternative understanding, every constitution has an identity in the sense of core attributes that form its character (Rosenfeld 2010: 11–12, 113). This meaning of 'constitutional identity' refers to the identity of the Constitution rather than to 'constitutional identity' as referring to the nation's identity. Having a constitutional identity in the former sense does not mean that the focal point of the nation's identity is the constitution. The constitution can have an identity, while the nation's identity is based on an ethos that is grounded in other documents or on ascriptive features of the nation's population

such as their ethnicity. Indeed, in many countries the primary function of the constitution is structural or normative while its identity function is minor (Grimm 2005: 194, 196; Rosenfeld 2005: 323). In these countries the constitution may have an identity, but their national identity's focal point is not the constitution. The identities of these nations are rooted elsewhere, in extra-constitutional factors (Jacobsohn 2006: 364–5, 368). No doubt, there are reciprocal relations between all of these components. A national identity which is based on ethnicity will most likely have manifestations in the constitution as well as in the nation's political ethos. Such an identity will affect legal norms, but is not constituted by them (Seidman 2001: 19 n*). Moreover, a gap can exist between the nation's identity and the core attributes of its constitution (Rosenfeld 2010: 100–1, 113).

Usually, it is not difficult to detect the focal point of a nation's identity (Rosenfeld 2010: 153–4). A nation may shift the focal point of its identity but this process is obviously a lengthy one. For example, at the time of the inception of the German Constitution (the Basic Law) in 1949, the focal point of German national identity was not the Constitution for the simple reason that the Basic Law was hardly central to public discourse. In a poll conducted in March 1949, 73 per cent of the West German electorate expressed either little interest or no interest in the Basic Law (Merkl 1963: 129). Its 'birth defects' as a potential focal point for national identity were multiple. Beyond never receiving explicit public endorsement at the time of ratification, there were two other prominent defects at its inception. First, the Basic Law did not receive the title of 'Constitution' and was not considered as such since it was designed for a transitional period that would only last until reunification (Chambers 2004, 165–6). Second, it was written during the postwar occupation and cannot be said to express the free sovereign will of Germans of that era (Merkl 1963: 114–27). The attempt to make the Basic Law the focal point of German identity using the concept of 'constitutional patriotism' was possible only after the Basic Law gained strong public acceptance despite its 'birth defects' (Kommers 2000: 491). Yet, it is still very much debated if this attempt has succeeded and whether the focal point of German national identity has become the Basic Law (Müller 2006; Müller 2007: 6, 43–4; Rosenfeld 2010: 73–6).

In addition to the centrality of the Constitution to American identity, another development in recent decades is the rise of judicial supremacy (Barkow 2002: 301–2). This position, according to which the Court has the 'final say' in questions of constitutional meaning (Whittington 2007: xi, 5–8), gave the Court the role as the institution that authoritatively interprets the Constitution and defines, or at least expresses, American identity (Levinson 1988: 37; Gustafson 1992: 13). In view of the centrality of the Constitution to American identity, and the supreme role of the Court in

interpreting the Constitution, the praxis of constitutional interpretation is central for American identity. Adopting a particular interpretative theory may thus disclose a commitment to a certain vision of America.

Interpretative theories may serve as roadmaps to American identity only in so far as the Constitution continues to function as the focal point of American national identity. The Court's role as the authoritative interpreter of the Constitution is also vital for interpretative theories' role as roadmaps since other branches that interpret the Constitution tend to put less emphasis on methodologies of interpretation. The Constitution was not always revered and treated as central to American national identity (Kammen 2006: 4, 22–3, 46–7, 72–5; Glendon 1991: 94). Some scholars argue that only after the Civil War did Americans begin to regard the Constitution as a representation of their national identity; others date this shift to much later (Eisgruber 1995: 71–4). The Court was also not always considered to have the final say in issues of constitutional interpretation. The rise of judicial supremacy is dated by most scholarly accounts to the late twentieth century (Kramer 2004: 223–4; Barkow 2002: 241).

Constitutional identity issues may arise in any question of constitutional interpretation that is connected to the basic values that define America. Viewing interpretative approaches as roadmaps to America's constitutional identity, and choosing between them according to their vision of American identity, may arise even when no statute is under review and even if the judiciary is not involved in the act of interpretation (Bobbitt 1982: 185–6).

In cases of judicial review of legislation the Court's role as the guardian of an identity based on the Constitution (Bickel 1962: 209; Michelman 2005: 272–3) is to examine whether the statute under review is consistent with American identity. Some cases of judicial review present a struggle between different understandings of American identity. A statute under review that aims to change America's identity may represent a misunderstanding of current identity or an illegitimate attempt to change it. Such a statute should be struck down as it defies the current proper understanding of American identity. For example, one may argue that the individual mandate in the ACA illegitimately changes American constitutional identity. Anchoring a new vision of American constitutional identity in 'regular' legislation (rather than a constitutional Amendment), is, or so the claim goes, an illegitimate change of American constitutional identity as expressed in the provisions of the Constitution including the Taxing clause. Below I elaborate on how different interpretative theories lead to different visions of American constitutional identity and how these different visions lead to different results on the question of the ACA's constitutionality.

Michael Seidman argues that Americans should stop discussing questions such as 'whether the framers would have thought that it was good for the

country' to have national health care, and start addressing 'whether national health care is good for the country' (Seidman 2012: 31). He claims that the constitutional debate is a smokescreen created to avoid the main issues. Seidman views the debate over 'techniques of constitutional interpretation' as 'a desperate effort to change the subject' (Seidman 2012: 29–32) or an attempt to avoid foundational questions (Seidman 2012: 136–8). But, Seidman fails to see that because of the centrality of constitutional discourse in the United States and because of the status of constitutional obligations as 'an unchallengeable axiom', the debate is not a 'false' problem (Seidman 2012: 136). The enhanced level of solidarity required from Americans by the ACA necessitates explanation in terms of the constitutional narrative that connects the American people.

Viewing judicial review through the lens of identity means that when the Court speaks in the name of American constitutional identity, it does not speak in the name of restrictions on the People that are created by the Constitution. It speaks in the name of the People since these 'restrictions' constitute the People's identity (Holmes 1988: 230). Take the example of Catherine the vegetarian. Through binding herself to certain commitments (such as not eating meat), Catherine constitutes her personal identity over time (Seidman 2001: 27). Her self-definition is maintained and her liberty is unrestricted by being unable to fulfil a passing desire for a steak. As a vegetarian, her abstinence from eating meat is not conceived as a restriction of liberty, it is just part of being Catherine. In other words, some constitutional pre-commitment represents the polity's true identity and thus the survival of this true-self necessitates the denial of passing whims. Self-sovereignty is achieved through adhering to the polity's true self-definition, rather than to its people's passing desires. The restrictions on changing the polity's identity represent the highest form of democratic self-definition of a people and therefore cannot be considered incompatible with democracy. The appropriate metaphor is not Ulysses tying himself to the ship's mast to ensure that he will not divert the ship from its preplanned course when he hears the sirens singing (Elster 2000: 88–105). The picture is not of the people who want to ensure that they will not betray a 'mere' pre-commitment but of the people who want to make sure they will not betray their own identity. This identity is constituted by their self-commitments. The ship's course needs to somehow capture Ulysses' identity in order for the metaphor to remain valid.

## II. Rereading interpretative theories as roadmaps to America's identity

My analysis below of various interpretative theories aims to expose their features as roadmaps to different visions of American constitutional identity.

Obviously, these interpretative approaches do not exhaust all possible interpretative roadmaps to a constitutional identity. Moreover, applying the approaches presented below in other countries may lead to a different type of narrative than the one produced in the American context. An originalist roadmap in one nation may offer a narrative of linking the present to the time of origin while in another nation it may serve to point to 'lessons of history' in an attempt to create a distance between the present and the time of origin. An iterative process exists between a nation's constitutional identity and the interpretative approaches with which it is read. The nation's identity is affected by the interpretative approach according to which its constitution is read, while the interpretative approach is moulded, in its turn, by the nation's identity.

