

# The ambivalence of US federalism under the Biden Administration: between the “Third Reconstruction” and new challenges by the States to cooperative federalism in an era of political polarization

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**Abstract:** L’ambivalenza del federalismo americano sotto l’amministrazione Biden: fra “Third Reconstruction” e nuove sfide dagli Stati al federalismo cooperativo in un’era di polarizzazione politica. – The current status of American federalism under Biden’s Presidency is characterized by bi-directional and ambivalent trend of the system of federal relations. On one side federalism has taken on the guise of a renewed instrument designed to launch a “Third Reconstruction” based on centralization and control by the Federal Government of public policies (as in the case of policies designed to combat the SARS-COVID 19 emergency); on the other hand, the same evolution of the federal system has been characterized by a significant growth of political and institutional conflicts between the Federal government and the States, as an expression of concurrent tendency to polarization of the political party system and of political arena.

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**Keywords:** Biden Presidency; Federalism; Trump and Trumpism, political polarization.

## 1. Introduction

Facing the challenges posed by the serious economic effects of the pandemic emergency and the institutional rubble left by the Trump Presidency (culminating in the assault on Capitol Hill on January 6, 2021), the Biden administration’s political program is aimed at a recovery of a spirit of national unity as well as the dismantling of a series of policies enacted by its predecessor (e.g., on immigration, climate change, racial equality and the coronavirus pandemic). The centerpiece of the program is a plan of shared anti-crisis measures, intended precisely to relaunch the economy and the welfare state, as well as the geopolitical role of the United States in the world (e.g., the return to the Paris accords and the execution of new climate agreements).

It seems useful, therefore, in analyzing the policies adopted by the Biden Presidency with regard to their effects on US federalism, to follow the following procedure:

We will begin by recalling, albeit synthetically, the general characteristics assumed by the US federal system following the advent of the cooperative federalism model and its tendency toward the

centralization of the system of federal relations. This preliminary examination of the role assumed by the Federal Administration (and within the same by the Presidency) in the development and application of a series of instruments (administrative/regulatory and financial) aimed at molding the US federal system in a cooperative sense, will illustrate the series of instruments of interinstitutional collaboration and conditioning that the Federal Government uses to bring the conduct of the Member States and the system of intergovernmental relations into conformity with its policy directives.

In the next part of the discussion, in accordance with the empirical theory of federalism of C. J. Friedrich and the centrality of an investigation focused on the guidelines of the US federalizing process, we will concentrate on the different ways in which the Trump and Biden administrations have interpreted and applied the federal principle in accordance with the political objectives pursued by the Presidents themselves.<sup>1</sup>

On the one hand, federalism has taken on the guise of a renewed instrument designed to promote centralization and control by the Federal Government of public policies subject to forms of competition-co-administration between the Federal administration and the Member States (as in the case of policies designed to combat the SARS-COVID 19 emergency and hasten the exit from the recession induced by it).

On the other hand, the same federal principle has been used according to the neo-federalist logic of restoring areas of autonomy (regulatory, administrative and financial) to the Member States in the management of the same public policies, as a function of the Presidential pursuit of the political objective of retreat (retrenchment) of the central government and the dismantling of public policies and federal standards introduced to protect public interests such as those related to environmental protection, welfare programs, and education.

After illustrating the oscillating and bi-directional trend of the system of federal relations, our analysis will move on to some summary considerations aimed at highlighting the elements of continuity and discontinuity of the current evolutionary framework of relations between the Federal Administration and the Member States, compared to the traditional classifying paradigms of the US federal system.

## 2. The centralizing tendencies inherent in the cooperative federalism model

It is by now the consolidated general opinion that the New Deal marked a fundamental moment of transformation in the American constitutional history.<sup>2</sup> The affirmation of the political formula of the social democratic

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<sup>1</sup> The reference is to the empirical theory of federalizing process processed by C.J. Friedrich, *Trends of Federalism in Theory and Practice*, New York, 1968, which defines federalism as 'the whole of the processes whereby the systems tend to distribute political powers in various ways and to varying degrees, internally and externally, among different centers or levels of government' (*Ibid*, p. 7).

<sup>2</sup> B. Ackerman, *We The People: Transformations*, Cambridge (Ma), 1998.

state brought about fundamental transformations in the institutional structure of the State, affecting both the horizontal articulation of power within the central government, and the vertical division of power between the different institutional levels of the federal state.

From the first point of view (changes in the form of government), it is evident that the consolidation of the welfare state has brought about a decisive evolution towards a model of "Regulatory State", based on the reinforcement of the role of the federal government and, within it, of the presidency (commonly referred to as Presidential Government, insofar as the president becomes the true governing power, constituting the political center of the state.<sup>3</sup>

an articulated structure of Federal Departments and Agencies (Independent Regulatory Agencies) with functions of preparation of guidelines and issuance of regulations concerning both the structure and the implementation of programs, and the governance and control of key sectors of the economy (for example, the supervisory activities in the fields of competition, banking, environment, transportation and communication, etc.).

From the second point of view (effects on the federal structure of the State), it is evident that the same process of consolidation of the Welfare State (and in parallel of the Regulatory State) has determined a process of federalization oriented towards the centralization of the federal system. The centralization has been induced by the extension of federal legislation aimed at introducing the rudiments of a welfare system in sectors such as health, social welfare services, education, and social security, as well as by the parallel and the concurrent incremental process of consolidation of the role of the Federal Administration in the coordination and management of those same welfare policies.

In this way, the push towards the expansion of the role of the federal government has led to the overcoming of the traditional dual model of federalism in favor of the affirmation of a different model of federal relations, known as cooperative federalism.<sup>4</sup>

This model is characterized by the tendency to centralize intergovernmental relations, integrating a centripetal federalization process that has manifested itself through the constant partnership between levels of government in the management of cooperative federalism regulatory programs, conducted according to co-administration modules in which the federal government limits itself to giving guidelines and providing funding, leaving it to the decentralized governments and

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<sup>3</sup> Thus moving beyond the model of *Congressional Government*, which was the expression of the previous legislative centrality in the dynamics of the formation and direction of policy development.

<sup>4</sup> Process of transformation of the US federal system always described in the famous essay by E. Corwin, *The Passing of Dual Federalism in American Constitutional History in Essays by E.S. Corwin*, New York, 1964. On the fundamental transformations induced by the New Deal we also see C. Bologna, *Stato federale e "national interest". Le istanze unitarie nell'esperienza statunitense*, Bologna, 2010. On the subject see A. Pierini, *Federalismo e Welfare State nell'esperienza giuridica degli Stati Uniti*, Torino, 2003, 50 ss., Id., *Federalism and the Welfare State*, in G. d'Ignazio, (cur.), *The constitutional system of the United States of America*, Milan, 2020, 163 ss..

institutions belonging to so-called Third Party Government,<sup>5</sup> wide discretion in the administration of such policies.

The need to strengthen intergovernmental collaboration in the main policy areas<sup>6</sup> in which the standardizing intervention of the Federal Administration was necessary (such as welfare, environmental policies and education), has led, therefore, to the development of a series of instruments of administrative and financial cooperation between levels of government, capable of profoundly influencing and shaping the organizational and management methods of Member States and local government institutions.

