

19 APRILE 2017

Social Mobility:
A Constitutional Matter

di Quirino Camerlengo
Professore associato di Diritto costituzionale
Università degli Studi di Pavia



Social Mobility: A Constitutional Matter^{*}

di Quirino Camerlengo

Professore associato di Diritto costituzionale
Università degli Studi di Pavia

Summary. **1.** Introducing this paper. **2.** About social mobility (in theoretical and empirical research). **3.** The welfare state and social mobility. **4.** Towards implementation of social mobility in the U.S. constitutional design. **4.1.** Democracy, pluralism, participation, human dignity: the first constitutional coordinates of social mobility. **4.2.** A brief excursus of the U.S. debate on welfare rights. **5.** Social mobility as a constitutional challenge for the future.

1. Introducing this paper

Sonia Sotomayor spent her childhood in the South Bronx area of New York City. Her Puerto Rican parents had lowly occupations. After graduating from Cardinal Spellman High School, Sonia Sotomayor attended Princeton University, where she graduated *summa cum laude*. She then earned her J.D. at Yale Law School, where she was an editor of the Yale Law Journal. After passing the bar in 1980, she served as a trial lawyer under District Attorney Robert Morgenthau. She became a US District Court Judge for the Southern District of New York City and was appointed by President Bill Clinton to the U.S. Second Circuit Court of Appeals. More recently, in 2009, President Barack Obama nominated her for Supreme Court Justice; this nomination was confirmed by the Senate¹.

Sonia Sotomayor is a shining example of upward *social mobility*: from the Bronxdale Houses housing project to the U.S. Supreme Court no less!² Sotomayor is a woman whose humble origins did not prevent her from reaching the pinnacle dreamed of by many American law graduates³.

^{*} Peer reviewed.

¹ These biographical data were obtained from multiple sources, including: US Supreme Court's website (*available at* <http://www.supremecourt.gov/about/biographies.aspx>), Wikipedia – The Free Encyclopedia (*available at* https://en.wikipedia.org/wiki/Sonia_Sotomayor), and, of course, S. Sotomayor, *My Beloved World*, 2013.

² R. SHULMAN, *Supreme Change*, in *The Washington Post* (June 16, 2009), wrote: «Her story has been hailed as an affirmation of the American dream: She came from the bottom and, against all odds, rose to the top». Similarly, R. LACAYO, *Sonia Sotomayor: A Justice Like No Other*, in *Time* (May 28, 2009), remarked: «Nobody expects you to make it to Princeton when you come from a public-housing project». P. BAKER and J. ZELENY, *Obama Selects Sotomayor for Court*, in *The New York Times* (May 26, 2009): «Her life story, mirroring in some ways Mr. Obama's own, would add a different complexion to the panel, fulfilling the president's stated desire to add diversity of background to the nation's highest tribunal».

³ It is no coincidence that E. BRENT, J. SCOTT LEWIS, *Learn Sociology*, Burlington, 2014, 270, open their chapter on social mobility with a reference to the social affirmation of Sonia Sotomayor, complete with a picture of her.



The President's remarks when nominating Judge Sonia Sotomayor are proof of the high value attached to her appointment as an example of social mobility. There are many qualities that Obama admires in a judge, such as intellectual rigor and recognition of the limits of the judicial role. These two qualities are, indeed, essential, but they are not sufficient. After recalling Oliver W. Holmes⁴, Mr Obama remarked that experience «can give a person a common touch and a sense of compassion; an understanding of how the world works and how ordinary people live. And that is why it is a necessary ingredient in the kind of justice we need on the Supreme Court». Hence his decision to nominate “an inspiring woman” whose her career has given her «not only a sweeping overview of the American judicial system, but a practical understanding of how the law works in the everyday lives of the American people. Along the way she's faced down barriers, overcome the odds, lived out the American Dream that brought her parents here so long ago. And even as she has accomplished so much in her life, she has never forgotten where she began, never lost touch with the community that supported her». He went on to say that Judge Sonia Sotomayor would bring to her role «the wisdom accumulated from an inspiring life's journey. And when [she] ascends those marble steps to assume her seat on the highest court of the land, America will have taken another important step towards realizing the ideal that is etched above its entrance: *Equal justice under the law*»⁵.

Data on social mobility (hereinafter SM) in Western countries are conflicting. In the United States, in particular, the “social elevator” does not work as it once did. On February 1st, 2016, the Stanford Center on Poverty and Inequality presented its third annual “state of the union” report devoted to these issues: «it is often claimed that there is much tolerance in the U.S. for high levels of inequality, as long as that inequality arises from a fair contest in which all children, no matter how poor or rich their parents, have the same opportunities to get ahead. This formula, insofar as it properly describes U.S. sensibilities, puts a premium on assessing whether indeed opportunities to get ahead in the U.S. depend much on one's starting point»⁶.

Widespread inequality, in itself a problem, becomes intolerable in situations in which there is very little SM and, therefore, an individual's fate is already sealed at the outset. Indeed, individuals are not the same at birth, and in the absence of SM they cannot foster the same hopes for a better future. In the mid nineties, Ralf Dahrendorf wrote as follows: «some regard all inequalities as incompatible with a decent civil society; this is not my view. Inequality can be a source of hope and progress in an

⁴ O.W. HOLMES JR., *The Common Law* 1 (1881): «The life of the law has not been logic; it has been experience».

⁵ <https://www.whitehouse.gov/the-press-office> (emphasis added). See A.W. DAVIS, *Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, in 40 *U. Balt. L.F.* 1, 3 (2009-2010): «The process surrounding Judge Sotomayor's confirmation reflects the perennial debate as to whether, and to what extent, a judge's personal experiences should influence his or her adjudication of disputes».

⁶ Available at <http://web.stanford.edu/group/scspi-dev/cgi-bin/sites/default/files/Pathways-SOTU-2016.pdf>.

environment which is sufficiently open to enable people to make good and improve their life chances by their own efforts. The new inequality, however, is of a different kind; it would be better described as inequalization, the opposite of levelling, building paths to the top for some and digging holes for others, creating cleavages, splitting»⁷.

The aim of this paper is to demonstrate that SM is a constitutional matter, and not a process relating only to social, economic, cultural and political relationships. SM is also a normative issue, all the more so when society is not, in itself, capable of promoting its development.

2. About social mobility (in theoretical and empirical research)

SM is the transition of individuals and groups from one social position to another. The movement can be in a downward or an upward direction (descending SM versus ascending SM, or social sinking versus social climbing).

SM does not eliminate inequality; rather, it implies its presence. Yet, the degree of inequality that can be accepted as reasonable differs depending on the degree of SM. Milton Friedman argued that inequality within a rigid social system, in which each individual remains stuck in his or her position over time, is more worrying than inequality within a mobile and dynamic social system: «consider two societies that have the same distribution of annual income. In one there is great mobility and change so that the position of particular families in the income hierarchy varies widely from year to year. In the other, there is great rigidity so that each family stays in the same position year after year. Clearly, in any meaningful sense, the second would be the more unequal society. The one kind of inequality is a sign of dynamic change, social mobility, equality of opportunity; the other, of a status society»⁸.

Studying SM means quantifying the degree of openness or fluidity that characterizes a given society at a particular historical juncture⁹. It is also necessary to appreciate that the cause of inequality in opportunities for SM is inequality in the *starting conditions*: members of different social classes do not all have, to the same extent, the resources necessary to access various social positions.

The amount and type of SM in society are determined by the isolated actions of individuals and the collective actions of social groups that, together, change the structure of society; in turn, these actions are influenced by the specific shapes of the systems of inequality, and also by how rigid or flexible the social system is in the face of the demand for change coming from disadvantaged groups.

According to Alexis de Tocqueville, in *Democracy in America*, equality of opportunity is the basis of democracy. Yet, he considered social ascent to be an individual phenomenon, linked to talent and

⁷ R.G. DAHRENDORF, *Economic Opportunity, Civil Society, and Political Liberty*, in 27 *Devel. Change* 229, 240 (1996).

⁸ M. FRIEDMAN, *Capitalism and Freedom*, Chicago-London, 1962, 171.

⁹ Cf. J. MATRAS, *Social Inequality, Stratification, and Mobility*, Englewood Cliffs, 1975.

merit, and to the efforts and commitment shown by each individual in the “race of life”¹⁰. John Stuart Mill was convinced that the evolution of capitalism would offer everyone the same opportunities for growth and individual affirmation¹¹. In liberal thought, SM was traditionally perceived as a basic characteristic of capitalist societies: through the Smithian “invisible hand”, the market would ensure the full realization of equal and opportunities¹².

From the earliest studies, SM was seen as a corrective to the structural imbalances embodied by the division of society into social classes, and thus as an antidote to social conflict and revolutions.