In the American case, understanding interpretative approaches as roadmaps to American identity provides an explanation for several phenomena in American constitutional law that currently do not receive proper explanation. For example, the fierce debates over the choice of interpretative theory or the use of foreign law in constitutional interpretation cannot be properly understood if interpretative approaches are treated as mere techniques and without exposing their nature as roadmaps to American identity. Many Americans view their collective identity as constitutive of their personal identity (Kahn 2005b: 261; Seidman 2001: 121). Hence, they tend to take debates over interpretative approaches to reading American constitutional identity very seriously.

Jurists who are bewildered by deep resistance to the use of foreign law in constitutional cases and see the entire controversy as 'a storm in a teacup' (Parrish 2007: 680) miss the link between constitutional interpretation and American identity. They argue that comparison to foreign law is merely an instrument for achieving better answers to common problems (Waldron 2005: 132–3, 140; Slaughter 2005: 279) and that is has only a negligible potential to affect the Court's decisions (Jackson 2005: 122; Tushnet 2006: 1278). Yet, to adequately understand this anxiety over foreign law, we need to view it through the lens of the unique connection between American identity and the Constitution. What for many other courts would be merely another instrument in constitutional interpretation becomes in the United States a potential foreign influence over the articulation of American identity.[3]

In a similar vein, the small contribution of dominant interpretative theories such as originalism or living constitutionalism to the development

[3] Cf *Thompson v Oklahoma* 487 US 815, 869–70 n. 4 (1988) (Justice Scalia) ('[w]e must never forget that it is a Constitution for the United States of America that we are expounding … the views of other nations … cannot be imposed upon Americans through the Constitution'.).

of doctrinal tools (Fallon 2001: 7, 38–9, 41, 80, 83) is better understood once one perceives these theories as roadmaps to American identity. Doctrinal tools, such as strict scrutiny, are central to the professional dialect (Friedman and Solow 2013: 97–100). But these theories are more concerned with the role of constitutional law in the identity domain, and less with its role as a language of professional expertise (Bassok 2014: 1–19).

Another example illustrating the fruitfulness of understanding interpretative theories as roadmaps to American identity is the re-establishment of the affinity between conservative positions and originalism, which is currently contested by several scholars (Strauss 2008). As will be explained in the next section, this affinity becomes more apparent once originalism is understood as a roadmap to American identity rather than merely as an interpretative approach for explicating the meaning of the Constitution or as an attempt to confront the CM difficulty.

### *Identity originalists*

For identity originalists, the identity difficulty captures the clash between original American identity and the voice of the current people and their representatives. The Court's role is to bind Americans to their original covenant, to their original self as it was expressed in the act of founding. The Court speaks in the name of the original American identity against the current majority that tries to change American identity. By holding the people true to their own foundational commitments, self-government is achieved (Rubenfeld 2001: 163). In other words, in order to have self-government, a self must be sustained and 'the being of what we are is first of all inheritance' (Derrida 1994: 54). The constitutional pre-commitment, as it was understood at the time the Constitution was formulated, represents the polity's true identity. Judicial review of legislation enacted by the current majority is legitimate since it guards some features of American original identity that survived over the centuries (Primus 2010: 85).

The basic goal of identity originalists is that American constitutional identity will adhere to certain properties of its original character that are discoverable through an originalist reading of the Constitution (Post and Siegel 2009: 31; Greene 2009a: 84). Originalism is superior to other interpretative schemes not because there is some consequentialist justification for the 'dead hand of the past' to control the present (McGinnis and Rappaport 2007: 372–4; McGinnis and Rappaport 2013: 2), not because it better constrains judges by offering 'articulable and transparent criteria for discerning the meaning of ambiguous constitutional texts' (Greene 2009a: 2; see also Brubaker 2005: 108; Scalia 1989a: 863–4), and

not because of the normative value of a shared constitutional past (Balkin 2013a: 673). It is superior because it reveals an authentic layer of American identity (Kahn 1992: 63; Primus 2010: 80). It ensures the survival of America's true-self.

According to identity originalists, the current American People wish to be true to their original identity through an originalist reading of the Constitution. In approaching the Constitution through the prism of the time of origins, the community demonstrates its attempt to re-approach the founding era, to get closer to its past. Even if such an attempt does not necessarily bring different results to constitutional interpretation than alternative approaches, this 'ritual' renews society's dedication to a certain vision of itself, it reasserts a vision that is defined by its dedication to its origin.[4]

Identity originalism is a truly conservative agenda in the sense that it aims to conserve American identity as captured by the original meaning of the Constitution. Conservative in terms of identity does not necessarily imply conservative in terms of judicial restraint. If identity originalists believe that America has strayed from its original identity, their call for fidelity is an argument for change and not for stasis (Balkin 2013a: 679). Yet, they still proclaim to restore and conserve the original identity, rather than reform it (Forbath 2011: 1117).

Not all originalists are identity originalists. There are 'traditional' originalists who reject the idea that the Constitution has a function in the identity domain (Solum 2011: 74). Many originalists find merit in originalism's resemblance to legal techniques used to interpret other, non-constitutional legal sources (Scalia 1989a: 854; Wilkinson III 2011: 39–44). They view constitutional law as a language of expertise and reject the Constitution's role as the basis of American national identity. The Constitution is a legal document, not an identity manifesto, they believe (McGinnis and Rappaport 2012: 750). These scholars reject interpretative schemes that require judges to construct American identity. After all, lawyers, even if they are Supreme Court justices, have no expertise in the domain of American identity (Eisgruber 1995: 82–3). For them originalism's merit lies exactly in its value as a technique of legal interpretation that is best fit to decipher the Constitution as a legal text.

Another merit 'traditional' originalists find in originalism is its comparative advantage over alternative interpretative methods in constraining judicial interpretation (Macey 1995: 302–4; Webber 2011: 160). As a scheme for interpreting a legal text, it serves as a means to reduce judicial discretion, or at least the appearance of it (Bork 1971: 7). Originalism as a roadmap

[4] Cf Taylor (2007: 57) (discussing the idea of 'time of origins').

to a certain vision of American identity does not necessarily adhere to this directive.

Justice Scalia is a non-identity originalist. His version of originalism is aimed at preserving the Court's enduring public support (or in professional jargon: its sociological legitimacy) (Bassok 2011: 264–7). Scalia believes that originalism achieves this goal by reducing the *appearance* of judicial discretion and enhancing that of legal expertise.[5] Indeed, he advocates both for originalism and for a jurisprudence of rules over standards (Scalia 1989b: 1184). This latter position does not emanate from his originalism, rather, both positions stem from his opposition to methods of interpretation that create the appearance of judicial discretion (Sullivan 1992: 65–6, 80; Whittington 2013: 386–7). In contrast to my analysis, Bruce Ackerman views the originalist interpretative theory promoted by Justices Scalia and Thomas as an attempt to 'purify the canon by focusing exclusively on the 1787 text and its amendments under Article V' (Ackerman 2014: 19). Ackerman identifies Scalia as an identity orignalist and sees a great danger in this movement as it 'represents nothing less than an elitist effort to erase the constitutional legacy left behind by our parents and grandparents as they fought and won the great popular struggles of the twentieth century' (Ackerman 2014: 19, 34).

Among those who adopt originalism as an interpretative scheme and acknowledge the role of the Constitution in the identity domain, there are still those who reject identity orginalism. They adopt originalism as an interpretative theory but reject identity originalism in favour of another roadmap to American identity. For example, Jack Balkin views the Constitution as central to American identity (Balkin 2011a: 98) and argues that 'framework originalism' is the proper interpretative scheme for constitutional interpretation. However, he argues that American identity is constituted through evolution towards redemption or progress and thus rejects identity originalism (Balkin 2011a: 74–81). A theory that envisions future redemption as the guiding star for the 'true' American identity is incompatible with an identity originalism that locates its guiding star in the past and fears an erosion of original American identity. Thus, originalist theorists who present a vision of an evolving identity cannot be considered

[5] *See Planned Parenthood v Casey*, 505 US 833, 996 (1992) (Scalia, J, dissenting in part) ('It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges – leading a Volk who will be "tested by following", and whose very "belief in themselves" is mystically bound up in their "understanding" of a Court that "speaks before all others for their constitutional ideals" – with the somewhat more modest role envisioned for these lawyers by the Founders.'). See also Gardner (1998: 1221 and n 8) (noting that Justice Scalia is one of the critics of 'the technique of appealing to American character' as way to decipher constitutional meaning).

identity originalists. Their identity vector is aimed to the future (Balkin 2011a: 29–32; Balkin 2013b: 130–2, 146–7), while identity originalists present a vector aimed towards the past, towards the original American identity. The difference between these two types of orginalism is not the addition to, or subtraction from, features of the core original values (Balkin 2011a: 261). Identity originalists do not deny that American original identity changed over the years. The difference is the vector.