In substance, this has meant that the administrative activity of state and local governments is constantly oriented toward cooperation with the Federal Government and to compliant implementation (compliance) of the objectives established by the latter.

In this regard, one of the most attentive analysts of US federalism has developed a reconstructive list of the models of cooperation between levels of the central, state, and local governments, on the basis of the following taxonomy, emphasizing that: "The federal government has eight key tools to induce one-way state and local cooperation: (1) grants-in-aid, (2) deficit spending, (3) minimum national-standards schemes, (4) waivers of federal law, (5) compliance-deadline extensions, (6) federal forbearance, (7) court orders and consent decrees, and (8) statutory and regulatory penalties".<sup>7</sup>

We are thus faced with a centripetal federative process, all the more consolidated as a result of the further, extensive recourse, even in sectors other than those linked to the welfare state (e.g., environmental policies), to institutions still aimed at allowing the introduction of uniform regulations at federal level or, in any case, to ensure the fulfillment by the States of objectives established by the central government.

The reference is to instruments such as "federal preemption"<sup>8</sup> and "federal mandates",<sup>9</sup> with reference to the diffusion of which there has

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<sup>5</sup> The phrase is used by O.J. Sage, *Towards a Constitutional Architecture for Cooperative Federalism*, in 79 N. C.L. Rev., 666 (2001). The same Bognetti (*La Costituzione democratica*, Torino, 2000, 207) pointed out that, from a structural point of view, social assistance programs were characterized by the adoption of a principle of typically cooperative organization in which 'the central State offers the Member States generous financial allocations to be used for certain purposes (often specifying precise methods and conditions of use, down to the details), Provided The State contributes with its contribution to the realization of the project'.

<sup>6</sup> The reference is to the main areas of policy or government activity, defined in a fundamental contribution of Lowi as different arenas of power in which various modes of interaction between groups and elites conductors V. T. J. Lowy, *American Business, Public Policy, Case-Studies, and Political Theory*, in 4 *World Pol.*, 677 (1964).

<sup>7</sup> J. Kincaid, *The eclipse of dual federalism by one-way cooperative federalism*, in 49 *Ariz. St. L.J.*, 1061 (2017).

<sup>8</sup> Where, in fact, the primacy of federal law over that of the Member States is accompanied by the provision of positive obligations for the latter, the Federal preemption Becomes *Federal mandate*. In other words, in the present case, the Federal Government does not limit itself to issuing *regulations* uniform at national level, intended to take precedence over conflicting provisions of state law, but imposes on Member States the obligation to implement by means of legislative or administrative acts the guidelines and guidelines contained in federal laws.

been talk from time to time among political scientists of "coercive" or "prefectorial" federalism<sup>10</sup> and also of "permissive federalism".<sup>11</sup>

The aforementioned definitions appear to underline how the evolution of the division of power and authority between the national government and the state governments has moved towards forms of "imposition" of policies and objectives by the federal government (specifically through legislative, administrative, regulatory, and fiscal instruments, as well as thanks to the primacy of the federal government's political initiative). Thus, "the partner state governments always rely on the permission and permissiveness of the national government".<sup>12</sup>

In conclusion, it can be said that the US federal system, while retaining the intrinsic dual structure deriving from the constitutional design of division of powers (for which, in relation to the same, at least according to the majority of scholars, it does not seem correct to speak of executive and / or administrative federalism, in parallel with the German federal system), has, however, developed over time a series of tools of political / administrative interaction between the levels of central, state and local government, such as to determine the consolidation of a system

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<sup>9</sup> It allows the Federal Government, on the basis of the «*Supremacy Clause*, to intervene to regulate raw materials directly left to the legislative and administrative competence of the Member States. It follows that, in matters falling within the competence of the federal legislature (art. I Sec. 8 U.S. Const.), any conflicts between federal law and state law are resolved in favor of the former and the courts seized of the relevant disputes are obliged to disapply the provisions contained in state laws vitiated by unconstitutionality».

<sup>10</sup> The expressions are used by D.J. Elazar, *Is federalism compatible with prefectorial administration?*, *Publius* 11, 3-22 (Spring 1981).

<sup>11</sup> M.D. Reagan, I.G. Sanzone, *The New Federalism*, New York-Oxford, 1972, 175.

<sup>12</sup> At the level of political processes, then, such a shift towards the center of the balance of powers between central and decentralized levels (state and local), has been favored by the spread of administrative cooperation tools such as open ended matching grants (e.g. in the field of public health, Medicaid) to the detriment of grants more specifically aimed at financing and supporting the local policies of the decentralized institutions themselves (as in the case of the Community Developments Block Grants involving direct transfers from the Federal Government to the municipalities).

This, where the same grants having open structure ended (as they are based on the financial participation of the Federal Government and the Member States in covering the costs necessary for the provision of welfare benefits) appear to be intended to directly satisfy the interests of individuals (voters and/or those linked to interest groups operating on a federal scale) and/or to protect public goods such as the environment, thus transcending the interests most directly linked to local communities (of which States and local authorities are exponential bodies).

In this way, a link of direct political/administrative responsibility is established between federal officials and categories and/or interest groups targeted by the interventions, reducing the role of participation of state and local administrators in the launch of the same public policies (conversely, reducing the function of the same institutions of state and local government to that of mere agents of the federal government, with consequent erosion of the areas of administrative autonomy of the former).

of cooperative intergovernmental relations and the consequent erosion of the dual nature of the structure.<sup>13</sup>

The result appears to be that of a dense network of interinstitutional relations that favors the primacy of the Federal Government in political dialogue with the States, as well as in the establishment of objectives, rules, conditions and obligations related to the determination and implementation of public policies characterizing the model of cooperative federalism (with consequent accentuation of the centralist connotations of the system of intergovernmental relations. It is clear, therefore, that the agenda of the federal administrations in terms of policies involving the system of relations between levels of government, has assumed the value of an essential key to understanding the analysis of the current, concrete ways of implementing the US federalizing process.

### 3. Political polarization and polarized or punitive federalism: the exasperation induced by the Trump presidency

The aforementioned centripetal extension of federal legislative and administrative interventions, as well as federal spending, into areas previously reserved to the Member States, has been significantly influenced by the current phase of constant polarization of political disputation. This dynamic has produced an accentuation of the conflictual relationships between competing levels of government compared to the more compromising relationships that had traditionally inspired the political representation and operation of the US presidential form of government.

On the one hand, in fact, the (proper) functioning of the US presidential form of government has usually been associated with a two-party political system characterized by high ideological / programmatic contiguity (ensured by the shared fundamental values of liberal democracy) and by a decentralized organizational structure based on the same shared values (in such a way as to strengthen the representation of the interests and the political leadership of territorial communities and attenuate the constraint of discipline towards national leaders).