According to émile Durkheim, in the more developed societies the intensification of the social division of labor feeds the processes of SM. This division promotes individual talents, regardless of family and social origins. Briefly, population growth stimulates the division of labor; the division of labor results in a widespread trend towards greater specialization, a phenomenon that, in turn, exalts individual talent regardless of family and social origins; all this drives upward SM¹³.

Vilfredo Pareto wrote that the higher strata of society can tend to decay, in other words, start to become made up of less able individuals who lack the qualities that enabled them to win their power and hold on to it. In such circumstances, the governing class is reinvigorated by the entry of families that have risen from the lower classes. Revolutions come about as a result of an accumulation of decadent elements within the higher strata of society, paralleled by an increase in superior quality ones within the lower strata¹⁴.

According to Gaetano Mosca, democracy is nourished by this renewal of the ruling class, which occurs through the infiltration of elements originating from society’s humblest layers, and power can be deemed to be perpetuated in a democratic way when the *élite* allows the members of any social stratum access to its rules and mechanisms¹⁵.

Max Weber argued that social stratification depends on the combination of three elements: power, prestige and wealth¹⁶. Every society is characterized by a plurality of hierarchies. As a result of this, SM

¹⁰ See, e.g., J.L. HOCHSCHILD, *Ambivalence about Equality in the United States or, Did Tocqueville Get It Wrong and Why Does That Matter?*, in 19 *Soc. Just. Res.* 43 (2006), and P.C. KISSAM, *Alexis De Tocqueville and American Constitutional Law: On Democracy, the Majority Will, Individual Rights, Federalism, Religion, Civil Associations, and Originalist Constitutional Theory*, in 59 *Me. L. Rev.* 35, 57 (2007).

¹¹ J. STUART MILL, *Principles of Political Economy with Some of their Applications to Social Philosophy*, London, 1848.

¹² See A. GIDDENS, *Capitalism and Modern Social Theory: An Analysis of the Writings of Marx, Durkheim and Max Weber*, Cambridge, 1971.

¹³ É. DURKHEIM, *De la division du travail social* (1893), transl., *The Division of Labour in Society*, Houndmills, 1984.

¹⁴ V.F.T. PARETO, *Trattato di sociologia generale* (1916), transl., *The Mind and Society: A Treatise on General Sociology*, III, London, 1935, 1430 f.

¹⁵ G. MOSCA, *The Ruling Class*, New York, 1939.

¹⁶ M. WEBER, *Wirtschaft und Gesellschaft* (1922), transl., *Economy and Society: An Outline of Interpretive Sociology*, New York, 1968.

is hampered by “social closure”: in contemporary societies, the upper classes, through mechanisms of “self-recruitment”, tend to implement exclusionary practices.

Pitirim Sorokin was a founder of the scientific study of SM, which should be understood as «any transition of an individual or social object or value — anything that has been created or modified by human activity — from one social position to another»¹⁷. In general, he argued that the presence of constant fluctuations, linked to various factors, exogenous (wars and revolutions) or endogenous (the tendency of the ruling classes to protect their own positions), makes it impossible to identify a clear and constant tendency towards an increase or decrease in the intensity and spread of SM. Sorokin held the pragmatic view that a degree of social inequality is inevitable. At the same time, he regarded SM as a balancing element, serving to ensure correct working of the system. In his view, the stratification of society is seen in three different dimensions: economic, political and occupational. These three dimensions of inequality are closely linked, but show different trends. In a society based on private property, economic stratification can show only limited fluctuations. In turn, political stratification depends on the presence of power inequalities. As for occupational stratification, tasks linked to the fulfilment of functions of organization and social control demand a higher degree of intelligence and it follows that those that possess this advantage will enjoy greater privileges and occupy a higher the rank in the occupational hierarchy. The “vehicles” of SM (schools and educational establishments, political parties, trade unions, the Church, the armed forces, the family) are those institutions that favor the transition from one social class to another, and may thus be seen as laboratories involved in the selection and distribution of individual talents (i.e. selection agencies).

It is only in relatively recent years that there has emerged, thanks to John Goldthorpe, a distinction between absolute mobility (i.e. the ability of a human being to attain one social position rather than another) and relative mobility (i.e. the different social classes’ differential opportunities to reach a given destination)¹⁸. Absolute mobility is a concept that allows us to identify each individual’s likelihood of moving from one social position to another, while a relative mobility analysis serves to describe the relationship between the mobility opportunities of one individual (or group) compared with another individual (or group).

In the United States, empirical research has played a very important role in this field. Taking as their starting point the idea that SM is the “right thing”, North American scholars have tried to show that

¹⁷ P.A. SOROKIN, *Social Mobility*, New York-London, 1927, 133.

¹⁸ J.H. GOLDTHORPE, C. LLEWELLYN, C. PAYNE, *Social Mobility and Class Structure in Modern Britain*, Oxford, 1987.

adherence to the liberal principles of merit and free enterprise has enabled the economy to offer more opportunities for SM¹⁹.

However, the data collected are not always satisfactory²⁰, and no remarkable differences have emerged between different industrial societies²¹.

Natalie Rogoff tried to verify the ability of the U.S. system to ensure equality of opportunity as a legitimate right. She developed an index of “social distance mobility” in order to establish whether increasing SM was due to a real fluidity of American society or rather to a change in the composition of the occupational hierarchy²².

Richard Lipset and Seymour Bendix showed that SM produces social order and stabilizing effects on the democratic system. However, the persistence of “status discrepancies” within the different dimensions of social stratification runs counter to this state of equilibrium, causing frustrations and social tensions. In developing industrial societies, management positions are constantly increasing. Moreover, the low fertility rate in the higher social classes, together with the phenomenon of generational turnover, is having the effect of opening up these positions to members of the lower strata²³.

While previous studies quantified changing rates of SM and then sought to explain them, Peter Blau and Otis Duncan attempted to identify the reasons why a person finds himself in a certain social position. An individual’s ultimate position is due to in part to his social background, and in part to his work/professional achievements. Using the technique of “path analysis” (i.e. a system of equations ordered hierarchically to represent the different causal relationships), these authors proposed “status attainment” as a model able to describe the weight of the different factors of SM²⁴.

Finally, the role of education in SM processes is controversial. The “paradox of Anderson” (i.e. an empirical paradox whereby a student obtaining a higher degree than that of his father will not necessarily occupy a higher social position) has highlighted the partial unreliability of this factor²⁵. Other empirical research has shown that level of education is not always decisive in driving SM, as

¹⁹ Compare J.O. HERTZLER, *Some Tendencies toward a Closed Class System in the United States*, in 30 *Social Forces* 313 (1952), with E.F. JACKSON, H. CROCKETT JR., *Occupational Mobility in the United States: A Point Estimate and Trend with Comparison*, in 29 *Amer. Sociol. Rev.* 5 (1964).

²⁰ O.D. DUNCAN, *Methodological Issues in the Analysis of Social Mobility*, in S.M. LIPSET, N.J. SMELSER (Eds), *Social Structure and Mobility in Economic Development*, Chicago, 1966, 90 ff.

²¹ S.M. MILLER, *Comparative Social Mobility: A Trend Report with Bibliography*, in 9 *Current Sociol.* 1 (1960).

²² N. ROGOFF, *Recent Trends in Occupational Mobility*, Glencoe, 1953.

²³ R. BENDIX, S.M. LIPSET, *Social Mobility in Industrial Society*, Berkeley, 1959.

²⁴ P. BLAU, O.D. DUNCAN, *The American Occupational Structure*, New York, 1967.

²⁵ C.A. ANDERSON, *A Skeptical Note on Education and Mobility*, in A.H. HALSEY, J. FLOUD, C.A. ANDERSON (Eds), *Education, Economy and Society*, New York-London, 1961, 176.

education is strongly influenced by social background²⁶. According to Raymond Boudon, the school system is characterized by a democratic attitude that can produce positive effects in the short term. However, over time, the costs of education rise exponentially for the poorest groups. Furthermore, the expansion of educational opportunities is, over time, increasing the presence of academic and professional qualifications: this has been suggested to harm those coming from lower classes²⁷. There is a tendency for social groups linked by common interests, shared market positions, cultural affinities and similar lifestyles, to take joint initiatives to preserve the advantages they enjoy. As noted by Frank Parkin, the privileged classes raise barriers to entry. In the field of education, heredity is a discriminating factor that helps to feed this antagonism²⁸. Along similar lines, Gary Becker theorized a model of intergenerational transmission of status. Selfless parents feel encouraged to allocate a portion of their income to the acquisition of education by their children. SM is low when the children of rich parents acquire more education than the children of poor parents. In this setting, state intervention may be ineffective, offset by the investments in education made by wealthier parents²⁹.

