

A new paradigm for American infrastructure: Biden's agenda to rebuild America

by Sergio Sulmicelli

Abstract: Biden's infrastructure policy represents one of the most important achievements of his administration and one that vastly departed from previous presidencies' policy. This achievement materialized within the Infrastructure Investment and Jobs Act: a bill approved by Congress in 2021 as a part of Biden's *Build Back Better* agenda. The Act provides for the hugest investment in physical infrastructure in American history since the New Deal and it put at the centre the federal government and the executive federal departments and agencies in financing and planning new projects and programs. However, for the success of the plan, a collaboration between federal government and States is much needed, in view of the approach of the U.S. federalism.

Keywords: Biden presidency; Build Back Better; Competitive grant programs; Formula grant programs; Infrastructure Investment and Jobs Act; Federalism.

1. Introduction

Since the electoral campaign of 2020, Biden's political agenda found momentum in the slogan Build Back Better.¹ This motto expresses a clear yet bivalent concept. First, there is an obvious reference to Disaster Risk Management itself, where the expression Build Back Better sends back to the phases of «recovery, rehabilitation, and reconstruction following a real disaster in order to increase the resilience of a given community».² The idea behind this concept is to integrate disaster risk reduction measures «with the restoration of physical infrastructure, but also social welfare systems», into «the revitalization of livelihoods, the economies and the environment».³

At the same time, it has soon become clear that the idea of reconstruction advocated by Biden was not only limited to “physical infrastructure” (roads, bridges, stations, water pipes, internet, and so on), but included that «human infrastructure» which Biden identifies in welfare

¹ L. Meeks, *When Two Become One? Examining Kamala Harris and Joe Biden's Campaign Themes from Primary to General Election*, in *52 Presidential Studies Quarterly* 313 (2022).

² United Nations Office for Disaster Risk Reduction, *Build Back Better in recovery, rehabilitation, and reconstruction*, 2017, p. 6, available at: https://www.unisdr.org/files/53213_bbb.pdf.

³ United Nations Office for Disaster Risk Reduction, *Build Back Better*, available at: <https://www.undrr.org/terminology/build-back-better>.

state policies such as free community college, universal preschool, and a comprehensive and nationwide paid-leave program.⁴

Indeed, both the general economic and social situation, as well as the specific situation in the infrastructure sector, inherited by Biden in the aftermath of the 2020 presidential election, gave full value to the Build Back Better narrative.⁵

The COVID-19 pandemic initial stage has forced more than 22 million Americans out of work.⁶ The unemployment rate was 6.4 percent the day Biden took office.⁷ The labor force participation was 61.4% in January 2021.⁸ In addition, due to the pandemic, the manufacturing sector had lost more than 180 thousand people employed during the pandemic period. The real GDP growth itself marked a 3.5% contraction in 2020 compared to 2019.⁹

The health emergency has also adversely affected the infrastructure sector, an already particularly precarious area of American economy. In 2017, the Report Card on Infrastructure issued by the Committee on America's Infrastructure of the American Society of Civil Engineer, stated that U.S. infrastructure was in «poor condition and mostly below standard», with many elements «approaching the end of their service life». According to the document, «a large portion of the system exhibits significant deterioration» and «condition and capacity are of serious concern with strong risk of failure».¹⁰ The investment estimated as needed to address the U.S. infrastructure gap has been calculated at more than «\$2 trillion over the decade 2016-2025».¹¹

After looking at the differences between Trump's and Biden's approach to infrastructure (section 2), this paper will first analyze the Build Back Better Act proposed by Biden and ultimately rejected by Congress (section 3). From this plan, however, the very physical infrastructure

⁴ University of Washington, *Second Biden "Infrastructure" Plan— Focused on "Human Infrastructure"— Released*, April 28, 2021, available at: <https://www.washington.edu/federalrelations/2021/04/28/second-biden-infrastructure-plan-focused-on-human-infrastructure-released>.

⁵ House Budget Committee Majority Staff, *President Trump has Failed American Economy*, October 2020, available at: https://budget.house.gov/sites/democrats.budget.house.gov/files/documents/President%20Trump%20Has%20Failed%20the%20American%20Economy%20Report_FINAL.pdf.

⁶ H. Long, *U.S. now has 22 million unemployed, wiping out a decade of job gains*, The Washington Post, April 16, 2020.