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<sup>13</sup> See, to that effect, v. Mr. Comba, *Esperienze federaliste tra garantismo e democrazia. Il "Judicial federalism" negli Stati Uniti*, Naples, 1996, p. 47-48, in which it is highlighted how executive federalism has assumed "particular importance in the context of the States that, contrary to the general US model and Swiss, are characterized by a form of Parliamentary government...", while "On the contrary, in federal states with the form of parliamentary government, the more marked horizontal division of powers has prevented this centralization of competences over federal relations". In turn, Kincaid notes appropriately as "The dual structure of American federalism, moreover, does not obligate states to administer federal programs. Unlike integrated federal systems, such as Germany's cooperative federalism, there is No constitutional expectation that states implement framework legislation enacted by the federal government. The federal government is expected to implement its own policies. However, the federal government relies predominantly on state and local bureaucrats, rather than on federal bureaucrats, to administer the lion's share of its domestic policies", in *The eclipse of dual federalism...*, cit., p. 1063.



On the other hand, however, especially since the Obama presidency, there has been an increasingly polarized political competition that has eroded the spaces for institutional dialogue (and therefore, compromise), both in the horizontal direction of relations between the highest level political bodies of the federal government, and once again in the vertical direction of relations between the federal government, Member States and local government institutions (the relevant profile for the purposes of this discussion).

Such an evolution towards the polarization and radicalization of political competition has, therefore, led to numerous instances of strong institutional conflict, exacerbated by frequent situations of divided government and the consequent misalignment between control of the two houses of Congress and control of the Federal Executive (as a result of the intrinsically dualistic nature of the presidential form of government).

This has also led, in the face of the inability of Congress to find points of agreement on major issues and the consequent increase of gridlock and / or stalemate in the exercise of the legislative function, to the tendency of Presidents to make extensive use of the prerogatives of the executive in order to bypass the approval and control of Congress over the political guidelines established by the Federal Government.

This increasing exercise of presidential powers has been expressed, firstly, through the use of regulatory instruments (such as executive orders, i.e. presidential directives that require or authorize certain actions to be carried out by the executive apparatus), to direct the activity of the Federal Administration independently of the legislative authorization and support by Congress; secondly, through the simultaneous strengthening of the Presidency's control over agency activities, thus highlighting a further trend towards centralization of the relevant decision-making processes.

In conclusion, it is evident that the tendency, mentioned above, towards the consolidation of an administrative presidency characterized by the centralization of the powers of direction and control over the administrative system by the President and White House staff, together with the growth of competitive/conflictual dynamics within the political system, are having significant repercussions, perhaps not on the structure of intergovernmental relations (still anchored to the modules of cooperative federalism), but certainly on the functional relationships between different institutional levels.

The main effect, in fact, appears to be the affirmation of a vision of federal relations<sup>14</sup> that has been acutely defined by political scientists as "opportunistic", in the sense that the declination in a centripetal or centrifugal sense of those relations (inherent in the bidirectional nature of the so-called federalization processes), appeared to be oriented by the political objectives pursued from time to time by the Federal Administration in the different policy areas affected by its interventions.

Practically speaking, we have witnessed the unfolding of pressures favoring the enlargement of the sphere of State autonomy in the

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<sup>14</sup> J. Kincaid, *The Three Shades of American Federalism*, in <http://50shadesoffederalism.com/case-studies/the-three-shades-of-american-federalism/>

management of those policies in relation to which decentralization, in particular administrative and financial, assumes an instrumental value in the retreat (retrenchment) and / or decrease of the commitment of the Federal Government in the regulation and management of those same policies. In this way, an instrumental use of the federal principle has been encouraged, as it aims to strengthen the role and responsibility of the States in accordance with the neo-federalist principles of "devolution" and "sorting out" of functions to the States on the basis of a re-evaluation of the Tenth Amendment to the Constitution.

On the other hand, in other policy areas, such as environmental regulation, there has been the opposite trend, marked by the desire of the Federal Government to favor the centralization of the powers of organization and management of the same policies, so as to erode the autonomy previously recognized to the Member States.

Such a "political" and instrumental use of the federal principle was taken to its extreme consequences by the Trump Administration, to the extent that the constant connection between the central government and the majority of Republican-led states has been used to strengthen the unity of the political and administrative direction pursued by the two levels of administration, and conversely, to restrict areas of self-government in states governed by the Democrats.

This evolutionary dynamic of the system of intergovernmental relations can be observed in a variety of fundamental policy areas, such as welfare, environmental policy, and education. In these areas, in fact, the action of the Trump Administration has been noteworthy for its attempts to sabotage the uniform implementation of federal programs by returning to the States margins of discretion in the administration of those programs.

This is, for example, the case of the Welfare sector, in which the will of the Trump Presidency to dismantle the main reforms approved by the previous Democratic Administration, with particular reference to the Affordable Care Act (so-called Obamacare), has resulted in the federal government granting to the states a series of waivers and administrative interpretations aimed at allowing the state administrations to introduce differentiated enforcement measures, thus weakening and / or hindering the uniform application of the law and undermining its fundamental objective of expanding federally authorized health insurance for uninsured persons.<sup>15</sup>

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<sup>15</sup> The exemptions granted concerned, in fact, a series of fundamental instruments for implementing the law, such as insurance policies exchangeable in the so-called health insurance exchanges (health policy grants) established and administered at state level with the aim of facilitating the meeting between supply and demand of policies. A push towards flexibility and differentiation between States in the application of the program, reinforced by further derogations aimed at granting States the power to set additional conditions and/or aggravate the existing conditions) for access to public health coverage guaranteed through the program Medicaid, which is also managed at state level (requirements to impose additional obligations and/or burdens on beneficiaries for reintegration into the labor market). This is in such a way as to frustrate the pursuit of another of the fundamental political objectives pursued by Obamacare, i.e. the extension of public health coverage itself.



The opposite tendency is exemplified by the contrasting centralizing orientation assumed by the Trump Administration in the field of environmental policy.

In this case, too, the choice of the Federal Administration was clearly determined by the intent to deregulate and relax the policies of environmental protection and emissions reduction activated by the Obama Presidency. This effort generated, in turn, political polarization and confrontation with the states governed by Democrats, more inclined to impose environmental protection standards higher than the federal standards.

In the present case, in fact, the Trump Administration moved in the exact opposite direction (of centralization) that it followed in the field of Welfare, refusing to confirm the series of waivers dating back to the 1960s granted to the State of California. The waiver had allowed California to impose air quality standards for the containment of polluting emissions (in particular from motor vehicles) that were more stringent than those established on the federal level (greenhouse gas mobile source emissions standards) and to launch programs aimed at further reducing pollution (such as the Regional Greenhouse Gas Initiative).

The waivers had, in fact, first favored a virtuous process of experimentation and imitation of the same measures by various other States and subsequently the activation of competing measures aimed at raising environmental protection standards at the federal level (leading, appropriately, to the definition of this chain reaction process of reception-repetition of rules, as "iterative federalism").<sup>16</sup>

Nevertheless, in line with the fundamental environmental policy guidelines pursued by the Trump Administration (in the sense of relaxing policies to contain polluting emissions and encouraging the use of traditional non-renewable energy sources and fossil fuels in service to a relaunching of the economy) the same federal authorities (in particular the EPA) engaged in a tug of war with California by effect of the revocation of the waiver in *subiecta materia* previously granted to the State.<sup>17</sup>

As can be seen, the Trump administration's denial of the renewal of the waiver was a contradictory and opportunistic use of the federal principle as it is strictly subordinate to the political guidelines of the Presidency, to be closely linked to the policies pursued by Republican-led administrations.