'We are all originalists' might be true in the sense that many constitutional jurists today give at least some weight to the text's original meaning in the process of constitutional interpretation (Cross 2013: 43). Yet, it is not true that most adhere to identity originalism. Acknowledging this difference may allow conservatives to respond to the recent transformation of originalism into a 'meaningless brand name' (Karlan 2009: 389). In recent years, originalism as an interpretative scheme 'has become murky and incoherent. It is a slogan now, not an interpretive methodology.' (Friedman and Solow 2013: 97–8; see also Colby and Smith 2009: 244) This erosion of originalism's borders, coupled with its appeal in terms of recruiting public support (Greene 2009b: 659), made it popular among progressives (Cross 2013: 2, 16). For example, Balkin recently admitted that while 'purposivism' may better capture the essence of his interpretative scheme, he preferred branding it as 'framework originalism' (Balkin 2013b: 130–2). Progressives who adopt the 'originalism' brand without committing to the vector pointing to the founding era will have to acknowledge their disloyalty to identity originalism.

Many features of the American original constitutional-identity have vanished, and for a good reason – for example, slavery and other forms of inequality (Balkin 2013a: 673). Indeed, identity originalists do not deny that changes have been made to the original identity. However, they insist on preserving a link to the identity of the founding generation. If the Constitution is to be 'a covenant running from the first generation of Americans to us and then to future generations', (*Planned Parenthood v Casey*, 505 US 833, 901 (1992)) identity originalists believe that a thread of identity from the framers to our own times must be guarded. Certain core features that connect founding America to current America must be maintained. Without this thread, the people who wrote the Constitution and the people who are bound by it today are distinct. They do not share the same identity over time (Seidman 2012: 57). It is no wonder then that identity originalists discount narratives that put emphasis on discontinuity between the founding and present because of the interludes of Civil War and the Reconstruction Amendments (Greene 2009a: 64).

Self-reliance, limited government, and the individual right to be left alone were central to American identity in the founding era (Rakove 1996: 288–338). Identity originalists insist that these characteristics remain

central to current constitutional identity so as to ensure that the continuing thread from America's original identity to its contemporary identity will not be severed (Rosen and Schmidt 2013: 117–18). From this understanding of the original identity emanates a firm objection to the individual mandate in the ACA. First, the individual mandate is an affront to the original idea of liberty as the right to be left alone because it compels the individual to buy a service (Rosen and Schmidt 2013: 100–3, 114–15). Second, the ACA demands a form of solidarity according to which rich and healthy Americans subsidise the health care of their poor and sick fellow citizens (Blackman 2013: 4; Super 2014: 947). This vision contradicts the founding era values of self-reliance and personal responsibility that were supplemented by a community-based aid system in which social problems were resolved by small communities, each with its own inner solidarity (Super 2014: 947).[6] Third, the ACA expands the powers of the federal government well beyond the original idea of limited government (Super 2014: 933). This last argument may be viewed as supporting the first two if one understands the original ideas of limited government and the federal structure not as ends by themselves; but as means to ensure 'the liberties that derive from the diffusion of sovereign power'.[7] Judge Roger Vinson of the Florida district court gave expression to some of these identity concerns in his judgment regarding the ACA, writing that '[i]t is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place … Surely this is not what the Founding Fathers could have intended.'[8]

True, the connecting thread is one the current generation constructs while looking backwards (Balkin 2013a: 673). The originalist American identity is thus in a sense an evolutionary endeavour or even a form of nostalgia, recreating a past in response to present anxieties (Rodgers 2011: 241). Moreover, the divisions within originalism as an interpretative theory, such as the division between original semantic meaning and original public meaning, can provide different historical narratives of

[6] But see Balogh (2007) (showing that contrary to the familiar historical narrative, the national government intervened powerfully in the lives of nineteenth-century Americans through the law).

[7] *Sebelius*, 132 SCt at 2578 (opinion of Roberts, CJ) (quoting *New York v United States*, 505 U.S. 144, 181 (1992)).

[8] *Florida ex rel. Bondi v U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1286 (N.D. Fla. 2011), aff'd in part, rev'd in part sub nom. *Florida ex rel. Att'y Gen. v U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011).

the time of origins and thus various ways of identifying with the past (Koppelman 2013: 79–80). For these reasons, identity originalists may find conflicting aspects in the past to identify with, and subsequently offer alternative readings of American identity at the founding era so as to accommodate the ACA.

The declaratory commitment to 'fixation' – the common characteristic shared by all schemes of interpretation that fall under the banner of originalism (Colby and Smith 2009: 240; Bennett and Solum 2011: 35–7; Cross 2013: 32) – is central also to identity originalism. The fixed reference – the identity during the founding of America – must have a substantive bearing on current American constitutional identity (Webber 2011: 152–3).

As opposed to 'regular' originalists, identity originalists attribute fixation to the original meaning of American constitutional identity rather than to the original meaning of each of the Constitution's provisions. They view the Constitution as containing a fixed core identity that can be properly understood only in terms of original meaning. Through fidelity to originalism as an interpretative scheme, fidelity to an original American identity may be achieved.

For identity originalists, the Constitution is more than an empty vessel, more than just a symbol with evolving meanings. It must connect the original generation and current one. The current generation of Americans must be able to see itself in its origins. Accordingly, identity originalism is an interpretative scheme committed to preserving a thread of identity stretching from the days of the founders to the present. The Court serves as a trustee, preserving the core of American original identity. The Justices serve as the 'keepers of the covenant' that constituted American identity (Rehnquist 2006: 406).

## *The living constitution*

As part of his general thesis that 'the earth belongs to the living',[9] Thomas Jefferson argued that living Americans do not stand in any special relationship to the identity of past generations. Present American identity is not a continuation of past American identities (Rubenfeld 1998: 1088). Rather, the relation between the present generation and past generations is like that of 'one independent nation to another'.[10]

The longevity of the Constitution speaks volumes of America's decision against Jefferson's rejection of the 'dead-hand of the past' controlling the

[9] *Letter from Thomas Jefferson to James Madison* (6 Sept 1789) in Boyd (1958: 395).
[10] Idem.

present (Strauss 2010: 25). America did not follow Jefferson's idea to constitute a new basic document, a new identity, with every new generation.[11] Rather, one generation of Americans is linked to another through the Constitution (cf McConnell 1998: 1133–4). Nevertheless, on the identity level, the idea of a 'living constitution' is a close approximation to Jefferson's generational idea. On this view, each generation leaves its imprint on the Constitution through the process of interpretation. Constitutional interpretation is one central device to keep American constitutional identity up to date (Goldford 2005: 61; Gillman 1997: 191).

Living constitutionalism as a roadmap to America's constitutional identity creates an analogy between constitutional identity and personal identity. Its advocates argue that like the identity of a person, America's constitutional identity is not stagnant; rather, it continues to evolve and adapt to contemporary needs and values (Dodson 2008).

Identity-living constitutionalists believe that in order to remain as authentic as possible, American constitutional identity must mirror the developments in the identity of the American people. The American public must be able to identify themselves in the current constitutional vision. Yet, this view of American constitutional identity is not produced by interpreting the Constitution to accommodate the regular politics of the day. Changes in American constitutional identity must reflect changes in foundational politics (Sunstein 2004: 63). Hence, American constitutional identity must be a dynamic collective story that continues to evolve and change in accordance with deep changes in American society (Goldford 2005: 58). It grows with society, even if in the process it outgrows its original meaning (Rubenfeld 2005: 9–10).