3. The welfare state and social mobility

Sociology studies have shown that SM is a complex phenomenon that tends to be influenced by culture, dominant values, and tradition. The economic factor is not decisive and, as mentioned, no major differences have emerged between industrialized societies. Inequalities persist and feed a social stratification of society that, however, is now less marked than in the past. Belonging to a certain social class is considered important because it is linked to the issue of social prestige and the possibility of participating in decision-making processes. The higher strata of society manifest a tendency to erect barriers to entry through cooptation mechanisms. Finally, the link between education and SM has not yet been defined with the necessary precision.

At this point, it must be ascertained whether SM can be stimulated through the intervention of the state. The question of whether or not SM is a constitutional issue is not an insignificant one; and neither is that of the kind of state within which it is pursued: a classical liberal state or a welfare state.

The concepts of SM and inequality are naturally linked, because the former logically presupposes a structure based on inequality; otherwise, it would not make sense to speak of transitions from one

²⁶ See R. GIROD, *Inégalité, inégalités. Analyse de la mobilité sociale*, Paris, 1977, and P. WEISS, *La mobilité sociale*, Paris, 1986.

²⁷ R. BOUDON, *L'inégalité des chances. La mobilité sociale dans les sociétés industrielles*, Paris, 1973.

²⁸ F. PARKIN, *Marxism and Class Theory. A Bourgeois Critique*, New York, 1979.

²⁹ G.S. BECKER, *A Treatise on the Family*, Cambridge (MA), 1981.

social class to another. At the same time, SM is seen as the antidote to intolerable inequalities: it is meant to offer all people the chance to improve their circumstances and thus to feel less “unequal”.

Equality is a fundamental principle in liberal states and is, indeed, the necessary condition underlying the eligibility of all individuals for fundamental rights. However, *ownership* of fundamental rights is not always reflected in the *actual exercise* of these rights. There are many barriers to the effective exercise of fundamental rights: above all, economic and social obstacles. Often, their exercise depends on the availability of goods and services. In contemporary societies, not everyone has access to these, and this results in the existence of «*de facto* inequalities»³⁰.

In liberal states, the solution to the problem of *de facto* inequalities is sought in ordinary social and economic relationships. The idea is that everyone can, through talent, intelligence and a spirit of sacrifice, improve their unfavorable conditions. The state is not opposed to individual initiatives and does not interfere with social relationships; indeed, it relies on the market’s ability to achieve, spontaneously, an appropriate balance. The attitude is the same in states that adhere to the pillars of Smithian liberalism: it is up to people and society to work to ensure a reasonable distribution of resources.

The welfare state, on the other hand, adopts a different attitude. The 1929 crisis exposed the failings of the market. According to Keynesian theory, the state cannot be a passive spectator; rather, it must take action to reduce the gap between social classes. The state must guarantee the goods and essential services necessary in order to guarantee the effective exercise of fundamental rights.

SM, then, is hampered by *de facto* inequalities³¹. Moreover, those who are born needy have little real possibility of improving their living conditions. This makes SM an equal opportunities issue, given that not all individuals embark on the “race of life” from the same starting point. The liberal state supports the quest for SM, but leaves its affirmation to the individual: indeed, the liberal state chooses not to interfere with people’s life choices, arguing that every human being is master of his own destiny. The welfare state, on the other hand, pursues SM by intervening directly in social and economic relationships: it considers the obstacles and the burden of *de facto* inequalities too great to be overcome by individuals left to themselves: society alone cannot guarantee an efficient and equitable allocation of resources.

In short, while the liberal state trusts in individualism, the welfare state believes in solidarity, and becomes an actor in economic and social relationships. From this perspective, the assumption of an

³⁰ See F. FUKUYAMA, *Poverty, Inequality, and Democracy: Dealing with Inequality*, in 22 *J. Democr.* 79 (2011).

³¹ B. COOPER, J. GLAESSER, R. GOMM, M. HAMMERSLEY, *Challenging the Qualitative-Quantitative Divide: Explorations in Case-focused Causal Analysis (Continuum Research Methods)*, London, 2012, 59.

active role by public institutions is a prerequisite for SM. Hence the importance of the welfare state as a means of encouraging SM processes.

Some European states expressly declare themselves welfare states. The German *Grundgesetz*, Article 20, states that «The Federal Republic of Germany is a democratic and social federal state»³². The *Constitución española*, Article 1, states that «Spain constitutes itself into a social and democratic state of law which advocates liberty, justice, equality, and political pluralism as the superior values of its legal order»³³. The Italian Republic does not expressly recognize itself as a welfare state. However, Article 3 of its constitution states that: «It is the duty of the Republic to remove the economic and social obstacles which, by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country». This is the principle of “substantive” equality, which gives substance to the more formal concept that «all are equal before the law». It is not enough to recognize that all individuals are equal before the law when the *actual* exercise of fundamental rights is impeded by economic and social obstacles. Thus, the state must act to reduce the gap between people with regard to the availability of resources: substantive equality is understood as a redistribution of wealth in the name of fairness and social justice³⁴.

The welfare state pursues its objectives through welfare or social rights. As holders of these rights, individuals receive, from the state, the benefits provided for under its constitution: education, employment, welfare and healthcare. Since the market is not able to provide these services efficiently, the state steps in, in place of private individuals, to make these services accessible to everyone (universality).

The constitutions of welfare states do not expressly refer to the concept of SM. Nevertheless, on the basis of the following fundamental principles, SM can be said to fall within the ambit of constitutional matters in these states.

a) *Substantive equality* may be defined as “equality of starting point” (*Chancengleichheit*)³⁵. The state must work to ensure that all individuals are allowed the same opportunities for social advancement despite their different social and family backgrounds. Absolute egalitarianism, however, is never an objective pursued by the welfare state, as it is incompatible with the constitutional recognition of fundamental rights, private property and freedom of enterprise. The economic system towards which the welfare state leans is not socialism, but the social market economy: the *Soziale Marktwirtschaft* is a system

³² See, e.g., L.F. NEUMANN, K. SCHAPER, *Die Sozialordnung der Bundesrepublik*, Frankfurt a-M.-New York, 2008.

³³ Cf. F. DIEZ MORENO, *El estado social*, Madrid, 2004.

³⁴ See S. CASSESE, *Governare gli italiani*, Bologna, 2014, 291 ff.

³⁵ See N. ENGELS, *Chancengleichheit und Bundesstaatsprinzip*, Berlin, 2001. See, e.g., B. CARAVITA, *Oltre l'eguaglianza formale, Un'analisi dell'art. 3 comma 2 della Costituzione*, Padova, 1984.



combining free market capitalism and social policies³⁶. The social market economy considers the market as an efficient instrument of economic organization and, at the same time, as the main instrument of social integration of individuals, according to a prescriptive vision of the “economic constitution”, derived from ordoliberal positions. According to this model, public intervention has tended to residual and corrective market, and consists essentially of care interventions related to the participation of the individual in the labor market.

If substantive equality is a prerequisite for promoting SM, then liberation from economic need, through social rights, is the necessary (but not sufficient) condition in order to break down social barriers and overcome the cultural isolation and political resistance of the higher social classes³⁷.

b) It is often forgotten that SM improves *democracy*. Indeed, SM stimulates the circulation and interaction of life experiences and social, cultural and political sensitivities, as opposed to “self-recruitment” by oligarchic élites.

The minimum conditions for a well-functioning democracy are well known: equal enjoyment of political rights; equal weight of votes; electors able to vote freely according to their own convictions; free electoral contests held at predetermined intervals; pluralism of participants in electoral contests; and the principle of majority, accompanied by adequate guarantees for minorities.

Even an élite-based system can be democratically sustainable, provided that access to the ruling class is not substantially blocked or impeded. Because democracy is not incompatible with an élite: what is important is the selection process. Provided it is open, and not restricted to just a few social classes, then the democratic ideal is fulfilled.

Therefore, SM, being the mechanism capable of preventing access to political power from being determined only by the élitist attitudes of limited groups of individuals, who transmit their positions through family ties or deep-rooted social and cultural affinities, enhances the democratic principle. The process of selecting the ruling class is a key moment in the implementation of democracy. SM, as a form of selection technique open to all, is therefore a necessary condition for democracy³⁸.

Moreover, democracy lives thanks to the juridical “device” of electors and elected. The people exercise their self-sovereignty through representatives chosen through the application of democratic electoral systems³⁹. To make this “device” less contrived, it is necessary to introduce real conditions for effective rotation: or at least, it is appropriate that this rotation not be prevented by the barriers erected by the ruling classes. To ensure its survival, SM operates in such a way that the relationship between

³⁶ Cf. W. RÖPKE, *Civitas Humana. Grundfragen der Gesellschafts und Wirtschaftsordnung*, Zurich, 1944.