On the other hand, where local government institutions traditionally controlled by the Democratic Party had been pursuing political-administrative guidelines contrary to those advanced by the Federal Administration, the same local authorities had been subjected to heavy

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<sup>16</sup> A. Carlson, *Iterative Federalism and Climate Change*, in 103 *Northwestern University Law Review* 1097 (2009).

<sup>17</sup> Revocation in turn motivated by the assumption that the looser federal standards on environmental protection launched by the EPA under President Trump, as aimed at fueling and reviving economic growth, should have prevailed – thus exercising the so-called "Fiscal Protection") federal preemption – on the most stringent standards dictated by the States, making use of the previous derogation (relieving companies of a series of additional costs deriving from the application of the same environmental protection measures launched at state level).

sanctions, such as cuts in federal funding allocated to them. This is the famous case of sanctuary cities, which refused to provide data to the federal immigration authorities that could be used to implement the highly restrictive guidelines enacted by the Trump Administration (such as information concerning the status of immigrants, to be used in deciding the possible loss of welfare benefits and / or their expulsion).<sup>18</sup> The same cities also refused to cooperate in initiatives aimed at implementation of the guidelines (such as joint patrols). In this regard, therefore, it is appropriate to speak of punitive federalism.<sup>19</sup>

Such an approach was also followed in the final phase of the Trump Presidency, marked, as is known, by the emergency induced by the spread of the Sars-COVID 19 pandemic.

In its response to the emergency the Trump Administration distinguished itself not only by the substantial inconsistency of the behavior assumed by the President himself in the face of the spread of the virus, but also for the lack of coordination of the containment policies activated by state institutions.<sup>20</sup>

These shortcomings again affected the application of the federal principle, both in the vertical dimension of relations between the Federal Administration and the States (as marked once again by the President's attempt to override the Governors of the States in ordering re-openings), and in the horizontal dimension of relations between States, as holders of competences in the field of public health (in the context of that<sup>21</sup> general police power that does not fall, pursuant to the Tenth Amendment of the Constitution, within the powers conferred on the national government. Hence the series of diversified measures to contain the virus - such as the Stay-at Home Orders - SAHOs - adopted by the Governors in the exercise of the emergency powers attributed to them).

Once again, therefore, the Trump administration adopted an instrumental use of the federal principle in which the political polarization and ideological opposition of the President to strict measures aimed at containing the virus,<sup>22</sup> restricted the space for effective cooperation between levels of government, thus further weakening the traditional cooperative structure and practice of the system of intergovernmental

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<sup>18</sup> V. G. Caravale, *Donald Trump e le città santuario: aspetti della dialettica federazione – Stati*, in *Federalismi.it*, n. 12 - 05/05/2021, 26 ss.

<sup>19</sup> 2020: *Polarized and Punitive Intergovernmental Relations*, in 50 *Publius: The Journal of Federalism* 3, 311-343. See also, G. Delledonne, *Uso e abuso delle relazioni finanziarie intergovernative durante il mandato di Donald Trump*, in *Nomos*, 2, 2022, 2 ss.

<sup>20</sup> T. A. Birkland et al., *Governing in a Polarized Era: Federalism and the Response of U.S. State and Federal Governments to the COVID-19 Pandemic*, in 51 *Publius: The Journal of Federalism* 4, 650-672 (2021). See also F. Clementi, *Gli Stati Uniti e la risposta al Covid-19, tra Federazione e Stati, nell'anno delle elezioni presidenziali*, in *DPCE online* 2, 2020, 1875 ss.

<sup>21</sup> On the harsh contrasts between Trump and the Governors of the States v. F. Clementi, *President Trump and the American Governors: Two Years of Dialogue*, in G.F. Ferrari (ed.), *The American Presidency under Trump*, The Hague, 2020.

<sup>22</sup> On Trump's denial see E. Bertolini, *Cinquanta sfumature di... negazionismo da Coronavirus*, in *DPCE online*, 2, 2020, 2715 ss. See also F. Clementi, *The United States and the response to Covid-19, between Federation and States, in the year of the presidential elections*, in *DPCE online*, 2, 2020, 1879 ss.

relations that saw the substantial devolution to the States of choices in the matter).<sup>23</sup>

#### 4. The “Third Reconstruction” launched by Biden: the difficulties of a weak Presidency

The Presidency of Joseph Lee Biden, following the institutional lacerations caused by the predecessor Trump Administration, culminating, as is known, in the dramatic phase of the transfer of power to the President-elect, opened with the proclaimed intention of starting a “Third Reconstruction.” Through the launch of a broad plan of interventions by the federal government, the Biden “reconstruction” aimed to revive the traditional objectives underlying the political agenda of the Democrats, which Trump had tried by all means to hinder and weaken.

Therefore, policies aimed at pursuing goals to combat inequalities (racial and social) through the strengthening of welfare programs, environmental protection (through incentives for the development of renewable energy and measures aimed at reducing emissions), strengthening the instruments of democratic participation and protection of civil and political rights appear to be central.<sup>24</sup>

These policy initiatives were accompanied by anti-crisis measures to relaunch the economy (such as the great infrastructure plan launched in 2022), and resolve the pandemic emergency.

It seems interesting, therefore, to analyze, in terms of their impact on federal relations, how the concrete implementation, of the measures launched by the Biden Administration (as well as its basic policy) is being influenced by a series of basic elements and trends such as:

on the one hand, the variable constituted by the contingent, intrinsic political weakness of the Biden Presidency, dependent on a particularly narrow majority of Democrats in the Senate and facing a new phase of divided government after the mid-term elections of November 2022 with the Republican conquest of a narrow majority in the House of Representatives.; on the other hand, the evolution, mentioned above, of the system of intergovernmental relations, as it is continues to be conditioned by the polarized and antagonistic political context of relations between institutional actors.

Both factors are, in fact, contributing to rendering the path of the measures launched by the Biden Administration fraught with difficulties,

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<sup>23</sup> J. Kincaid, J. W. Leckrone, In *US COVID-19 responses, party polarization has trumped cooperative federalism*, in <https://blogs.lse.ac.uk/usappblog/2021/12/01/in-us-covid-19-responses-party-polarization-has-trumped-cooperative-federalism/#Author>.

<sup>24</sup> V. X. de Sousa Briggs, J. Rogers, *A More Democratic Federalism?*, in *Democracy* (Fall 2021), per cui: “Doing so would amount to a Third Reconstruction in this nation’s history, equivalent in scope and promise to the short-lived “new birth of freedom” Reconstruction after the Civil War and the de facto Second Reconstruction of the New Deal, as well as Roosevelt’s “four freedoms” and “new bill of rights” speeches, and the immediate postwar years, which instituted the mixed-economy Keynesian welfare state and at least a weak version of social democratic politics that the right has always hated and neoliberalism successfully weakened” (p. 3).

both in terms of the legislative implementation by Congress, and the administrative implementation by the states, elements inherent in the permanent cooperative structure of federal programs.