Since amending the Constitution is very difficult, constitutional law must adopt an interpretative scheme linking the constitutional identity to current developments in order to keep pace with the development of American identity. Identity-living constitutionalism ensures that fundamental decisions regarding American identity are not insulated from the democratic process. American constitutional identity evolves not through ruptures and 'constitutional moments' but through responsiveness, over time, to foundational political changes and cultural forces through various mechanisms, including judicial interpretation (Balkin 2011a: 18–19, 88–91, 320; Seidman 2001: 47; Rosen and Schmidt 2013: 132–3).

Those who subscribe to living constitutionalism as a roadmap to American constitutional identity confront three main dangers. First, there is the danger of a legislature that responds to momentary whims

[11] 5 *The Writings of Thomas Jefferson* in P. Ford (1894: 121).

of public opinion. Such a legislature poses the danger of promoting through legislation an identity reflecting current passing preferences that conflict with America's current constitutional identity, which is based on the public's foundational commitments. The Court is thus responsible for discerning the deep currents of American identity, the evolving constitutional commitments, from mere public opinion (Bennett and Solum 2011: 79). It protects the people from inauthentic manifestations of their evolving identity. The Court must ensure that the legislature does not divert from the contemporary foundational values, from the contemporary identity of the American people.

Second, there is the danger that adopting living constitutionalism as a roadmap to American identity will allow constant changes in America's foundational values. American identity will transform into a constant stream of conscience without a fixed core that makes a stable identity possible (Dunn 2011: 93–4). 'Constitutional moments' cannot truly be moments, as identity cannot be defined and redefined by the moment. This is not freedom to self-author the polity's identity. Rather, it is a recipe to dissolve the agent's identity and to lose any sense of freedom (Rubenfeld 1998: 1100).

Third, there is the danger of a Court that is too loyal to 'the dead hand of the past', to the identity of earlier generations preventing the evolution of America's constitutional identity. The current generation's vision of America's foundational values should guide the Court in articulating America's constitutional identity instead of the values of long-dead generations. Identity-living constitutionalism serves as a mechanism for ensuring judicial responsiveness to currents in public opinion but at the level of foundational values. This differentiates this interpretative approach from other mechanisms that aim to ensure responsiveness of the Court to public opinion at the level of regular politics (Bennett and Solum 2011: 79; Bassok 2012: 350–8).

Assuming that the Court properly adheres to identity living constitutionalism and defends current American identity from passing public whims and from capitulating to the identity of past generations, it cannot be accused of acting contrary to the will of the people. According to those adhering to identity-living constitutionalism, self-government is not achieved by conforming to the public will at any given time. Self-government is achieved by holding the people to their own foundational commitments as they evolve over time (Rubenfeld 2001: 168). By viewing American constitutional identity as emerging from a continuing process of democratic self-determination by the people, the Court avoids any notion of confrontation with popular sovereignty (Habermas 2001: 771). It holds the people true to their developing narrative as it is crystallised in the

Court's judgments. It expresses 'the nation's best-understanding of its fundamental values' (Liu, Karlan and Schroeder 2009: 24).

Not all those who subscribe to an interpretation of the Constitution as a living document, also view the American Constitution as the focal point of American identity. Rather than viewing living constitutionalism as a roadmap to an identity manifesto, these jurists view it as a tool to update the Constitution to reflect changing times, so that the Constitution can continue to function as enforceable law (Sunstein 2004: 139–44).

Some living constitutionalists argue that in view of the difficulty of amending the Constitution, the Court cannot be the only body responsible for updating America's constitutional identity. Another path is through the enactment of super-statutes by Congress. These super-statutes go through the regular statutory enactment process yet they have 'power beyond their formal legal ambit' since they 'have generated strong social entrenchment' (Eskridge and Ferejohn 2010: 8, 27). According to William Eskridge and John Ferejohn, these statutes, more than any of the Court's interpretations, are responsible for change in American constitutional identity during the twentieth century (Eskridge and Ferejohn 2010: 19–20). They provide a 'more embracing understanding of [the] nation's fundamental commitments' (Eskridge and Ferejohn 2010: 77). Based on various super-statutes, such as the Social Security Act of 1935 and the Civil Rights Act of 1964, Eskridge and Ferejohn offer a revisionist reading of American constitutional identity that is oriented to the 'core values' of economic equality, environmental protection and responsiveness to new social groups (Eskridge and Ferejohn 2010: 19, 42–52).

These super-statutes tell the story of an evolving constitutional identity. Individualism and self-reliance are not the driving force of this story. Rather, the story is one of progress toward equality (Dionne 2012: 12). American understanding of freedom has evolved. Government intervention in the economy is not understood any longer as violating freedom, but as vindicating freedom by awarding an equal opportunity for every citizen to develop her or his abilities and participate in the market economy. In order to fulfil this commitment to equal opportunity, each individual should have access to proper health care. As a result, Congress's authority '[t]o lay and collect Taxes [etc] to … provide for common defence and general Welfare'[12] should be read as to allow the individual mandate as part of the continuing endeavour to fulfil this vision of American constitutional identity. The ACA merely implements the vision of American identity expressed in these super-statutes.

[12] United States Constitution, art I, section 8, cl 1.

While we could trace this vision to reading of the founders' values conducted from a bird's-eye view,[13] according to proponents of living constitutionalism, to be true to American identity is to admit that America has changed. The idea of 'rugged individualism' has declined over the years and does not have a significant role in American identity. While upholding the Social Security Act,[14] the Court explained in *Helvering*[15] that the days when Americans could escape from economic trouble by moving to the frontier and succeed on their own are long past. Individualism has faded away and government involvement, as well as a greater sense of a national community, has risen in its stead (Marshall 2012: 140–4; Dionne 2012: 12–14; Eskridge and Ferejohn 2010: 179–80). American constitutional identity has changed, as people have become more interdependent. Some degree of social security is now part of this constitutional identity (Sunstein 2004: 5). A certain right to welfare has become a constitutive commitment in the sense that it constitutes one of America's basic values (Sunstein 2004: 62–5). Adequate medical care, as provided by the ACA, is just a part of America's basic commitments. Current public opinion polls showing otherwise are merely passing waves of resistance as opposed to deep commitment to social welfare adopted over decades.

### *Ackerman's intergenerational synthesis*

Bruce Ackerman contends that '[t]he Constitution is best understood as … an evolving language of politics through which Americans have learned to talk to one another in the course of their centuries-long struggle over their national identity' (Ackerman 1989: 477). In this vein, Ackerman's dualist model, aimed at explaining regime changes in American constitutional discourse, can be best understood as a formulation of the ongoing struggle over American collective identity (Ackerman 1984: 1072; Ackerman 2014: 28).

According to Ackerman, in certain periods, political movements gain enough public legitimacy in order to 'renew and redefine the collective sense of national purpose' (Ackerman 1995: 63). In these periods, they speak as the 'authentic' voice of the people (Seidman 2001: 46). Since the

[13] For example, one may argue that in order to fulfil the 'the pursuit of happiness', as stated in the Declaration of Independence, Congress has a constitutional duty to 'make the poor somewhat happier' and this duty has been adopted in super-statutes including most recently, the ACA. Cf Eskridge and Ferejohn (2010: 52, 184–85) (discussing Congressional discussion of the old-age and unemployment insurance legislation in the 1930s).

[14] Social Security Act of 1935, ch 531, 49 Stat 620 (1935).

[15] *Helvering v Davis*, 301 US 619 (1937).

constraints of Article V make the incorporation of these changes through a formal amendment very difficult, the American people, according to Ackerman's dualist model, tear the veil of uninterrupted legality and amend their constitutional identity outside of the procedure stipulated in Article V (Ackerman 1991: 44; Ackerman 1998: 10–11, 28–31, 115).