³⁷ H. KAELBLE, *Soziale Mobilität und Chancengleichheit im 19. und 20. Jahrhundert*, Göttingen, 1983.

³⁸ Cf. A.R. GIRARD, *La réussite sociale*, Paris, 1967, 11.

³⁹ See E.-W. BÖCKENFÖRDE, *Staat, Verfassung, Demokratie*, Frankfurt a-M., 1991.

representatives and represented has a circular structure, which ensures continuous exchange processes. The turnover of the political class, as a fundamental element of a democratic system, is favored by SM.

c) SM is a means of ensuring concrete affirmation of *pluralism*. A pluralistic society is one that recognizes and protects all its members and groups, acknowledging their equal dignity. A pluralistic society is an open community. As such, it does not tolerate social immobility. Without SM, pluralism becomes a formal label behind which the dominant group continues to exercise its power at the expense of other groups.

Pluralism promotes the democratic integration of multiple social realities. Pluralism is a form of competition, and there must be no barriers to entry. Everyone, relying on their own resources, must be able to access the various “markets” as a protagonist, and not merely a passive spectator. A pluralist state must promote SM through targeted interventions.

d) SM encourages *participation* in democratic processes. Participation may be seen as a reversal of perspective in relations between the state and the individual. Indeed, in the presence of participation the individual is no longer merely subjected to power: by expressing his freedom, he contributes to the vitality of the state. By participating, the individual reaffirms the inviolability of his own sphere of autonomy, in the sense that he accepts the constraints imposed by the law as a condition of his genuine sense of belonging to the state. Kelsen wrote that «a politically free person is one who is subject only to his own, not to an alien»⁴⁰.

Participation is not only the involvement of the people in election campaigns, and it does not only manifest itself at election times. In a modern democracy, participating means being an effective presence: in this context, everyone should be guaranteed the same opportunities to be a concrete presence and a protagonist. SM is an inherent part of genuine active participation. The substantive democracy presupposes not only a plurality of interests that interact and often oppose each other, but also effective circulation between the different social classes.

Participation should also contribute to an emancipating or inclusive democracy; through SM, it should encourage a system that allows individuals to rise, fully affirming their autonomy and freedom⁴¹.

The concept of full participation is more than just an allusion to the need to return to the “*isegoria*”, meaning equal opportunities for access to the arena or agora of speech. It also means something more concrete, namely the opportunity to be involved in the preliminary definition of the issues that will be the subject of future decisions. And this is made possible by SM.

⁴⁰ H. KELSEN, *Vom Wesen und Wert der Demokratie* (1929), transl. *On the Essence and Value of Democracy*, in A.J. JACOBSON, B. SCHLINK (Eds), *Weimar: A Jurisprudence of Crisis*, Berkeley, 2000, 85 ff.

⁴¹ See K.L. KARST, *The Supreme Court, 1976 Term-Foreword: Equal Citizenship Under the Fourteenth Amendment*, in 91 *Harv. L. Rev.* 1, 4 (1977).

e) SM is the road that leads to the complete achievement of *human dignity*⁴². In many states, the concept of human dignity entered through the «main door»⁴³. For example, the German Constitution, in Article 1 says that «die Würde des Menschen ist unantastbar». In international law, the principle is explicitly mentioned in the 1945 *Charter of the United Nations* and in the *Universal Declaration of Human Rights*, signed in New York in 1948⁴⁴. Thus, human dignity is one of the fundamental principles of different constitutional systems⁴⁵.

The individual who demonstrates talent, intelligence, a sense of responsibility, and initiative, must be supported in his daily actions, even if he started out at a disadvantage. Otherwise, his dignity will be violated: the dignity of a person is realized if his merit is recognized and valued.

Liberalism recognizes an individual's personal initiative and sense of responsibility as attributes that allow him to be master of his own destiny. In order to realize the value of human dignity, liberal policies seek to promote maximum exploitation of these individual attitudes and attributes. Thus, for liberalism, human dignity is reflected in the individual's ability to rise above others and to achieve. Hence, the man or the woman who reaches the highest levels of social achievement is deemed truly “worthy.”

A social democracy, by supporting the ideals of social justice and equity, also promotes the concept and pursuit of human dignity. In this setting, the institutions are required to interpret social needs, and to react to them with active policies of intervention. In this system, a truly “worthy” person is one who, albeit benefitting from state aid, nevertheless aspires to improve his social condition.

In short, SM can be considered a constitutional topic on the strength of the fact that it combines the following principles: substantive equality, democracy, pluralism, participation and human dignity. Thus, a static society is a society that does not promote individual achievement – a society that fails to see individuals as subjects capable of contributing, through their own efforts and talents, to the development and well-being of society as a whole. Democracy is not only a principle of legitimation of

⁴² Cf. G. DÜRIG, *Der Grundrechtssatz von der Menschenwürde*, in *Archiv öff. Rechts*, 1956, 121 ff.; O. SCHACHTER, *Human Dignity as a Normative Concept*, in 77 *Am. J. Int'l L.* 848, 849 (1983); W. GRAF VITZTHUM, *Die Menschenwürde als Verfassungsbegriff*, in *Juristen Zeitung*, 1985, 201 ff.; M.J. PERRY, *The Idea of Human Rights. Four Inquiries*, New York, 1998, 5; D. LUBAN, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, in *U. Ill. L. Rev.* 815 (2005).

⁴³ S. HENNETTE-VAUCHEZ, *A Human Dignitas? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence*, in 9 *Int'l J. Constit. L.* 32 (2011).

⁴⁴ Cf. M.A. GLENDON, *Procter Honoria Respectful: Knowing the Universal Declaration of Human Rights*, in 73 *Notre Dame L. Rev.* 1153 (1998), and J. RABKIN, *Law and Human Dignity: What We Can Learn About Human Dignity from International Law*, in 27 *Harv. J. L. & Pub. Pol'y* 145 (2003).

⁴⁵ In Europe see: Portuguese constitution (Article 1); Spanish constitution (art. 10); Swiss constitution (Article 4). In Eastern Europe: Bulgaria, Macedonia, Poland, Serbia. In South America: Bolivia, Peru, Venezuela. See P. HÄBERLE, *Die Menschenwürde als Grundlage der Staatlichen Gemeinschaft*, in J. ISENSEE, P. KIRCHHOFF (hrsg.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Heidelberg, 1987, 816.

power; it is also a factor for growth and progress, but only if democratic decisions allow potential players to have access to spaces that were once closed to them. Democracy thrives on pluralism, effective participation, and equal social status: SM stimulates the growth of a people, and, in this way, prevents society from being reduced to an oligarchic system.

Through SM, the concept of a pluralist and participatory democracy can finally get close to its ideal structure, based on the promotion of individual self-realization through a truly merit-based selection process. This is also a necessary condition for the effective exercise of fundamental rights⁴⁶.

4. Towards implementation of social mobility in the U.S. constitutional design

As we have seen, SM is closely related to equality of opportunity. Only individuals who, despite being born at a disadvantage, are permitted to compete in the race of life from the same starting point as everyone else can truly aspire to improve their social condition.

Equality of opportunity is a bone of contention between conservatives and progressives. Conservatives prefer an approach conducive to spontaneous social dynamics. Progressives, on the other hand, want to see direct intervention by the institutions, in order to remedy the problem of unequal starting points.

Considering this issue from a historical perspective, Whig ideology was, as Stanley Katz showed, «grounded in a limited conception of equality that stressed equal opportunity and social mobility. Their vision was meritocratic, holding that the more capable individuals should be afforded the opportunity to progress freely and to acquire property through their enterprise»⁴⁷. Indeed, Whig social theory gave rise to the idea of “front end” equality, understood as equality of opportunity. This theory is in stark contrast to the vision preached by conservatives, well expressed by Chancellor James Kent of New York, whose words invoked the specter of leveling and majority tyranny, «a constant tendency in human society ... in the indolent and the profligate, to cast the whole burthens of society upon the industrious and the virtuous»⁴⁸.

This dispute between conservatives and progressives has never really abated. However, ideology cannot be the pivot around which legal reasoning on SM revolves, and the task of the constitutionalist is to test the ground of constitutional law, seeking to establish whether the concept of SM might actually have a legal basis.

⁴⁶ J. HABERMAS, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates* (1992), transl., *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge (MA), 1996.

⁴⁷ S.N. KATZ, *The Strange Birth and Unlikely History of Constitutional Equality*, in 75 *J. Am. Hist.* 747, 753 (1988).

⁴⁸ Quoted by KATZ, *supra* note 47, at 753.

Democracy, pluralism, participation and human dignity are all principles shared by both welfare states and liberal states. But what the latter lack are the principles that specifically characterize the welfare state: substantive equality and welfare rights.