From the first point of view (difficulty in legislative implementation of the program of the Federal Administration), it should be noted that the accentuation of political polarization and the consequent rift between Republicans and Democrats in Congress, by increasing the party discipline of Senators and Representatives (previously rather weak due to the federative structure of the large US parties), is in fact precluding the original objective of the Biden Presidency: to extend the boundaries of the Democratic majority, seeking, in a bipartisan perspective, the support of the more moderate Republican opposition in order to approve the key bills for the implementation of the President's program.

While it is true, in fact, that some of the most important measures proposed by the current Administration have finally been translated into law by Congress, with consequent successes in terms of implementing the pillars of the President's political agenda, it is equally true that the approval process of the same bills has been particularly troubled, highlighting the absence of any bipartisan consensus.<sup>25</sup>

Emblematic, in this regard, are the cases of the American Rescue Plan and the Infrastructure Investment and Jobs Act, both approved in 2021, where the first launched a series of interventions aimed at addressing the health and economic problems deriving from and / or connected to the Covid-19 pandemic. This, through welfare measures providing forms of direct support to families and small and medium-sized enterprises (attributable to the so-called Helicopter Money),<sup>26</sup> the strengthening of vaccination plans, as well as the investment incentives aimed at modernizing production cycles and the use of information technologies. The second measure instituted a major financing and infrastructure plan including the improvement of major communication routes (roads, ports, airports) and the public transport system, as well as a series of measures aimed at strengthening digitalization and the ecological transition.

Although both of the aforementioned bills were proposed with a view to recomposing national unity around a framework of shared measures aimed at combating the effects of the pandemic emergency, they once again met the united opposition of the Republican Party and were therefore approved by the Democratic majority alone (with the exception of a small number of Republican representatives, who voted in favor of the Infrastructure Plan). Furthermore, the necessary votes from the majority were gathered after exhausting negotiations within the Democratic majority.

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<sup>25</sup> On this point we see. D. M. Konisky, P. Nolette, *The State of American Federalism 2021–2022: Federal Courts, State Legislatures, and the Conservative Turn in the Law*, in 52 *Publius: The Journal of Federalism* 3, 353–381.

<sup>26</sup> Come those aimed at guaranteeing direct transfers to low-income families as a stimulus to the economy, mitigating the effects of cyclical unemployment resulting from the pandemic emergency by increasing unemployment benefits and extending the health coverage guaranteed to the unemployed themselves (from the program Consolidated Omnibus Budget Reconciliation Act - COBRA), to always support families for the purchase of meals, to extend tax incentives for dependent children.

For the same reasons (difficulty in compacting the Democratic majority in the Senate, strenuous opposition of the Republican component), other proposals of the Biden Administration have stalled in Congress, with some of them subsequently winning only partial approval and with forecasts of extremely interventions and spending commitments.

This was the case, for example, of the Build Back Better Act (BBBA), which provided for a series of expansive measures and welfare support for families (Family Plan), such as those aimed at providing free day care for all children aged between 3 and 4 years, wider investments in health care for children, the elderly and the disabled, as well as combatting climate change (through measures to incentivize the ecological transition of economically disadvantaged families and communities), to reduce the cost of medicines and to extend health care provided through the Affordable Care Act and Medicaid. The bill remained stranded in the Senate for months (throughout practically all of 2021) due to the opposition of moderate Democratic Senator Joe Manchin of West Virginia, who finally agreed to vote for only some of the measures originally included in the BBBA, when they were included in the Inflation Reduction Act approved by Congress in 2022, (thus greatly reducing the planned spending commitment of the federal government). The law, in fact, aiming to cut inflation through the reduction of the public deficit, provides for a series of investments in the field of clean energy, measures aimed at lowering the cost of prescription drugs and energy supply, and a reform of corporate taxation (with a consequent drastic decrease in proposed welfare interventions).

Also stranded in the Senate, this time without overcoming the Republican opposition, is the proposed For the People Act (FTPA), presented by the Democrats to block many of the procedural restrictions introduced at the state level in elections, by introducing some uniform federal guarantees for the exercise of the right to vote (such as automatic voter registration - AVR structured according to the best good practices of States that have already provided for such a mechanism, a uniform two-week early voting period with some restrictions, while ensuring that this period includes weekends and hours outside normal working hours; postal voting allowed to any voter along with multiple options to return the ballot).

This defeat offered further proof of the weakness of the presidential leadership and the consequent difficulty of implementing the President's political program when it is not supported by a solid majority in Congress, and even more so in a situation of so-called divided government. Both situations that open the way to serious institutional deadlock, even of real paralysis of the federal government, all the more accentuated by the repeatedly recalled political-party polarization that is increasingly characteristic of the dynamics of the US political process.

## 5. The perpetuation of polarization in federal relations: institutional effects



The contingent political weakness of the Biden Presidency is matched by other elements capable of further eroding, on the institutional level, the role of primacy assumed by the Federal Government (and in it by the Presidential leadership) within a system of intergovernmental relationships that continues to be characterized by dynamics of centralization and institutional cooperation typical of coercive federalism.

From this point of view, the allocated resources appear to be intended, in the first place, to flow into existing state or federal programs, regulated by their own pre-defined specific norms and criteria for the division of competences (as in the case of the additional resources intended to finance the Homeowner Assistance Fund, aimed at subsidizing homeowners who had lost their jobs or were otherwise late in paying mortgage loans on properties and / or victims of foreclosures on their mortgages - see Sec. 4017 - d 1, 2, 3 ARP, as well as those aimed at strengthening the highway network under the National Highway Performance Program).<sup>27</sup> There is also the establishment of new grants, with the structure of grants or project grants, involving mechanisms of cooperation-consultation between the Federal Government, the States and local governments on programs and projects to be implemented and developed at local level (as in the case of transfers aimed at financing States in the development of climate change and environmental protection projects (Congestion Mitigation and Air Quality Improvement Program Sec. 1104 e5 ss. IIA) - and also those projects directed to States in the field of urban road improvement, as provided for and financed by the IFA - Sec. 177 a) ss.).<sup>28</sup> Finally, equally significant is the increase in resources allocated to the financing of open-ended matching grants such as Medicaid, where the Biden Administration, as part of a series of interventions intended to strengthen the application of the Affordable Care Act, has provided a series of incentives for States that had extended the coverage guaranteed by the program.<sup>29</sup>

In the face of the permanent centrality of the Grants' system as an instrument of financial and administrative cooperation between the Federal Government and the Member States in the activation of a series of anti-crisis policies and the support and relaunch of the economic system and infrastructure projects, there are, however, elements that appear capable of producing a push in the opposite direction with respect to the centralizing tendency induced by the renewed growth of Federal intervention in economic and social policy.

Attention must first be paid to the reinforcement of federal jurisprudence aimed at limiting the power of federal agencies, rooted in the preemption doctrine, to approve regulations governing matters otherwise

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<sup>27</sup> Other examples that can be given are always those of the additional resources in the field of school education provided by the Department of Education pursuant to Sec. 2001 - a) of the ARP).