Ackerman's dualist model lacks any substantive criteria for determining what qualifies as a proper constitutional change (Ackerman 1991: 13–16). It is focused on public involvement in 'politics' i.e., on the process, rather than on the substance of the issues debated (Ackerman 1991: 299; Levinson 2014: 2648). His distinction between constitutional politics that may lead to a 'higher lawmaking' and 'normal politics' is based on the intensity of the public's involvement in the debate.

According to the dualist model, the Court's role is to ensure the synthesis between different components of American identity authored by different generations. During the long periods of 'normal politics', the justices' role is to protect the synthesised American identity. Using judicial review, the Court ensures that the public and the representative branches are bound to the changes made to American constitutional identity, which were accepted by the People during periods of 'constitutional politics' (Ackerman 1991: 10, 60, 72, 192, 171, 261–4, 289). The Court's role is to identify true changes in American identity, including those made 'outside' of Article V, and to synthesise constitutional visions of different generations into a new whole. The 'basic unit' of authorship is 'the generation' and thus the roadmap to American identity is an 'intergenerational synthesis' (Ackerman 1997). The nation's constitutional memory is reorganised by the synthesis of different constitutional moments. Past events are read in view of recent events. Out of this mix arises a new, synthesised American identity.

The constitutional identity produced in accordance with the intergenerational synthesis does not necessarily reflect the most morally justified constitutional narrative. Rather, the synthesis is the roadmap to the authentic voice of 'We the People' (Ackerman 1998: 81–95).

Ackerman thus confronts the identity difficulty by synthesising identities. The death of a generation does not imply that its 'dead hand' cannot control the present generation (Ackerman 1998: 258). The 'intergenerational synthesis' ensures that the identities of the 'dead hands of the past' will be synthesised with recent identities, even if some of these identities were not formally codified. In times of 'regular politics', the Court protects the synthesised intergenerational identity against the current majority.

The difference between Ackerman's roadmap and identity originalists' roadmap is not, as Ackerman has indicated that identity originalists want to return to the original American identity as expressed in the 1787

Constitution (Ackerman 2014: 19, 34). They accept that changes expressed in formal Amendments should be synthesised into the current American constitutional identity. Their insistence on formal Amendments – as opposed to Ackerman's informal amendments outside of Article V – is hardly unique, as Ackerman himself admits (Ackerman 2014: 19, 35). The true difference between these two roadmaps is that Ackerman's model allows earlier identities to dissipate or become marginal. Identity originalists insist that the central thread connecting Americans past and present arises from the original constitutional identity. Ackerman's intergenerational synthesis does not require that a remnant of the founding era remains a substantial part of contemporary American identity. The founding constitutional moment may fade away if 'We the People' so wishes.

Ackerman's roadmap contains a 'filter' for distinguishing between social movements that succeeded in achieving a regime change in American constitutional discourse and social movements that failed to bring about such a change. The former affect American constitutional identity, while the latter do not. Ackerman extracts this filter from patterns he detects in American constitutional history (Ackerman 1991: 266–7; Ackerman 1998: 66–7). Questions arise regarding the calibration of this 'filter'. For example, scholars debate whether incremental 'small' changes involving compromise and cooperation, without creating a 'big showdown' equivalent to the one required by Article V (Eskridge and Ferejohn 2010: 14, 38, 165–6), affect American constitutional identity, or whether only rare 'constitutional moments' create changes in American identity (Sunstein 2009: 3–6).

In his third volume, Ackerman acknowledges the civil rights landmark statutes as constituting a constitutional moment (Ackerman 2014: 61). As opposed to the 'full constitutional status' he now grants to the landmark statutes of the civil rights revolution (Ackerman 2014: 8–9, 34), in his earlier volumes Ackerman viewed the civil rights movement's accomplishments as falling short of an independent episode of proper, higher law-making (Ackerman 1991: 111, 136, 196).[16]

In the first two volumes of *We the People*, a rupture in legality existed in all three constitutional moments. These ruptures were later concealed behind a myth, or at least forgotten. The ruptures assured that Ackerman's theory would not become another version of 'living constitutionalism' as this family of theories depicts the constitutional development as a continuing

[16] See also Michelman (1998: 78) (noting that according to Ackerman constitutional matters 'were last left' in the year 1937); Eskridge and Ferejohn (2010: 63, 483 fn 64) (detecting the change in Ackerman's view).

process bound by legality. Understanding Ackerman's position on the issue of ruptures in legality is imperative in order to understand his roadmap, especially in the context of the ACA's constitutionality. As will be elaborated below, there is a strong argument that the Court's adoption in *National Federation of Independent Business v Sebelius* (132 SCt 2566 (2012)) of the argument that Congress did not have power under the Commerce Clause to impose the individual mandate as part of the ACA was a rupture in legality.

The rupture in legality is evident in the founding period 'constitutional moment' as the Philadelphia Convention acted against America's first constitution, the Articles of Confederation, overstepping its own mandate given by the Continental Congress and breaking with the ratification process specified by the Articles of Confederation (Ackerman 1998: 34–9, 49). This was indeed 'a blatant break with established constitutional norms' (Ackerman 1998: 168). Yet, while the revolutionary character of the Constitution is recognised in the American imaginary because of the connection to the American Revolution that occurred a few years earlier (Ackerman 1998: 8–9), the legal break from the Articles of Confederation is less emphasised and recognised (Ackerman 1991: 41; Kammen 1988: xviii, 70–1).

Similarly, the conventional narrative of the Reconstruction Amendments, the second 'constitutional moment' Ackerman acknowledges, assumes that the amendments were processed in compliance with Article V. Yet, as Ackerman shows, this 'collective amnesia' (Ackerman 1998: 22–3, 168, 255; Ackerman 1991: 42–6, 211) conceals the blatant break with the process of Amendment that occurred during the ratification process of the Thirteenth and Fourteenth Amendments (Ackerman 1998: 123–4, 168).

'A myth of rediscovery', according to which the Court rediscovered and restored John Marshall's Constitution during the New Deal, still controls the way people perceive the third 'constitutional moment' that Ackerman acknowledges (Ackerman 1998: 259–61; Ackerman 1991: 61). Yet, according to Ackerman, this myth conceals the rupture in legal doctrine created by the New Deal Court, which broke from an established line of precedents in one stroke (Ackerman 1991: 52; Ackerman 1998: 26, 211, 256).

While Ackerman never explicitly acknowledged the pattern of rupture plus myth as a requirement for a proper 'constitutional moment', this pattern has a strong logic emanating from his novel idea of constitutional changes outside of Article V. A rupture in legality signals to the public that a change in the foundational politics of the nation is about to occur. Yet, after a 'constitutional moment', the occurrence of a rupture in legality must be concealed in order not to disturb the commitment to the notion of

continuing legality ('the rule of law'). The legitimacy emanating from popular movements heals the rupture in legality and conceals it. Only in this manner, and thanks to the American revolutionary tradition, could 'We the People' award constitutional status to substantive ideas without going through the Article V procedure. This was Ackerman's 'revolution on a human scale' (Ackerman 1999: 2279).

Viewing the civil rights era landmark legislation – without detecting any rupture in legality preceding it or in the process of legislation – as the culmination of a change to American identity alters Ackerman's theory and brings his model closer to the living constitution approach (Ackerman 2014: 69–70, 193, 313). Statutes, even landmark statutes, usually fail to create a rupture in legality. They are part of the regular stream of legality. To attribute a 'constitutional moment' to the civil rights era landmark legislation, without detecting a rupture, is closer to the notion of incremental changes rather than to the idea of 'revolutionary' moments. Call it from now on, 'evolution on a human scale'.