Is this difference enough to allow us to rule out the possibility that the constitution of a liberal state can embrace the idea of SM? In other words, does the liberal state provide less fertile ground for sowing the seeds of SM as a constitutional concept?

The United States of America is the liberal state I have chosen for my analysis of this issue.

4.1. Democracy, pluralism, participation, human dignity: the first constitutional coordinates of social mobility

The basic axiom of pluralism was defined by Robert Dahl: «Instead of a single center of sovereign power, there must be multiple centers of power, none of which is or can be wholly sovereign»⁴⁹.

Pluralism takes different forms. Institutional pluralism is primarily a vertical separation of power. Decentralization creates different levels of government, concerned with different interests and designed to perform different functions⁵⁰.

James Madison, in the Federalist No.10, stated that the political mechanisms created by the new constitution were specifically designed to balance internal conflict between competing factions and interests. Hence, political pluralism is the representation of (and participation by) several groups organized around class, racial, ethnic and cultural interests⁵¹.

American democracy, on the basis of the knowledge that pluralism and democracy are compatible, even mutually enhancing, has long been pervaded (and driven) by social pluralism: «socially pluralistic societies are characterized by a diversity of interests which are allowed to organize and compete with each other formally and informally for rewards»⁵².

Pluralism in American society provides antidotes against an oligarchic concentration of power. Access to government is open to all social groups⁵³.

⁴⁹ R.A. DAHL, *Pluralist Democracy in the United States. Conflict and Consent*, Chicago, 1967, 67. See also D. NICHOLLS, *The Pluralist State*, London, 1975; S. Tierney, *Constitutional Law and National Pluralism*, Oxford, 2006; N. KRISCH, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford, 2010.

⁵⁰ C.J. FRIEDRICH, *Trends of Federalism in Theory and Practice*, London, 1968.

⁵¹ According to J. MADISON, *Federalist 10*, in H. Cabot Lodge (ed.), *The Federalist*, New York, 1888, 61, the faction is «a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of community».

⁵² P.H. CONN, *Social Pluralism and Democracy*, in 17 *Am. J. Pol. Sc.* 237, 238-239 (1973).

⁵³ Cf. C.J. BURTENSHAW, *The Political Theory of Pluralist Democracy*, in 21 *West. Pol. Q.* 577, 585 (1968): «in contemporary American society, there is no considerable concentration of power anywhere... There are slack of resources everywhere, which means that no one is necessarily disadvantaged: positions of leadership are accessible to everyone... Leaders have an incentive to meet the wishes of their constituents, and this may cause them to

American democracy benefits from the pluralist views represented by different interest groups, i.e. from government by people operating through competing interest groups. A great diversity of autonomous societal organizations helps to enrich the spectrum of values and possible decisions, thereby increasing the possibility of an efficient government⁵⁴.

In turn, social pluralism ensures that individuals are more exposed to political questions and helps increase participation. Procedural democracy is transformed into substantive democracy⁵⁵.

The US Constitution contains no explicit references to human dignity⁵⁶. However, this silence has not prevented human dignity from entering Supreme Court constitutional jurisprudence. From the time of Justice Murphy's dissent in *Korematsu v. United States*⁵⁷ to more recent decisions, the Supreme Court has interpreted the U.S. Constitution «to include human dignity as a value»⁵⁸.

The concept of human dignity has also appeared in decisions regarding: protection against cruel and unusual punishment; protection against self-incrimination; marriage, contraception, procreation, intimate acts; and so on.

In the course of its jurisprudence, the U.S. Supreme Court has interpreted matters of human dignity in the following terms: «involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [they] are central to the liberty protected by the Fourteenth Amendment»⁵⁹.

The link between human dignity and individual autonomy, understood as the individual's chance to indulge his inclinations, achieving useful results, is evident. An individual's realization of his life project, consistent with his own attitudes and initiatives (self-realization), is part of the «pursuit of happiness»⁶⁰.

The U.S. Supreme Court has not interpreted human dignity only from a liberal perspective. Indeed, in some of its decisions, human dignity seems to emerge as a basis for state intervention in favor of economically and socially weaker individuals. In *Goldberg v. Kelly*, Justice Brennan imagines the effects of

reflect popular will. There is a floor under oppression, for a persecuted group will be stimulated to gather up slack resources».

⁵⁴ Cf. H. BLOKLAND, *Pluralism, Democracy, and Political Knowledge: Robert A. Dahl and His Critics on Modern Politics*, Farnham, 2011, 88.

⁵⁵ See K. JANDA, J. BERRY, J. GOLDMAN, *The Challenge of Democracy: Government in America*, Boston, 2008, 35.

⁵⁶ On the history of human dignity see L.H. TRIBE, *Equal Dignity: Speaking Its Name*, in 129 *Harv. L. Rev.* 16, 20-21 (2015).

⁵⁷ 323 U.S. 214, 240 (1944). See also Justice Frankfurter's dissent in *Glasser v. United States*, 315 U.S. 60, 89 (1942), which, however, referred generically to "dignity".

⁵⁸ M.D. GOODMAN, *Human Dignity in Supreme Court Constitutional Jurisprudence*, in 84 *Neb. L. Rev.* 741, 748 (2006). See also A. GEWIRTH, *Human Dignity as the Basis of Rights*, in M.J. MEYER, W.A. PARENT (Eds), *The Constitution of Rights. Human Dignity and American Values*, Ithaca-London, 1992, 10 ff., and R.D. GLENSY, *The Right to Dignity*, in 43 *Colum. Hum. Rts L. Rev.* 65 (2011).

⁵⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003), 574.

⁶⁰ Cf. J. BRONSTEEN, C. BUCCAFUSCO, J.S. MASUR, *Welfare as Happiness*, in 98 *Geo. L.J.* 1583 (2010) (defending a conception of well-being that differs from each of the main currents of thought).

the state's failure to provide public assistance: «welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessing of Liberty to ourselves and our Prosperity'»⁶¹.

Therefore, the invocation of human dignity has opened a crack in the wall blocking access to the welfare state paradigms⁶² and started to bring about a reduction of the gap separating the U.S. from many countries of Western Europe (Germany, Italy, Spain). As Vicki Jackson noted, «human dignity is a core component of constitutional jurisprudence in a constitutional system which also incorporates obligations of social solidarity (and government support of positive welfare) not found in the U.S. Constitution»⁶³.

In short, democracy, pluralism, participation and human dignity can be said to be the first constitutional coordinates of SM. But this is still not enough.

4.2. A brief excursus of the U.S. debate on welfare rights

The fact that the U.S. Constitution contains no explicit reference to affirmative (or positive or second-generation) rights to social and economic welfare (hereinafter welfare rights)⁶⁴ is a matter of intense debate – a debate that unfolds against the background of the general disagreement between originalists and substantivists⁶⁵. In the present context I can summarize this debate only briefly, focusing on the aspects strictly useful to an analysis of SM as a constitutional issue.

⁶¹ 397 U.S. 254 (1970), 265. Cf. *Brown v. Board of Education*, 347 U.S. 483 (1954). On this judgement, and comparing this judgement with *Shelley v. Kraemer*, 334 U.S. 1 (1948), see B. ACKERMAN, *De-schooling Constitutional Law*, in 123 *Yale L.J.* 3104, 3124, (2014): «While *Shelley* focused on the broader implications of the New Deal's repudiation of laissez-faire constitutionalism, *Brown* focused on a key issue arising out of the New Deal's affirmation of the welfare state».

⁶² Not so according to GOODMAN, *supra* note 58, at 787: «The Court has typically reversed lower court decisions favoring the poor. These rulings reflect that, constitutionally speaking, the state need not take affirmative steps to protect and preserve human dignity».

⁶³ V.C. JACKSON, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, in 65 *Mont. L. Rev.* 15, 18 (2004).

⁶⁴ Cf. M. TUSHNET, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton, 2008. See also H. HERSHKOFF, «Just Words»: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, in 62 *Stan. L. Rev.* 1521 (2010) (examining the welfare rights clauses that are included in some state constitutions in the U.S.). In general, cf. T. DAINTITH, *The Constitutional Protection of Economic Rights*, in 2 *Int'l J. Const. L.* 56 (2004).

⁶⁵ With this expression I refer to a collection of doctrinal positions antithetical to the jurisprudence of original intent.

In general, originalists argue that constitutional protection cannot be extended to situations not expressly mentioned in the constitution. Interpretive sources other than its text cannot be invoked. Therefore, it is up to politics to decide whether and how to deal with these situations⁶⁶.