<sup>28</sup> And also funding for States and local governments for the activation of programs aimed at reducing the harm deriving from the consumption of drugs - see Sec. 3056 - b 1 and b 2 ARP.

<sup>29</sup> F. J. Thompson, M. K. Gusmano, *Biden and the Affordable Care Act: Congressional Action, Executive Federalism, State Litigation, and Program Durability*, in 52 *Publius: The Journal of Federalism* 3, 382-407.



destined to be the subject of state regulations. The driving force behind this limitation on federal regulatory powers has been the consolidation of so-called constitutional conservatism within the jurisprudence of the Federal Courts (starting with the Supreme Court).

The rise of constitutional conservatism is, as is well known, the consequence of the extreme politicization of the exercise of the power of appointment of federal judges that prevailed during the Trump Presidency and of the concurrent circumstance for which the former President himself was able to fill a particularly large number (over 200) of vacancies within the federal court system; vacancies left open by the predecessor Obama administration due to the strenuous opposition of the Republican-majority Senate in Obama's second term.<sup>30</sup>

The consequent appointment by Trump of about a quarter of the federal judges currently in office, chosen from the main conservative think tanks such as the Federalist Society and the Heritage Foundation (with the first two years focused on appointments of Court of Appeals judges and the second on appointments for the Trial Courts) with significant consequences for trends in federal jurisprudence on relations between levels of government.

From this point of view, in fact, the series of judgments with which the recent jurisprudence of the federal courts, criticizing the previous orientation based on self-restraint as expressed in the supervision control over the exercise of the regulatory powers by the federal agencies, as expressed in the Chevron decision,<sup>31</sup> has effected a more penetrating review of the same powers, by enforcing the so-called "Major Questions Doctrine".

This doctrine imposes a limit on the discretionary power of federal agencies to assume "decisions of vast economic and political significance," as a result of a more general "clear statement" Kavanaugh.<sup>32</sup>

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<sup>30</sup> This, also thanks to the extension to the appointments of federal judges of the use of the so-called constitutional or nuclear option, which allows a motion to be tabled aimed at overcoming obstructionism through the filibustering of the minority in the Senate.

<sup>31</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). In this regard, it was appropriately observed that "In the United States, the regulatory function of authorities (rulemaking) and that seeking the adoption of individual measures (adjudication) are subject to a unitary discipline, therefore the limits of judicial review are not normally analyzed in relation to the type of activity carried out. For a long time, U.S. courts have taken a remarkable deferential approach to acts issued by U.S. courts. independent agencies, carrying out a control of minimum intensity and limited to the profiles of illegality or strict reasonableness, without ever substituting its own judgment for that of the agencies. The approach of deference, exemplified by the well-known judgment of the Supreme Court in the Chevron case, presupposes that the legislature has entirely delegated to the authorities, endowed with a wide degree of independence and technical specialization in the matters within their competence, the decision of all cases included in the matters falling within their sphere of action, so that the authorities would always be in a privileged (and unquestionable) position, with respect to the courts, with regard to the interpretation and application of the rules conferring the powers of rulemaking" (E. d'Orlando, *Politica e tecnica nella produzione normativa*, in *DPCE Online*, 50, No Sp (2022), 396.

<sup>32</sup> That, since the Senate hearing on September 5, 2018, he specified that: "I'm not a skeptic of regulation at all. I am a skeptic of unauthorized regulation, of illegal

The necessary application of the principle of legality (first of all, constitutionality) of the delegation of standardization powers to independent regulatory agencies presupposes, in fact, that they cannot extend to decisions having "great importance from an economic and political point of view", in the absence of a clear attribution to this effect by the Legislature (referring precisely to the canon of the Clear Statement Rule).

This approach has been espoused in a series of recent Supreme Court decisions<sup>33</sup> with which the justices have asserted a restrictive interpretation of the regulatory powers conferred on independent agencies, starting from those on the containment of polluting emissions exercised by the Environmental Protection Agency (EPA) under the Clean Air Act.

Such an approach, which is in line with attempts to revive the so-called delegation doctrine,<sup>34</sup> is now being consolidated thanks to a series of decisions of the Roberts Court since 2015,<sup>35</sup> appears to be oriented,

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regulation, or regulation that's outside the bounds of what the laws passed by Congress have said. And that is what is at the root of our administrative law jurisprudence."

<sup>33</sup> Through the previous extensive interpretation of the regulatory and provisional powers granted to the EPA and the concurrent deference of the Federal Judges towards the exercise of discretion by the agency, the EPA had assumed the role of a fundamental instrument for the discretionary implementation of the environmental policy objectives pursued by the Federal Government and for the consequent imposition on the States of uniform standards on the containment of polluting emissions of energy transition and the fight against climate change.

In the very recent case *West Virginia et al v. Environmental Protection Agency*, however, the Supreme Court invoked a restrictive interpretation of SEC. 111(d) of the CAA, by which the imposition of general limits on carbon dioxide emissions from stationary sources, such as to determine in fact a real ecological transition from the use of coal to forms of clean energy, falls outside the scope of that provision.

Specifically, the Court pointed out that the imposition of a best system of emission reduction (BSER), as provided for in the EPA regulation approved in 2015 (Clean Power Plan rule), evidently introducing a system-wide regulation, capable of restructuring the energy market in the United States, could only fall within the prerogatives of Congress or, in any case, of a regulatory body that acts by virtue of a clear delegation in this sense by the Legislature (since otherwise the same delegation cannot be inferred from the generic attribution to the EPA of a power to set standards on the reduction of polluting emissions and approval of State Plans intended to implement the same standards).

<sup>34</sup> In *J.W. Hampton v. United States*, 276 U.S. 394 (1928), the Supreme Court clarified that when Congress does give an agency the ability to regulate, Congress must give the agencies an "intelligible principle" on which to base their regulations. In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Supreme Court held that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

<sup>35</sup> Among which it seems appropriate to recall the decisions *King v. Burwell*, 576 U.S. 473 (2015), with which the Supreme Court, in deciding a case concerning the application of the Affordable Care Act, while recognizing the legitimacy of the extension, decided by the Internal Revenue Service (IRS), to the federal health insurance exchanges of the tax incentives (tax credits) provided for the state exchanges, based this inclusion, not so much on deference to the federal agency, but rather on the court's interpretation of the legislative dictate of Obamacare. This, on the reiterated assumption that, since the case concerns issues of profound economic and political importance, the court could only legitimize the agency's work by

through a more penetrating judicial review, to limiting the discretion of federal agencies in the exercise of the powers of regulation and adjudication attributed to them by the respective founding laws, (overriding, effectively, the traditional attitude of deference towards the same administrative rule-making and regulatory activity by the federal agencies).

This push to limit the regulatory powers of federal agencies assumes, therefore, objective oppositional value with respect to the tendency mentioned above towards the centralization in the federal government of the regulatory functions of a series of fundamental policy areas, such as health and environmental policies, with concurrent expansion of the regulatory and administrative autonomy of the States in the aforementioned sectors (and on the contrary, erosion of the direction and control of the administrative system assumed by the President as part of the Administrative Presidency model mentioned above).