*Brown v Board of Education* (347 US 483 (1954)) is the only point during the civil rights era that fits Ackerman's earlier pattern of a rupture in legality that is exposed to all and then disguised over the years behind a thick veil of myth. For the legal community during the 1950s, it was extremely difficult to justify *Brown* in terms of legality (Horwitz 1992: 258). The legal resources the Court found to support the *Brown* decision were thin, pushing the justices to rely on dubious social science (Engel 2011: 288–9). Over the years, many scholars agreed that the decision lacked legal legitimacy (Hand 1958: 55; Balkin 2001: 4; Powe 2000: 40).[17] It was a rupture in legality (Bassok 2013: 179–85). Yet today, '[i]n nearly all eyes', Richard Fallon writes, '*Brown* reflects the Supreme Court at its best' (Fallon 2001: 58). Just as in the three earlier constitutional moments, the rupture in legality in *Brown* is hidden today behind a thick veil of myth. *Brown* became the symbol of the civil rights revolution (Ackerman 2014: 134). As Jack Balkin writes, '*Brown* became recognized as a symbol, not only of racial equality, but of equality and equal opportunity generally' (Balkin 2001: 9. See also Balkin 2011b: 140). The civil rights era's achievements are imagined today through the symbol of *Brown*, although they were hardly encapsulated in this judgment that was restricted to primary and secondary public education (without even directly overturning *Plessy*) (Balkin 2004: 1541, 1564–8; Balkin 2011a: 312).

Ackerman views *Brown* in his first two volumes as an application of the New Deal constitutional moment (Rubenfeld 2005: 11; Eskridge and

[17] Contra Strauss (2010: 85–92) (*Brown* can be justified 'solidly' on the basis of the common law method as many precedents led to it).

Ferejohn 2010: 62–3).[18] Yet he writes that '*Brown* came to possess the kind of numinous legal authority that is, I believe, uniquely associated with legal documents that express the considered judgments of We the People' (Ackerman 1991: 137). In his third volume, *Brown* serves as merely 'a *constitutional signal*, provoking an escalating debate among ordinary Americans about the need for a Second Reconstruction' (Ackerman 2014: 48, 51).

Detecting a 'constitutional moment' usually requires the hindsight of several decades. Without the advantage of this kind of hindsight, I argue that according to Ackerman's roadmap, the ACA may serve as part of such a constitutional moment, either as a signal or as a rupture.

According to Ackerman, until America enters a period of constitutional politics, the Court's role is to protect the current synthesis of constitutional identities by striking down any attempt to deviate from it (Ackerman 1991: 94, 124–30). However, in *Sebelius* the Court took a rather perplexing route. It affirmed the ACA but failed to recognise that it represents an attempt to alter American identity. It also adopted an argument that has the potential to change American identity in direction opposite to the expressed goals of the ACA.

The ACA requires an identity vision that can explain on what common value an American from Iowa should further subsidise the health care of an American from Connecticut who is a complete stranger (Super 2014: 919). Over the years, social security and other measures of the welfare state were adopted, but the ACA represents a significant step forward towards that vision (Sandel 1996: 280–3, 346). An identity-vision that can justify the higher solidarity between Americans was put twice at the centre of political debate during American history. It was raised first by President Franklin Roosevelt in his 'Second Bill of Rights' speech. Twenty years later it was raised again in President Lyndon Johnson's 'Great Society' speech.[19] On both occasions the American people did not adopt this vision (Sunstein 2004: 4, 128–30, 179–80, 194).

By putting a vision of increased solidarity among Americans at the centre of the constitutional agenda again, the Court might have used the ACA as a signal for a constitutional change, provoking and escalating debate among ordinary Americans about the need for greater national solidarity.

[18] In his third volume, Ackerman portrays the 'New Deal – Civil Rights synthesis', but the landmark statutes rather than *Brown* are the central component of the Civil Rights higher law-making (Ackerman, 2014: 108–16).

[19] See President Lyndon B. Johnson, 1965. "Remarks at the University of Michigan." (22 May 1964) In 1 *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1963–64*, 704–7.

Yet rather than discussing any identity vision, the Court chose in *Sebelius* (as well as in *Hobby Lobby* and *King v Burwell*) to avoid altogether the question of identity (Bassok 2014: 42–4).

Therefore, the ruling in *Sebelius*, affirming the constitutionality of the ACA under the Taxing clause, did not signal an adoption of a vision of American identity that can serve as the basis for higher solidarity. In fact, the ruling may instead be a rupture in legality signalling the rise of a constitutional vision that contradicts the one promoted by the ACA. Five justices accepted the argument that Congress did not have the power, under the Commerce Clause, to impose the individual mandate to buy health insurance as part of the ACA. In essence, the Court adopted what has been called the 'broccoli argument'. According to this argument, the Court could not uphold the mandate based on the Commerce Clause since this position means that Congress would have unlimited power and could also mandate the purchase of broccoli (Blackman 2013: 92–5). The 'broccoli argument' reflects a libertarian vision of American identity according to which the state is much more limited in constraining people's choices. This vision of American identity contradicts forms of solidarity anchored in the current understanding of the New Deal and the Civil Rights 'constitutional moments'. These forms of solidarity were embedded in the interpretation of the Commerce Clause until the *Sebelius* judgment (Ackerman 2014: 147–8).

Yet the Court did not adopt, or even present, this libertarian identity vision that stood behind the challenge to the ACA. Had it adopted this vision and read the Constitution as expressing a libertarian constitutional identity, libertarianism would also affect the interpretation of the Taxing clause and not only the interpretation of the Commerce clause, thus leading the Court to strike down the individual mandate. Indeed, constitutional identity affects the interpretation of the entire document and the Court cannot read the Commerce clause alone as anchoring the vision that stood at the basis of the 'broccoli argument'.

By accepting the 'broccoli argument', an argument that was considered as lacking any legal legitimacy in the eyes of almost all constitutional law experts just a few years ago (Rosen and Schmidt 2013: 100–1), the Court created a rupture in legality. This argument was considered by almost all speakers of the constitutional language as an invalid claim that stands outside the borders of the constitutional language (Bassok 2015: 67, 75). Yet, it was incorporated into constitutional language by the Court thus challenging the current vision of American identity.

However, at the end of the day, the Court upheld the ACA and did not adopt the identity thesis offered by the administration or the thesis offered by those who challenged the law. The Court de facto maintained the status

quo in terms of constitutional identity (Bassok 2014: 42–3). According to the current understanding of American constitutional identity, in order to allow individuals to make truly free choices based on their visions of the good life, the state must ensure a certain minimum level of welfare. Such a requirement does not hinder the neutrality of the state as it is understood in the post-*Lochner* era. It only tries to ensure citizens' true liberty to make choices and thus to ensure a truly 'free' market (Sandel 1996: 43–53).

### *Rights foundationalists*

Rights foundationalists view rights as fundamental to American identity (Perry 2003: 638–9). According to their view, protecting rights is what America and the American Constitution is all about (Dworkin 1977: 147; Richards 1992: 75).[20] Constitutional rights consciousness is what binds Americans together (Hartog 1987: 1013–20). Michael Perry explains that what gives Americans meaning is their belief in their special responsibility, their special obligation, among the nations of the world. Currently, according to Perry, this moral leadership is understood in terms of promoting human rights (Perry 1982: 97–101).

Charles Black views the US as 'a nation that founded its very right to exist on the ground of its commitment to the securing of nobly envisioned human rights in very wide comprehension' (Black 1997: 1). Already in 1944, Gunnar Myrdal argued that America's deepest values, the ones that give meaning to its struggle for independence and serve as the cement of the nation, include equal inalienable rights of all individuals. These values, the tenets of the 'American Creed', were anchored in the Declaration of Independence: the Preamble of the Constitution, the Bill of Rights and states' constitutions thus becoming 'the highest law of the land' (Myrdal 1944: 3–4, 8–9; Smith 1997: 19). However, other scholars argue that the essence of American constitutional identity was not always rights-based (Henkin 1990: 116). For example, Mark Tushnet describes a 'narrative of national unity', that is based on 'universal human rights justified by reason', as a centrepiece in the 'Lincolnian project' (Tushnet 1999b: 100). He adds that the rights fundamentalist vision reflects how 'America has long tried to understand itself' (Tushnet 1999b: 100).

Many scholars who adhere to rights talk suggest that CM judicial review is justified in the name of protecting human rights (Bassok 2012: 344–5).

[20] For an analysis of this approach see Ackerman (1991: 11) (describing the common thread of 'Rights Foundationalists': 'Whatever rights are Right, all agree that the American constitution is concerned, first and foremost, with their protection.'); McGinnis and Rappaport (2002: 705) (arguing that 'fundamental-rights theorists' view the Constitution as promoting a single political principle: human rights).