Originalists do not accept that the equal protection clause (fourteenth amendment), which prohibits discrimination, can justify a constitutionally required state intervention⁶⁷. In their view, all the state can do is extend, to similar cases, guarantees already provided for certain categories of individuals⁶⁸. Judicial review of legislation cannot touch laws that permit the existence of inequalities deriving from private choices or the economic dynamics of the market⁶⁹. According to originalists, problems of distributive justice can be addressed through legislative policymaking, and not constitutional adjudication.

Substantivists interpret the equal protection clause as meaning “equal freedom”⁷⁰. Thus understood, this clause can confer constitutional significance on welfare rights. These rights are supported by a substantive vision of justice, as opposed to one restricted to its procedural dimension. Therefore, it is possible to identify a notion of “just” or “common good” that the Supreme Court could use. The gap between this view and “Lochner’s Legacy”⁷¹ characterized by the inaction of the constitutional state, by immutable distribution of rights, and by respect of common law⁷², is clear to see.

⁶⁶ A. SCALIA, *A Theory of Constitution Interpretation* (Oct. 18, 1996), available at <http://www.courtstv.com/archive/legaldocs/rights/scalia.html>. Cf. also A. REED AMAR, *Intratextualism*, in 112 *Harr. L. Rev.* 747, 788-790 (1999). In general, D.A. FARBER, *The Originalism Debate: A Guide for the Perplexed*, in 49 *Ohio State L. Journal* 1085 (1989). On the importance of history and tradition in the US Supreme Court jurisprudence see *Moore v. Cleveland*, 413 U.S. 494 (1977), and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). See also L.K. WEIS, *What Comparativism Tells Us About Originalism*, in 11 *Int’l J. Constit. L.* 842 (2013). On the benefits and the costs of the new originalistic approach see T.B. COLBY, *The Sacrifice of the New Originalism*, 99 in *Geo. L.J.* 714, 736-763 (2011). Compare J.M. BALKIN, *Living Originalism*, Cambridge (MA)-London, 2011, with D.A. STRAUSS, *The Living Constitution*, Oxford, 2010. As noted by M.C. DORF, *The Undead Constitution: A review of two recent books on living constitutionalism*, in 125 *Harr. L. Rev.* 2011, 2011 (2012), «Meanwhile, originalism’s supposed archenemy, the living Constitution, has never been much more than a placeholder». Finally see J. KING, *Two Ironies about American Exceptionalism over Social Rights*, in 12 *Int’l J. Constit. L.* 572 (2014) (exploring the causes and consequences of the experience, and suggesting what lessons it may hold for other countries).

⁶⁷ On the objects of fourteenth amendment cf. N.Q. ROSENKRANZ, *The Objects of Constitution*, in 63 *Stan. L. Rev.* 1005, 1052-1066 (2011).

⁶⁸ R.H. BORK, *Commentary: The Impossibility of Finding Welfare Rights in the Constitution*, in 1979 *Wash. U. L. Q.* 695 (1979) and D.P. CURRIE, *Positive and Negative Constitutional Rights*, in 53 *U. Chi. L. Rev.* 864 (1986).

⁶⁹ R.K. WINTER JR., *Poverty, Economic Equality, and the Equal Protection Clause*, in *Sup. Ct. Rev.* 41 (1972).

⁷⁰ F.I. MICHELMAN, *The Supreme Court 1968 Term-Foreword: On Protecting the Poor Through the Fourteenth Amendment*, in 83 *Harr. L. Rev.* 7 (1969); J.H. ELY, *Toward a Representation-Reinforcing Mode of Judicial Review*, in 37 *Md L. Rev.* 451 (1978); C.R. SUNSTEIN, *Constitutionalism after New Deal*, in 101 *Harr. L. Rev.* 421 (1987); B. ACKERMAN, *Liberating Abstraction*, in 59 *U. Chi. L. Rev.* 59 (1992).

⁷¹ Cf. C.R. SUNSTEIN, *Lochner’s Legacy*, in 87 *Colum. L. Rev.* 873 (1987).

⁷² This position can be traced in Posner’s thought. He distinguishes between the clause-to-clause (or bottom-up) conception of the procedural perspective, and the holistic (or top-down) conception of substantivists: R.A. POSNER, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, in 59 *U. Chi. L. Rev.* 433 (1992).

In addition, originalists regard collective preferences as the sum of self-interested individual preferences, while substantivists consider them to be the sum of other-regarding preferences⁷³.

However, the strongest criticism leveled by originalists at their opponents concerns the possible paternalistic connotations of their theoretical positions⁷⁴; they argue that, in the context of this paternalism, individual abilities are regarded with suspicion, or skepticism, as it is not believed that individuals are able to provide for themselves in all their needs. In this way, however, public interventionism involves a violation of basic liberties⁷⁵.

Substantivists, for their part, contest the trust placed by originalists in self-determination; substantivists believe in the need for constitutionally imposed public intervention in order to remove intolerable inequalities due to several factors: incompleteness of information, decision-making flaws, and inequalities in the distribution of economic resources. They argue that government intervention is constitutionally legitimate if it produces benefits for “rationally limited” individuals without simultaneously harming “rationally perfect” ones⁷⁶. The goal of this public interventionism is to ensure equal starting points: it is preferable to remedy market failures in direct supply of goods and services than to have recourse to tax incentives. By contrast, originalists argue that it is up to the legislative and the executive power to address the issue of welfare rights, preferably through tax policies.

Overall, the constitutional significance of welfare rights is a question of interpretation⁷⁷.

It is not true that the Supreme Court adopts rigid positions⁷⁸. Its attitude is sensitive to the evolution of social relations, as was shown by the case of the Rehnquist Court on the constitutionality of affirmative action⁷⁹. Affirmative actions serve to restore equality of starting conditions, in other words “difference blindness”. Their purpose is to restore, in full, the formal equality of the citizens⁸⁰.

⁷³ F.I. MICHELMAN, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, in 121 *U. Pa. L. Rev.* 962 (1973).

⁷⁴ R.A. EPSTEIN, *The Uncertain Quest for Welfare Rights*, in *BYU L. Rev.* 201 (1985).

⁷⁵ R.A. POSNER, *Against Constitutional Theory*, in 73 *N.Y.U. L. Rev.* 1 (1998). See also G. MITCHELL, *Libertarian Paternalism Is an Oxymoron*, in 99 *Nw. U. L. Rev.* 1245 (2005).

⁷⁶ C.R. SUNSTEIN, *Beyond the Republican Revival*, in 97 *Yale L. J.* 1539 (1988), and R.H. THALER, C.R. SUNSTEIN, *Libertarian Paternalism*, in 92 *Amer. Econ. Rev.* 175 (2003). In general, see G. DWORKIN, *Paternalism*, in 56 *The Monist* 64 (1972).

⁷⁷ See C.R. SUNSTEIN, *One Case at the Time. Judicial Minimalism on the Supreme Court*, Cambridge (MA)-London, 1999.

⁷⁸ Cf. M.C. NUSSBAUM, *The Supreme Court 2006 Term Foreword: Constitution and Capabilities: “Perception” Against Lofty Formalism*, in 121 *Harv. L. Rev.* 4, 7 (2007) (supporting the argument that the United States has had an «inconstant relation» to the Capabilities Approach, «protecting some entitlements very effectively, but shying away from the protection of entitlements in the area of what are usually called social and economic rights – that is, welfare rights»).

⁷⁹ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁸⁰ Cf. K.M. TANI, *Welfare and Rights Before the Movement: Rights as a Language of the State*, in 122 *Yale L.J.* 314 (2012) (showing how concepts of “welfare rights” filtered through federal, state and local administrative channels and into communities around the nation).

There is scope for an evolutionary interpretation of the text of the U.S. Constitution⁸¹. Interpretation has been suggested to be an appropriate vehicle for the requests advanced by the people in moments of constitutional transition⁸². A «multi-valenced interpretive approach»⁸³ is a feasible way of ushering in extralegal elements⁸⁴.

This process of constitutional interpretation and enrichment can lead to a rediscovery of values, including, among those of particular importance, political pluralism⁸⁵, equality and human dignity⁸⁶, and deliberative democracy⁸⁷.

The evolution of constitutional jurisprudence from the New Deal to the Warren Court mandate has created the conditions for an openness to welfare rights⁸⁸. Republicanism has favored the emergence of a remarkable debate (characterized by an unprecedented sensitivity to the question of welfare rights) favoring the idea that reduction of inequalities should be considered a constitutional issue⁸⁹.

A clarification is very important. Even when the Supreme Court has shown a greater sensitivity towards social equality, it has placed the social rights under the umbrella of the Equal protection only in relation to desegregation policies: in all other cases, the Supreme Court has invoked the principle of due process in the procedural sense. Therefore, the provision of social services is not constitutionally duty. The Constitution only requires to enable correct procedures when these services are solicited and even when the institutions decide to cancel them.