Still on the political level, moreover, a further element capable of weakening President Biden's leadership in the system of relations with the governments of the member states is the Republican Party's increasing control, acquired over the last 30 years, of the majority of state legislatures and governorships.

In fact, despite some signs of recovery of the Democratic Party in the 2022 midterm elections, it is clear, also from this point of view, that such a political primacy of the GOP at the state level is allowing the party to strengthen the constant oppositional role played by the states administered by the same Party to the guidelines of the federal administrations led by Democratic.<sup>36</sup>

This, both in the legislative discipline of matters fundamental to the functioning of the US democracy itself (such as electoral procedures), and in terms of the necessary administrative and financial cooperation in the

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interpretation of the legislative provision. An orientation confirmed, this time in the opposite direction of the ascertained lack of decision-making power for the Federal Administration, in the absence of an express delegation of regulatory power by the Legislature, in the face of a situation once again requiring decisions with a strong economic and social impact, such as those following the spread of the COVID 19 Pandemic. In the case of *NFIB v. OSHA*, (Nos 21A244 and 21A247, January 13, 2022), in fact, the Supreme Court declared the illegality of the obligation imposed by OSHA (by virtue of the emergency powers attributed to the same Federal Agency by the legislation approved to deal with the effects of the pandemic) to companies with at least 100 employees to ensure that the latter were vaccinated or in possession of a negative test for the virus carried out at their expense for no more than 7 days. This, on the basis of the reiterated absence of a delegation and / or authorization in this sense of the federal Legislature and the consequent lack of agency power to make regulations of economic and social importance such as a vaccination program.

<sup>36</sup> As can be seen from the victory in the elections for the Governors of states such as Michigan and Maryland, for years administered by the Republicans, as well as the further conquest of the majority in the Legislatures (or at least in one of the branches of the latter) of states such as Michigan, Pennsylvania, Minnesota, New Hampshire and Arizona (source: Phil McCausland, Democrats make big gains in state legislatures after beating expectations, <https://www.nbcnews.com/politics/2022-election/democrats-make-big-gains-state-legislatures-beating-expectations-rcna56478>, November 10, 2022).

management of federal programs in areas such as welfare, education, the environment and migration policies.

From the first point of view (regulation of electoral matters), it is necessary to draw attention to the widespread approval, by the Republican majority state legislatures, of a series of laws aimed at stiffening electoral procedures. These laws are supposedly justified by the need to guarantee the regularity and integrity of elections, both by improving the concrete conduct of electoral operations, and by limiting the use of new tools aimed at increasing participation in voting, such as early voting and remote voting.<sup>37</sup>

Among other things, the new laws provide for limitations and burdens such as the reduction of the time allowed to request postal voting and the deadline for the delivery of the ballot; limiting the number of mailboxes for ballots; strengthening voter identification requirements for both postal and in-person voting; the ban on the distribution of snacks and water to waiting voters (waits that can even last hours); the reduction of polling stations and the limitation of days or times for early voting.<sup>38</sup>

Even the developing option for assigning to the state legislatures, rather than to independent Commissions, the job of redesigning the Congressional districts (a task to be carried out periodically on the basis of the updated censuses of the inhabitants residing in the States) seems to lend itself to the risks of a partisan exercise of this important administrative function (encouraging forms of gerrymandering in the design of the districts).<sup>39</sup>

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<sup>37</sup> See D. Zecca, *Gli effetti della crisi sanitaria sull'esercizio del suffragio negli Stati Uniti d'America: considerazioni sul recente contenzioso relativo al voto per corrispondenza e anticipato*, in *DPCE online*, 4, 2020, 4817 ss.

<sup>38</sup> Emblematic in this sense, is the case of the Georgia legislature which, after the run-off, held in January 2020 for 2 Senate seats due to the State (one for the remaining part of the term of the Republican Senator who resigned in December 2019), intervened approving in March 2021 profound changes to the regulation of electoral procedures, with the explicit intent of imposing greater burdens on the conduct of elections. This has happened, both by reviewing the organization and increasing the powers of control of the State elections board on County Election Offices, that through further restrictions such as those concerning the number of mailboxes to be made available for the exercise of postal voting (establishing how many mailboxes each County can have, how many days and hours they can remain open and where they must be placed), the time strictly imposed for the exercise of early voting, the reduction of the time window for requesting mail-in ballots and the deadline for ballot delivery, the shortening of the Election campaign period for the run-off and finally the aforementioned prohibition of distribution of snacks and water to voters waiting to vote.

<sup>39</sup> Risks, those highlighted above, made the more impending by the concurrent restrictive interpretation, also made by the Roberts Court, of the powers of the federal government under the Voting Rights Act to circumscribe and limit the exercise of the regulatory power of the States in the field of elections. See e.g., *Shelby County v. Holder*, 570 U.S. 529 (2013), *Abbott v. Perez*, 585 U.S. \_\_\_\_ (2018), and *Brnovich v. Democratic National Committee*, 594 U.S. \_\_\_\_ (2021). Finally, the Supreme Court's decision on *Moore v. Harper*, in which the legislature of a Republican state like North Carolina is attempting to take to the extreme the thesis of the "independent state legislature" for which the constitutions and courts of the states would tend to be without authority to

We are thus witnessing, in conclusion, an increase in the regulatory autonomy of the States in an area that, although falling within the competence of the State Administrations pursuant to Art. I Sec. 4 Cl. 1 (Election Clause), appears fundamental both in terms of repercussions on the level of organization and functioning of the federal government, and on the effectiveness of the recognition and protection of political rights recognized by the federal constitution.<sup>40</sup>

Hence the objective of strengthening the use of the federal principle but, at the same time, moving it in a direction contrary to that inspired by constitutional progressivism and theorized by Judge Brandeis in the 30s of the twentieth century,<sup>41</sup> namely, the vision of States as "laboratories of democracy" and institutional innovation, able to guarantee the experimentation at a decentralized level of instruments and programs for the protection of rights intended, then, through a circulation of models, to be transposed at federal level.

Rather, this new tendency risks eroding the spaces of democratic participation and protection of fundamental rights (not only political) within the States, with effects, therefore, on the levels of protection of the same rights at the federal level.

## 6. Conclusions

Wishing to draw conclusions from the survey carried out above, it can only be reiterated that the current trend towards the strengthening of ideological polarization and political opposition at all institutional levels (i.e. both in the horizontal direction of relations between the Presidency and the Legislative, as well as in the vertical direction of intergovernmental relations between the Federal Government and Member States), is producing a series of effects also on the functioning of the U.S. federal system.

On the one hand, it is a consolidated interpretation that the existence of competitive dynamics between the same levels of government (also and above all from a political point of view) has always marked the evolution of US federalism, oscillating between centralization tendencies induced by the growing interventionism of the federal government in sectors such as Welfare, environmental protection, education<sup>42</sup> and anti-

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impose limits on the power of the legislatures of the same states to dictate rules regarding federal elections.