Yet, not all of them view rights as part of American constitutional identity. For some of them, human rights that are anchored in the Constitution trump majority opinion, not because of their central role in constituting a robust vision of American identity, but because of moral justifications (Dworkin 1977: 133).[21] For others, the theory of rights stands apart from the constitutional text and is part of a universalistic moral theory that inspires the interpretation of any constitutional text, whether it is the American or not. According to this view, judicial review is justified since it is an effective tool for achieving the substantive end of defending human rights (Whittington 1999: 27–8). Yet in both cases, human rights are not a roadmap to American identity.

Those who view rights as the core of American constitutional identity read the Constitution as aimed, above all, at protecting a certain vision of human rights that constitutes American identity (Henkin 1990: 104–5). Various rights stand at the centre of different rights-based constitutional identities. For example, Walter Murphy attacks the thin and limiting vision of rights presented by the Court in cases such as *Carolene Products* (*United States v Caroline Products*, 304 US 144 (1938)) and *Barnette* (*West Virginia State Board of Education v Barnette*, 319 US 624 (1943)), and argues that American constitutional identity is centred on one distinct human right. According to his view, 'the fundamental value in the American polity has become the dignity of each human being' (Murphy 1980: 708 and fn 19, 745). The Court's role, according to Murphy, is to protect this value against competing values as well as against 'hostile government action' (Murphy 1980: 706). Progressives, who adopt this vision, read human dignity as requiring minimum standards of living (Goodman 2006: 743; Parent 1992: 71). For them, the roadmap that connects human dignity in the sense of adequate economic welfare, the pursuit of happiness and true individual freedom is the most authentic representation of current American identity. Without freedom from want, without having the most basic standard of living satisfied, true liberty cannot be achieved (Sunstein 2004: 2, 12, 76–81, 205). Thus, according to this perspective, the ACA is constitutional, because the government must provide health care as part of its constitutional commitment to human dignity.

In contrast, libertarians view freedom from interference as the core of American rights-based constitutional identity. According to this approach, a citizen's individual agency and free choice are at the centre of American constitutional identity (Rao 2012: 183–4). Subsequently, the ACA is

[21] In his later work, Dworkin argued that his vision of rights is required by a commitment to democracy; see Dworkin 1996: 2–38.

unconstitutional as it represents a frontal attack on this understanding of American constitutional identity.

For rights foundationalists judicial review is a tool for safeguarding America's true identity, for protecting its self-understanding as a nation committed to human rights.[22] Thus, Louis Henkin explains that 'judicial review is now intrinsic to our idea of rights and essential to its realization, our hallmark and pride and a source of envy around the world … it is an authentic, homegrown response to the needs of our conception of rights' (Henkin 1990: 105–6, 124–5). Foundational-rights theorists argue that the current public should be prevented from straying from the rights-based American identity, even if their immediate desires direct them to do so. Such deviation would be a renunciation of America's true identity.

### *Constitutional existentialists*

Instead of offering a roadmap to a certain vision of American constitutional identity, several scholars suggest that the quest itself, the continuing search for a constitutional identity, is the only constant component of American constitutional identity. The eternal search for foundational values constitutes, by itself, the American constitutional identity. American identity is not to be found in any particular moment in time or in any fixed principle beyond the people's ability to live out and rewrite their self-determined political commitments (Rubenfeld 2001: 11–12; Post 2000: 186; Powell 2002: 213). American identity is constituted by the process or ritual of rewriting these foundational commitments, rather than based on a certain fixed set of foundational commitments (Kahn 2004: 265). The continuing endeavour of drawing the map to American identity is the essence of constitutional existentialists.

Under this thesis, the Court may serve as one important participant in the process of rewriting American constitutional identity (Balkin 2011a: 22; Balkin 2011b: 96, 236). Alternatively, it may serve as the institution responsible for expressing lucidly the most recent version of American identity as rewritten by the American people (Kahn 2003: 2690–1, 2696), or as the institution that ensures that the quest continues by unsettling any stable outcome (Seidman 2001: 93, 97, 159–61). Under each of these versions, the identity difficulty is dissolved. Identity formation is an ongoing process and American identity finds meaning in the formation ritual itself. There is nothing beyond this ritual (Kahn 2005b: 110). In this continuing endeavour, judicial review is merely another part of the never-ending ritual

[22] Not all rights fundamentalists necessarily support judicial review. Tushnet presents the foundationalist-rights vision of Lincoln as not supportive of judicial review (Tushnet 1999b: 100–1).

through which Americans rewrite their identity (Balkin 2011a: 22). Even if the Court has the 'last word' in a certain controversy at a certain period, there is no identity difficulty in the sense that a past identity constrains an ever-changing American polity because, according to constitutional existentialists, American identity is not dependent on certain content, only on the ritual of rewriting American constitutional identity.

Scholars who belong to this category of constitutional existentialism differ in terms of their depictions of the quest, of the constitutional authorship ritual. Yet all of them agree that the process of self-authorship of constitutional identity is what defines American identity (Balkin 2011b: 91; Seidman 2001: 9, 81, 91, 125). They are not committed to any particular content of American constitutional identity. Thus, constitutional existentialism does not lead to a particular result in the debate over health care. The ACA may be part of different narratives self-authored by the American people. It may be part of a narrative of redemption of social solidarity between Americans or a temporal retreat, soon to be fixed, part of the story of a nation committed to redeeming the idea of liberty (cf Balkin 2011b: 161–2). A constitutional existentialist must accept the ACA as a necessary part of the constitutional quest only if he believes that people cannot be truly free to participate in writing their identity without basic health care (cf Sunstein 2004: 162, 167–8).

Constitutional existentialists are committed to the understanding that the coherence or inner consistency of legal doctrine can never block identity claims (Kahn 2003: 2689–90). In other words, for all of them, the rise of the 'broccoli argument' from a position supported by strong social movements, but rejected by constitutional scholars, to becoming the law of the land represents the correct path of constitutional discourse. Identity arguments cannot be blocked by argument of constitutional expertise. Even if the community of 'expert speakers' of the constitutional language found that this argument defies the constitutional professional language (Blackman 2013: 45), constitutional existentialists view self-authorship by the public as the purpose of constitutional law. Thus, even without a Constitutional Amendment according to Article V, and even without a proper 'constitutional moment', the Court can, and should, engage with arguments from public discourse that defy constitutional doctrine if it is convinced that these arguments are part of the public's attempt to author its identity (Kahn 1999: 78–80; Kahn 2003: 2690–1, 2696).

## IV. Roadmaps to majority preferences

As elaborated above, in order to properly understand approaches to constitutional interpretation we must view them also as roadmaps to

American identity. And yet, so far constitutional interpretative schemes have been understood mainly as techniques for deciphering the Constitution or as justifications for the Court's CM authority (Bassok 2012: 343–58). Their identity function has been ignored. Why?

As elaborated below, in recent decades, the content of American constitutional identity has become so thin that its dominant component is democratic decision-making. This component is currently understood as a procedural mechanism for deciding by aggregation of popular choice. There is no wonder then that interpretative theories are mostly understood as attempts to confront the CM difficulty that posits the democratic component at the centre of the constitutional debate (Brown 1998: 538–9). The obsession over the CM difficulty is an expression of the central role of democratic decision-making in current American constitutional identity (Horwitz 1993: 33–4, 57–8; Friedman 2002). The identity difficulty has collapsed into the CM difficulty.

In recent decades, the Court has read the Constitution through the paradigm of 'thin liberalism' (Sandel 1996: 28, 46, 55; Bassok 2014: 34–5). Rather than reading the Constitution as endorsing a particular concept of the good as done in the past, under this paradigm, the Constitution is currently understood as anchoring the neutrality of the state toward the various ways that people choose to live their lives (Levinson 1988: 61; Seidman 2011: 543–5). Thus, in recent decades, the main ingredient of American constitutional identity is democratic rule (Bennett and Solum 2011: 42), while its liberal character has become thinner and thinner. Democracy, as Morton Horwitz shows, has become the new 'timeless truth … the active governing ideal' of American constitutionalism only after the 'one person, one vote' decisions in the 1960s (Horwitz 1993: 57–8, 61). The 'liberalism' component, for its part, has become in recent decades so thin that is now less an ideology and more a constraint on entrenching any form of ideology at the Constitution's core (Bassok 2014: 34–5).