⁷ U.S. Bureau of Labor Statistics, available at: <https://www.bls.gov/opub/ted/2021/unemployment-rates-lower-in-january-2021-in-33-states.htm>.

⁸ *Ibid.*

⁹ U.S. Bureau of Economic Analysis, available at: <https://www.bea.gov/news/2021/gross-domestic-product-fourth-quarter-and-year-2020-second-estimate>.

¹⁰ ASCE, *Infrastructure Report Card*, 2017, 6, available at: <https://2017.infrastructurereportcard.org/wp-content/uploads/2017/04/2017-IRC-Executive-Summary-FINAL-FINAL.pdf>

¹¹ *Ibid.*

framework that resulted in the Investment Infrastructure and Jobs Act was separated and saved (section 4).

Specifically on this Act, it will be appropriate to analyze the legislative history as well as the policies ultimately passed (section 5) and, by looking at its implementation and funding system (sections 5.1 and 5.2), it will be analyzed the relationship between the federal government and States (section 5.3). A brief Conclusions follows.

2. American infrastructure: from Trump to Biden

As previously mentioned, the pandemic has worsened an already particularly bad situation: a significant part of the infrastructure system is financed through the same use. During the pandemic period, water use for commercial purposes declined, commuters did not use public transportation, and airports and stations remained empty.¹² State and municipal budgets were severely reduced in infrastructure maintenance spending to meet health management expenses.¹³

The Trump presidency, despite electoral campaign proclamations, has done very little to address the problems that plagued, even before the pandemic, the American infrastructure sector. Indeed, during the 2016 presidential election campaign, former President Trump proposed a \$1 trillion infrastructure plan aimed at boosting the sector and stimulating local public and private investment. However, the one who was soon nicknamed, by himself, as «the builder president»¹⁴ has indeed underdelivered on expectations. Trump's \$1 trillion plan changed during his presidency into a series of specific financings totaling \$200 billion, with the goal, never clarified on how it would be implemented, of stimulating an investment over the decade 2016-2025 of \$1.5 trillion from private and local investors.¹⁵ Thus, Trump's proposed plan included only a stimulus from the federal government to infrastructural investment on a private and local government basis.¹⁶

Biden's approach to the infrastructure issue largely departs from what Trump proposed and implemented. The idea of a federal government acting solely as a stimulus and the scheme according to which only States

¹² L. Liu, H.J. Miller, J. Scheff, *The impacts of COVID-19 pandemic on public transit demand in the United States*, in 15 *Plos One* 1, 3 (2020).

¹³ A. Siripurapu, J. Masters, *How COVID-19 Is Harming State and City Budgets*, Council on Foreign Relations, March 19, 2021.

¹⁴ J. Johnson, *Trump in Texas: 'I'm the builder president. Remember that.'*, *The Washington Post*, October 25, 2017.

¹⁵ D. Shepardson, *Trump unveils infrastructure plan; uphill battle awaits in Congress*, Reuters, February 12, 2018, available at: <https://www.reuters.com/article/us-usa-budget-infrastructure/trump-unveils-infrastructure-plan-uphill-battle-awaits-in-congress-idUSKBN1FW1X3>.

¹⁶ J. Yusuf, *Not only is President Trump's infrastructure plan dead in the water, it would do little to solve the fundamental problems facing the US infrastructure system*, in *London School of Economics Blogs*, May 30, 2019, available at: <https://blogs.lse.ac.uk/usappblog/2019/05/30/not-only-is-president-trumps-infrastructure-plan-dead-in-the-water-it-would-do-little-to-solve-the-fundamental-problems-facing-the-us-infrastructure-system/>

or private investors shall finance infrastructure did not appear, in Biden's view, to be sufficient to address the problems affecting the American infrastructure sector.¹⁷

The idea of reconstruction and rehabilitation of physical infrastructure, anchored in the Build Back Better motto of Biden's agenda, looked at the federal government as the main character of the plan.

In response to the pandemic, the US federal government, under Biden's administration, responded with approximately \$5 trillion of relief spending, and the new administration of President Biden proposed an additional \$4 trillion to Build Back Better. As a matter of fact, this included huge investments in physical infrastructure that was supposed to produce «environmentally and socially sustainable growth».¹⁸

Two years after the day the Build Back Better agenda entered the White House Oval Office, the legislative record tells us the story of the relationship between the Presidency and the Congress, and also between the federal government and the States. The story of the Build Back Better agenda, after two years, is a story of both success and failure for Biden's administration.