Moreover, the S.C. jurisprudence followed a wavering trend: a significant opening to the end of the 70s and a turnaround in the more than 30 subsequent years. An important example is that of affirmative action. They were admitted at some length, but they were brought back within the fold of reverse discrimination since the Rehnquist Court. The Roberts Court has not changed this trend.

Certain stereotyped ideas have been reduced, if not removed. Welfare rights are justiciable like all other fundamental rights⁹⁰. Another issue for debate is whether a strong or weak form of judicial

⁸¹ P. KAHN, *Legitimacy and History. Self-Government in American Constitutional Theory*, London, 1992, 65 ff.

⁸² B. ACKERMAN, *We the People: Foundations*, Cambridge (MA)-London, 1991.

⁸³ V.C. JACKSON, *Multi-Valenced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of Mark Tushnet*, in 26 *Quinnipiac L. Rev.* 599 (2008).

⁸⁴ D.A. STRAUSS, *Common Law Constitutional Interpretation*, in 63 *U. Chi. L. Rev.* 877 (1996); V.C. JACKSON, *Constitutions as "Living Trees"? Comparative Constitutional Law and Interpretive Metaphors*, in 75 *Fordham L. Rev.* 921 (2006); M. TUSHNET, *The Constitution of the United States of America: A Contextual Analysis*, Oxford, 2009.

⁸⁵ J.H. ELY, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge (MA)-London, 1980.

⁸⁶ R. DWORKIN, *Taking Rights Seriously*, Cambridge (MA), 1977, 198 f.

⁸⁷ J.E. FLEMING, *Securing Deliberative Autonomy*, in 48 *Stan. L. Rev.* 1 (1995).

⁸⁸ Cf. C.R. SUNSTEIN, *The Partial Constitution*, Cambridge (MA)-London, 1994, 40 ff.

⁸⁹ K. ABRAMS, *Law's Republicanism*, in 97 *Yale L.J.* 1591 (1987); F.I. MICHELMAN, *Law's Republic*, in 97 *Yale L.J.* 1493 (1988); J.D. MICHAELS, *To Promote the General Welfare: The Republican Imperative to Enhance Citizenship Welfare Rights*, in 111 *Yale L.J.* 1457 (2002).

⁹⁰ See e.g. F.I. MICHELMAN, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, in 6 *Int'l J. Constit. L.* 663 (2008); O. GERSTENBERG, *Negative/Positive Constitutionalism, "Fair Balance," and the Problem of Justiciability*, in 10

enforcement of these rights is called for⁹¹. Nevertheless, comparison of constitutional systems demonstrates a progressive and unstoppable rise of welfare rights among the individual positions protected by the exercise of judicial power⁹². Moreover, the idea that only social rights carry a cost has been refuted, on the basis of robust arguments⁹³. More generally, there is a widespread belief that the political process has an open and, therefore, inclusive structure: it is based on dialogue between institutions. It is thought that, through this dialogue, welfare rights could become a constitutional issue⁹⁴.

5. Social mobility as a constitutional challenge for the future

In the European welfare states, the constitutional coordinates of SM are easily identifiable: principally, they are substantive equality, corresponding to an obligation, on the part of state institutions, to intervene directly in social and economic relationships in order to promote equality of opportunity; and welfare rights, understood as the tools the state can use to achieve substantive equality (education, healthcare, work, housing, subsistence, and certain other social goods)⁹⁵. In addition to these, we find democracy, pluralism, participation, and human dignity, as we have seen.

In the United States the identification of these constitutional coordinates is a more complicated, but not impossible, undertaking.

The constitutional recognition of welfare rights is no longer a taboo in the United States. Since 1969, and Michelman's *Foreward*⁹⁶, a theory of minimum welfare rights has received widespread and authoritative support in the U.S., and many scholars have tried to provide a constitutional solution to the problem of unequal provision of certain basic goods. The problem of the justiciability of these rights has been shown to have substantial theoretical foundations, thanks to Rawls' Theory of Justice⁹⁷.

Int'l J. Constit. L. 904 (2012); M. KLATT, *Positive Rights: Who Decides? Judicial Review in Balance*, in 13 *Int'l J. Constit. L.* 354, 357-359 (2015).

⁹¹ Cf. M. TUSHNET, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, in 38 *Wake Forest L. Rev.* 813 (2003), and ID., *Social Welfare Rights and the Forms of Judicial Review*, in 82 *Tex. L. Rev.* 1895 (2004).

⁹² See R. DIXON, *Creating Dialogue about Socioeconomic Rights: Strong-form versus Weak-Form Judicial Review Revisited*, in 5 *Int'l J. Constit. L.* 391 (2007) (promoting a commitment to cooperative constitutionalism, through dialogue among courts, in the enforcement of welfare rights). In general, M. TUSHNET, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, in 3 *Chi. J. Int'l L.* 435 (2002).

⁹³ S. HOLMES, C.R. SUNSTEIN, *The Cost of Rights: Why Liberties Depends on Taxes*, New York-London, 1999.

⁹⁴ See F.I. MICHELMAN, *Welfare Rights in a Constitutional Democracy*, in 1979 *Wash. U. L. Q.* 659 (1979), and J. COHEN, *Procedure and Substance in Deliberative Democracy*, in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political*, Princeton, 1996, 95 ff.

⁹⁵ Cf. MICHELMAN, *supra* note 73, at 962.

⁹⁶ MICHELMAN, *supra* note 70.

⁹⁷ J. RAWLS, *A Theory of Justice*, Cambridge (MA), 1971. The approach of M. WALZER, *Spheres of Justice: A Defense of Pluralism and Equality*, Oxford, 1983, is different: Walzer considers the history, social practices, shared understandings of a particular community to be decisive. Walzer has therefore developed criteria which guide the decisions of the courts without invoking hypothetical moral principles.



Constitutional interpretation can now go beyond the text, albeit without force such as to alter the overall constitutional design⁹⁸.

Once the constitutional significance of welfare rights is recognized, then it becomes logically possible to legitimize direct state actions in social and economic relations. Whereas, in several European countries, substantive equality is the basis of welfare rights, in the United States, on the other hand, welfare rights can prepare the ground for the establishment of substantive equality. Indeed, once the constitutional legitimacy of welfare rights is established and acknowledged, then there is nothing to prevent the state from intervening in economic and social relations in order to reduce the gap between social classes and ensure genuine equality of opportunity for all.

In June 1965, President Lyndon Johnson famously remarked: «You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair»⁹⁹.

The American system of SM has worked admirably for many decades. The “American Dream” is an expression familiar to Americans and Europeans alike, but in recent years a sharp decline in the availability of opportunities has seemed to show that social relationships, by themselves, are no longer able to ensure achievement of this dream. Therefore, there is room for government intervention in this direction — for action that may be stimulated by the combined interpretation of several constitutional principles. In a social structure characterized by a *plurality* of groups who aspire to *participate* in decision making, movement between social classes is a necessary condition for *democracy* and, in this sense, it is an expression of popular sovereignty. *Equality of opportunity* thus becomes the condition that allows every individual to live by his own talents, finding personal fulfillment in full realization of his *dignity*¹⁰⁰. All this is well summarized by the “pursuit of happiness” which is one of the pillars of the U.S. Constitution¹⁰¹.

Many people see significant state intervention in private relationships as an affront to human dignity. But this is true only if the question is seen from a strictly liberal perspective. Liberalism, however, is not

⁹⁸ On the possibility of going beyond the text when interpreting the constitution see D.A. STRAUSS, *The Supreme Court 2014 Term Foreword: Does the Constitution Mean What It Says*, in 129 *Harv. L. Rev.* 1 (2015): «American constitutional law ‘contradicts’ the text of the Constitution more often than one might think. Adhering to the text would require us to relinquish many of the most important and well-established principles of constitutional law».

⁹⁹ L.B. JOHNSON, *Commencement Address at Howard University «To fulfill these rights»*, <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>.

¹⁰⁰ A «severe deprivation and inequality continue to pose serious challenges to our commitment to human dignity and equal citizenship»: G. LIU, *Rethinking Constitutional Welfare Rights*, in 61 *Stan. L. Rev.* 203, 205 (2008).

¹⁰¹ See R.S. TAYLOR, *Self-Realization and the Priority of Fair Equality of Opportunity*, in 1 *J. Moral Philos.* 333, 345 (2004).



the only philosophy that permeates the constitutional design. It is also an affront to human dignity when an individual, despite having merits, fails to improve his standard of living simply because he started out at a disadvantage. An affirmative action in favor of a weak subject is a categorical imperative to protect human dignity, and the state must step in if society is unable to remove this disadvantage. Thus, providing the subsidiary nature of state intervention is recognized, there can be no opposing a strong action, on the part of public institutions, to promote SM.