In recent decades with the rise of opinion polling, collective preferences, as expressed in opinion polls, are understood as a new form of popular sovereignty. Democracy has been understood more and more in terms of majority preferences as it is expressed in public opinion polls rather than in terms of collective decisions produced in elections (Ackerman 2010: 75–6; Althaus 2003: 6). To paraphrase Alexis de Tocqueville's observation about judicial review (De Tocqueville 1835: 280), scarcely any question arises in the United States that does not become, sooner or later, a subject of public opinion polling. Consequently, the CM difficulty split into two versions and the version that emphasises majority opinion rose to dominance (Bassok and Dotan 2013: 14–15). According to this new version, the

tension between constitutionalism and democracy is viewed as the problem of the Court defying, in the name of constitutionalism, the current, immediate stream of preferences of the American public. Therefore, the CM difficulty arises when the Court is not *responsive* to the majority of the public since it invalidates legislation that enjoys the support of the majority of the population, as captured by public opinion polls before the Court's decision or shortly thereafter. This *literal* version of the CM difficulty is focused on whether the Court's judgments correspond with the aggregated preferences of the populace or in other words, on whether the judgments are literally countermajoritarian (Bassok and Dotan 2013: 14). This understanding of the difficulty focuses on the majoritarian aspect of democracy. The *traditional* understanding of the CM difficulty focuses on another aspect of democracy: electoral *accountability*. According to this understanding, the difficulty arises when unaccountable judges invalidate legislation enacted by electorally accountable representatives (Bassok and Dotan 2013: 14).

The CM difficulty in its literal version emphasises the present wishes of the American public and negates the notion of a subject that extends across generations (Rubenfeld 2001: 152). According to this version of the difficulty, the 'dead hand of the past' should not impose any substantive limitations on what Americans can currently choose. Faced with a growing sense of a loss of meaningful control over their own affairs, Americans demand that the government policy corresponds, at any time, with exactly what they want (Dionne 2012: 20). For this reason they are constantly engaged with the problem of the Court straying from their current preferences (Sandel 1996: 201–5, 294).

The liberty to choose your own ends became the liberty to pursue your preferences at any point in time (Rodgers 2011: 17, 29). Liberal democracy becomes merely a procedural mechanism for coordinating personal preferences. Owen Fiss captured these processes at the end of the 1970s when he wrote: '[w]e have lost our confidence in the existence of the values that were the foundation of the litigation of the 1960s and, for that matter, in the existence of any public values. All is preference.' (Fiss 1979: 16–17) It is no wonder then that scholars discovered a correspondence between the Court's salient judgments and public opinion during the Rehnquist era (Friedman 2009: 364–5; Rosen 2006: 4). Through responsiveness to the preferences of living Americans, the Court can avoid issuing countermajoritarian judgments and simultaneously articulate American constitutional identity as a reflection of their current preferences (Bassok 2014: 34–7). It thus can avoid making controversial decisions on ultimate ends or on the good of the community as a whole beyond the sum of private preferences.

In subordinating the Constitution to the voice of the public at the present moment, the Constitution is reduced to an empty shell, to a hollow ritual (Rubenfeld 1998: 1111). Without a core, unifying commitment that extends over time, a nation that attempts to live only in the present, to rewrite itself in sync with public preferences, risks a collective dissolution (Rubenfeld 2001: 11; Seidman 2012: 58). Left with shifting preferences the nation lacks a narrative to make sense of its character. In such a situation of a 'constitutional yo-yo', collective agency that is based on the Constitution slips away and it becomes difficult to speak of a collective 'self' and of *self*-government (Sandel 1996: 350–1; Graber 2013: 715–16).

Almost three decades ago Sanford Levinson had already detected a public anxiety stemming from 'the realization that there may be no other basis' besides the Constitution 'for uniting a nation of so many disparate groups' (Levinson 1988: 73). The triumph of thin liberalism as the dominant paradigm for understanding American constitutional identity only exacerbated this anxiety. Since in recent decades America's identity has ultimately been a set of constitutional ideas, the thinning of these ideas put it in a fragile position. Without a constitutional telos that went beyond neutrality towards the question of the good, the sense of a loss of identity or a loss of agency was intensified (Huntington 2004: 4–5; Dionne 2012: 1–4).

Ironically, as a result of the triumph of the paradigm according to which the state is liberated from the debate on the good life and respects each person's capacity to choose her own ends, feelings of disempowerment grew among Americans. The loss of the ability to offer a narrative connecting the past to the present is the ultimate disempowerment of a community (Sandel 2000: 74, 86; Sandel 1996: 201–2, 275, 294, 323, 350–1).

Yet hope remains. If we sharpen our vision adequately we can observe that the CM difficulty currently captures both the fear of the loss of agency and the fear of loss of self-government. While the latter is overt, the former is concealed. The fear of loss of agency is exposed only when one properly reads constitutional interpretation methods as roadmaps to American identity. Once properly viewed, it is evident that these schemes do not offer only normative justifications for the Court's CM authority, but also that they view that authority as defending a certain identity narrative. Understanding interpretative schemes as offering various roadmaps to certain visions of American identity exposes them as more than just attempts to confront the Court's accountability deficiency (the CM difficulty in its traditional sense) or lack of responsiveness to public opinion (the CM difficulty in its newer, literal sense). They are attempts to protect visions of American identity that are more robust than thin liberalism. According to these theories, the Court's struggle with the tension between

constitutionalism and democracy should be focused on various readings of the notion of constitutionalism instead of emphasising different aspects of democracy. The emphasis should be on the nation's telos as it is manifested in its constitution.

Justified or not, the roadmaps offer narratives on what makes America what it is. Legitimacy is understood not in terms of popular support or in terms of justification but in terms of authenticity or telos (cf Weiler 2012: 825–8, 832–3). For example, identity originalism is best understood not as a promise to justify judicial review by constraining justices to a relatively determined text or by reasserting the sovereignty of the original 'We the People'. It is best understood as a map for a nation struggling through an age of fracture and seeking for its authentic character as a unifying point of reference. By making its time of origin present, identity originalists are seeking to recreate a sense of a cohesive, continuing community (Rodgers 2011: 222–4, 232–4, 241). Judicial review is the means by which a vision of American identity, as derived from the Constitution using a certain interpretative scheme, manifests its superiority to competing visions or the whims of the current public.

## V. Conclusion

In 1955, Louis Hartz wrote in his seminal book *The Liberal Tradition in American* that 'law has flourished on the corpse of philosophy in America, for the settlement of the ultimate moral question is the end of speculation about it … It is only when you take your ethics for granted that all problems emerge as problems of technique' (Hartz 1955: 10). Contrary to Hartz, I argued that law does not necessarily entail settlement and death of 'speculation' about political philosophy. What is perceived as a choice dictated by legal expertise between interpretative legal techniques may serve as the stage for debates over political philosophy. As long as debates on the meaning of American identity are conducted in the language of constitutional law, the choice of which tool to use for reading the Constitution cannot be considered merely 'problems of technique' (Bassok 2015: 76). But, Hartz was correct in arguing that if the question of the good is banished from constitutional law, the choice of interpretative approach will be perceived as merely a question of technique. My article exposed that interpretative approaches in fact offer distinct visions of American national identity, although in the current American constitutional discourse they are considered as merely techniques to decipher the Constitution or justifications for the Court's judicial review authority.

The American Constitution, or any constitution that serves as the focal point of its nation's identity, cannot be considered as a genetic code for the

nation's identity since the technology to decipher it affects the reading of the 'code'. The same genetic code can produce different identities according to the tool used for reading it. Subsequently, the choice of the interpretative roadmap is not a neutral choice dictated by legal expertise. Rather, it is a political choice in the deepest sense of the word: the choice of a roadmap to the identity of the nation.

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