<sup>40</sup> K.L. Shanton, *The State and Local Role in Election Administration: Duties and Structures*, Congressional Research Service Report March 4, 2019, in <https://sgp.fas.org/crs/misc/R45549.pdf>.

<sup>41</sup> One famous citation is the passage from the dissenting opinion of Justice Brandeis in the case of *New York Ice Co. V. Liebermann*, 285 U.S. 262, 311 (1932) which emphasized that «it as one of the happy accidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country».

<sup>42</sup> Emblematic, in this sense, is the very recent student debt forgiveness plan approved by the Biden administration for loans to middle and working-class students particularly affected by the economic crisis due to the COVID 19 pandemic emergency. With the same measure, a federal student debt cancellation of between \$



crises, and opposing tendencies towards the enhancement of political initiative and the role of Member States (think of Reagan's New Federalism and the centrality assumed in it by the idea of a resurrection of States' Rights, with links to the conservative jurisprudence of the Supreme Court following the Rehnquist Presidency).<sup>43</sup>

On the other hand, it must be emphasized that the exasperation of the politicization of relations between central government and member states is leading to an interpretation and application of the federal principle increasingly molded by political interests and instrumental to the implementation of the opposing objectives of central and local governments.

The result is a series of pushes and pulls towards the centralization or decentralization of the activities of regulation and management of public policies, from time to time determined by ideological reasons and / or political expediency, rather than by an evaluation of the best allocation of the related functions, in terms of efficiency, cost-effectiveness and better response to the general interests of the communities involved.

Hence, some definitions appropriately coined by political scientists, such as "opportunistic federalism",<sup>44</sup> or "kaleidoscopic federalism", as aimed at underlining the absence of a single prevailing interpretation of the federal principle (in a dual or cooperative sense) and the consequent fragmentation of the choices adopted in the conformation of relations between the federal government and member states (as from time to time characterized by polarization,<sup>45</sup> inaction, indecisiveness, convolution, and collaboration).<sup>46</sup>

Beyond the purely descriptive value of the above definitions, on the legal level it must be emphasized that, without prejudice to the necessary

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10,000 and \$ 20,000 has been provided for borrowers earning less than \$ 125,000 per year or having a household income of less than \$ 250,000.

<sup>43</sup> On which you see e.g., H. Schwartz, *States' Rights Rise Again*, in *The Nation*, September 24, 2000 rep. in <https://www.thenation.com/article/archive/states-rights-rise-again/>. V. Also A. Pin, *Sovereignty and Federalism*, in G. D'Ignazio, *The Constitutional System of United States*, cit., 147 ss.

<sup>44</sup> V. T. Conlan, *From cooperative to opportunistic federalism: Reflections on the half century anniversary of the commission on intergovernmental relations*, in 66 *Public Administration Review* 5, 663–676 (2006); More recently v. T. Conlan, P.L. Posner, *American federalism in an era of partisan polarization: The intergovernmental paradox of Obama's "new nationalism"*, in 46 *Publius: The Journal of Federalism* 3, 281–307 (2016), J.H. Adler, *The Administrative Presidency Encounters Opportunistic Federalism*, 44 *Regulation*, 59 (2021).

<sup>45</sup> T.A. Birkland, K. Taylor, D.A. Crow, R. De Leo, *Governing in a Polarized Era: Federalism and the Response of U.S. State and Federal Governments to the COVID-19 Pandemic*, in *Publius*, 2021 Aug 14, 2, in which it is also emphasized as "There is not a single overarching form of federalism that characterizes all policy domains, so it is difficult, if not impossible, for students of federalism to say that the United States is characterized by one kind of federalism", *Ibid*, p. 5..

<sup>46</sup> V. E.J. Benton, *Intergovernmental relations in the early twenty-first century: Lingering images of earlier phases and emergence of a new phase*, in C.W. Stenberg and D.K. Hamilton (eds.), *Intergovernmental relations in transition: Reflections and directions*, New York, 2018, 15–36; Id., *Challenges to federalism and intergovernmental relations and takeaways amid the COVID-19 experience*, in 50 *American Review of Public Administration* 6–7, 536–542 (2020).



cooperative structure of the system of federal relations, resulting from the constant overlapping of functions of regulation, administration and financing of public programs and policies exercised by the different levels of government involved (central, state, local), the current trends are producing significant effects on the functioning of the federal system itself, as well as on the protection of the fundamental civil, political and social rights.<sup>47</sup>

From the first point of view, in fact, we have highlighted how the main legislative measures approved during the first term of the Biden Presidency continue to leverage the traditional structure of the grants' system for the implementation of policies to support the economy, Welfare (e.g. in the fields of subsidies to families, education and health), and the energy transition. Hence, the permanent, necessary collaboration between the Federal Government, Member States and Local Authorities in the co-administration of the same programs (where, for the most part, the central government is called to direct the state governments about the purposes or destination of the allocated funds, or to set general criteria relating to the identification of the beneficiaries).

From this it follows, therefore, that the current trend towards an "ideological" and polarized interpretation of "cooperative federalism" appears likely to affect the implementation of public policies, where cooperation seems destined to develop, both in the vertical direction of relations between the federal government and the member states and in the horizontal direction of relations between the latter, especially between administrations directed by the same political party.

Therefore, to the extent that such alignment fails, we are witnessing the perpetuation of a series of initiatives aimed at blocking, and in any case hindering, the implementation of federal intervention plans (the case of Obamacare is emblematic), including the initiation of a series of legal before the federal courts by the Attorneys General of states governed by the party opposed to the President, or rather to reinforce forms of horizontal cooperation between state governments, like those in the area of environmental policy that have led to the formation of the United States Climate Alliance (a bipartisan coalition of governors united by the intention to strengthen policies to combat climate change).<sup>48</sup>

The same conflicting dynamics are influenced, as we have seen, by the guidelines adopted by the jurisprudence of the federal courts, aimed at asserting increasingly penetrating limits with regard to the discretion of the central administration in the regulation and implementation of the main federal programs, on the basis of restrictive interpretations of the rules of law conferring the same powers (with concurrent effects, therefore, in terms of increasing the administrative autonomy of the States in the joint management of interventions).

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<sup>47</sup> The principle of vertical division of powers is liable to affect the classification in terms of universality of the same constitutional rights.

<sup>48</sup> V. C. Holt Segall, *Networked Federalism: Subnational Governments in the Biden Era*, in *Ecology L. Quart.*, 1-10 (2021).

Finally, the same must be said for the impact of current trends on the levels of protection of fundamental rights,<sup>49</sup> where the growing tendency towards an enhancement of the federal principle has also been underlined, no longer incremental with respect to the protection of the rights themselves, but rather directed to the reaffirmation of a "communitarian" vision of federalism as a system that allows for the expression of the different traditions and cultural identities prevailing in the various member states, (as in the case of abortion rights) or, in any case, of a renewed enhancement of traditional state functions (such as the conduct of elections).

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<sup>49</sup> In accordance with the principles of the so-called New Judicial Federalism, on which, see M. Comba, op. cit., 262 ss.