SM is a constitutional matter since it expresses an ideal conception of social relations geared at building a structure that recognizes and values the resources, commitment and sense of responsibility of every individual. Put simply, SM is the complete realization of *merit*.

Merit rewards those who develop their individual resources and, in so doing, generate utilities both for themselves and for the whole community. For this system to work, SM must open the centers of power also to those who come from disadvantaged social classes.

This observation mitigates the risk feared by Michael Young, who envisaged a system governed by individuals, chosen purely on the basis of their outstanding IQ, that would surely collapse under the pressure of a revolt of the masses against this élite (the latter accused of being too distant from real problems)¹⁰². The aim of SM is precisely to avert this risk. Social advancement, favoring the social ascent of those born in social settings outside the ambit of power, makes it possible to select a ruling class that, having first-hand experience of life's problems, is well equipped, once in a position of power, to manage and solve them. Is this not one of the reasons why President Obama attached such significance to the nomination of Sonia Sotomayor to the Supreme Court?

The position of every individual, in the presence of economic and social disadvantage, should be protected by the state. Welfare rights are the answer to this problem. If the individual aspires to reach the centers of power, through his own merit, then it is the duty of the state to support this aspiration by guiding the action of the individual political and social institutions. This is obvious. A country's destiny should be determined by the real capacity demonstrated by its leaders. A community should be run by those who have shown that they know how to make wise, optimal and efficient use of the available resources. What is more, many people are proving able to find new resources. The progress of a state depends on the talent and commitment of those who work for its growth. It is assumed that an organization, large or small, should work well, and merit is the key ingredient. The problem is that talk of meritocracy seems to be increasing precisely at a time when this idea is struggling to survive, or is being abandoned; the fact is that in a mature society, led by intelligent and responsible people, it should

¹⁰² M.D. YOUNG, *The Rise of the Meritocracy, 1870-2033: An Essay on Education and Equality*, London, 1958.

not even be necessary to discuss it. In this sense, SM serves to emphasize the role of merit as the sole criterion for selecting the ruling class.

Therefore, recognizing SM as a constitutional matter has the following consequences.

First of all, SM can provide a legitimate basis for major interventions by public authorities in private relationships, even if this means facing accusations of paternalism. Barack Obama's health reform may be seen as a case in point¹⁰³. If SM were a constitutional value, then a possible judicial review could support this reform and thus resolve the dispute over this contested law.

Second, SM may be used as a criterion for resolving interpretive dilemmas. When it is a question of choosing between two possible interpretations, a court may choose the one most favorable to the realization of SM.

It makes no sense to attribute constitutional significance to the equal protection provided by the law if the lack of basic goods prevents many individuals from effectively exercising their fundamental rights. The classical liberal rights do not preclude, and need not limit, the constitutional recognition of welfare rights. Rather, welfare rights are the *condicio sine qua non* for the effective exercise of liberal rights in the presence of market failures. When the market is unable to provide the basic goods at affordable prices, then the state cannot shirk its responsibility to remedy these failures.

Once the constitutional importance of the welfare state is recognized, it will become impossible to leave SM out of the constitutional design. Just as welfare rights are the means for boosting SM, so SM is a basic constitutional aspect of welfare rights.

Empirical research shows that the community wants the state to mount positive initiatives to accelerate the processes of SM. In the current era of globalization, constant flows of immigrants are associated with unprecedented hopes for social inclusion¹⁰⁴ and thus making it essential to conduct an overall review of the question of constitutional principles. Constitutional patriotism (*Verfassungspatriotismus*) could provide useful theoretical basis for a new commitment, by national institutions, to the principles of solidarity, inclusion¹⁰⁵ and social cohesion¹⁰⁶.

¹⁰³ See D.A. SUPER, *The Modernization of American Public Law: Health Care Reform and Popular Constitutionalism*, in 66 *Stan. L. Rev.* 873 (2014).

¹⁰⁴ Cf. A.C. AMAN, G. REHRIG, *The Domestic Face of Globalization: Law's Role in the Integration of Immigrants in United States*, in 2 *J. Multicult. Soc.* 43, 47 (2011).

¹⁰⁵ Cf. *Plyler v. Doe*, 457 U.S. 202 (1982) (immigration status may not be used to limit the access of any child in the United States to elementary and secondary education in public schools). Indeed, as argued by H. MOTOMURA, *Immigration Outside the Law*, in 108 *Colum. L. Rev.* 2037, 2073 (2008), «the reasoning in *Plyler* expresses a view of immigration that looks to integration, [and] celebrates vehicles of social mobility».

¹⁰⁶ See, e.g., D. ABRAHAM, *Constitutional Patriotism, Citizenship, and Belonging*, in 6 *Int'l J. Constit. L.* 137, 144 (2008) (reasoning if constitutional patriotism is a basis for a politics of solidarity and redistribution, he believes that SM together with civil rights, is “almost all that autonomous individuals need”).

It is no longer just a problem of legislative policy making. We are currently seeing a strong quest for constitution that calls for SM to be recognized as a constitutional matter. Indeed:

- there is no equality if individuals do not have the basic goods to exercise their fundamental rights¹⁰⁷;
- there is no democracy where power is concentrated in the hands of a small group of individuals (élite) that does not tolerate the entry of individuals from other social groups¹⁰⁸;
- there is no pluralism if barriers to entry, set up in the “corridors of power” (i.e. the higher levels of government), prevent new feelings and needs from being voiced¹⁰⁹;
- there is no participation if individuals born at a disadvantage are destined not to improve their starting conditions, and thus to remain nothing more than the passive subjects of other people’s decisions;
- there is no respect for human dignity if unequal opportunities hamper the full self-realization of individuals inadvertently disadvantaged by economic and social factors.

Equality, democracy, pluralism, participation and human dignity are the fundamental principles embraced by the states that adhere to the values of Western constitutionalism. Without constitutional recognition of SM, these principles cannot satisfy the quest for constitutionalism that is currently emerging with such force in the Western world. SM, too, is a fundamental condition of progress for nations inspired by certain basic constitutional principles. The incorporation of SM into judicial standards could therefore help to affirm the autonomy and, above all, increase the authority of constitutional law¹¹⁰. The courts, supporting efforts to give SM constitutional significance, could «find a way to articulate constitutional law that the nation can accept as its own»¹¹¹.

The living constitution, even in liberal states like the United States, must take note of and heed the feelings of the community. American society has always believed in SM and, when the social elevator gets stuck, the community wants to see the institutions intervening actively to guarantee the basic conditions that allow everyone to improve their own prospects. Evolutionary interpretation of the

¹⁰⁷ On substantive equality *see, e.g.*, K.L. KARST, *Why Equality Matters*, in 17 *Ga. L. Rev.* 245 (1982-1983).

¹⁰⁸ The hegemonic group often opposes SM, even in a mature democracy like the United States. *See* M.J. HORWITZ, *The Legacy of 1776 in Legal and Economic Thought*, in 19 *J. Law Econ.* 621, 622 (1976) (stigmatizing the «paranoid fear of the threat of substantive equality. Nowhere more often than in this most politically democratic country in the world did the political elite express the fear that equality of opportunity was in constant danger of being overwhelmed by the leveling impulse»).

¹⁰⁹ Moreover, behind the struggle for social mobility, there is also the old issue of racial segregation. As noted by L.H. TRIBE, *The Puzzling Persistence of Process-Based Constitutional Theories*, in 89 *Yale L.J.* 1063, 1074 (1980), «alternatively, assertion of group status may be a form of internal exile, a way of repudiating the limited possibilities for action that the larger social structure would allow, a choice of ‘exit’ rather than ‘voice’». Indeed Tribe quotes A.O. HIRSCHMAN, *Exit, Voice, and Loyalty*, Cambridge (MA)-London, 1970, 108 ff. (describing that «American black power movement advocates collective program for blacks as group and rejects traditional patterns of upward social mobility for individual, selected blacks»).

¹¹⁰ *Cf.* LIU, *supra* note 100, at 227.

¹¹¹ R. POST, *The Supreme Court, 2002 Term-Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, in 117 *Harv. L. Rev.* 4, 11 (2003).



constitution is the path to follow, because the values around which a given nation recognizes itself and coalesces are the ones that are etched in its constitution. As Cass Sunstein finely argued, «ordinary citizens have played a crucial role, certainly insofar as their judgments of both facts and value have helped to motivate fresh interpretations of the document The content of the American Constitution has significantly changed as a result of citizens' beliefs and commitments, developing over time. Americans celebrate the stability of their Constitution. But generational change is a fact of constitutional life»¹¹².

¹¹² C.R. SUNSTEIN, *A Constitution of Many Minds*, Princeton, 2009, 219.