While the ambitious plan promoted through the Build Back Better agenda has crashed against a Democratic-majority but budget-conscious Congress,¹⁹ Biden can surely celebrate one the largest federal investment in U.S. history with specific reference to physical infrastructure: the Investment Infrastructure and Jobs Act.²⁰

3. The Build Back Better Act: too big not to fail?

The Build Back Better plan is a regulatory framework, proposed by Biden during his first year in the White House. In its initial configuration, the plan included the largest public investment in U.S. history since the New Deal, with a combination of investments, worth \$4 trillion, on social, infrastructural, and environmental program. In fact, the initial plan was divided into three major pieces of legislation: the American Rescue Plan (hereinafter ARP), the American Families Plan (hereinafter AFP), and the American Job Plan (hereinafter AJP).²¹

The ARP was approved by Congress as the American Rescue Plan Act and signed by President Biden on March 11, 2021.²² The plan provided

¹⁷ See *infra*, section 5.

¹⁸ M.A. El-Erian, *Infrastructure Plan Opens Way to More Sustainable Growth*, Bloomberg, March 21, 2021, available at: <https://www.bloomberg.com/opinion/articles/2021-03-31/biden-infrastructure-plan-opens-way-to-more-sustainable-growth?leadSource=verify%20wall>

¹⁹ C. Rampell, *Build Back Better is 'dead,' says Manchin. He's not the only one to blame*, The Washington Post, February 3, 2022.

²⁰ B. Naylor, *Biden signs the \$1 trillion bipartisan infrastructure bill into law*, NPR, November 15, 2021.

²¹ The White House, *The Build Back Better Framework President Biden's Plan to Rebuild the Middle Class*, available at: <https://www.whitehouse.gov/build-back-better/>.

²² American Rescue Plan Act, Public Law 117-2 (117th Congress), full text available at: <https://www.govinfo.gov/content/pkg/PLAW-117publ2/pdf/PLAW-117publ2.pdf>

an economic stimulus worth \$1.9 trillion aimed at addressing the pandemic crisis and it was the first bill of the Build Back Better agenda coming into force.

The AFP was a proposal to fund a variety of social policy initiatives: government-subsidized paid and family leave, kindergarten, community college, and so on.²³

Finally, the AJP was the third part of the Build Back Better agenda, aimed at generating a transformative effort to overhaul the nation's economy. The plan intended to combine both funding to physical infrastructures reconstruction with financial aim to «human infrastructures» in order to «create millions of jobs, bolster labor unions, expand labor protections, and address climate change».²⁴

According to the initial proposal of the AJP, the plan called for a federal spending of \$3.5 trillion. The funding was planned to come from raising the corporate tax rate from 21% to 28% as a part of a proposed “Made in America Tax Plan”.²⁵ However, the Act soon found opposition from two democratic senators, Joe Manchin (West Virginia) - known to be the “most conservative democratic senator”- and Krysten Sinema (Arizona) because of the high spending forecast and the need to raise the corporate tax to meet the funding. According to Manchin, the AJP should have not exceed the limit total cost of 1.5 trillion dollars.²⁶

In order to avoid a legislative quagmire over the entire Act, the American Jobs Plan Act was then divided into two proposals: the Build Back Better Act (hereinafter BBBA) and the Infrastructure Investment and Jobs Act (hereinafter IIJA).

The BBBA inherited from the AJP those policies defined as «human infrastructure» such as funding for childcare and child tax credit, but also policies for clean energy, extreme weather events, and the expansion of the Affordable Care Act. The IIJA, instead, inherited from the AJP those policies related to investment in the construction and rehabilitation of physical infrastructure: ports, airports, railways, pipelines, energy and technology infrastructure, and high-speed Internet.

However, while the IIJA was eventually passed by the Congress in November 2021 (see *infra*, section 4), and although a long negotiation between the Executive and the Congress, the BBBA ultimately found opposition in the Senate from Senator Joe Manchin, which decreed its legislative failure.²⁷

²³ The White House, *The American Families Plan*, available at: <https://www.whitehouse.gov/american-families-plan/>

²⁴ J. Jaeger, K. McLaughlin, J. Neuberger, C. Dellesky, *Does Biden's American Jobs Plan Stack Up on Climate and Jobs?*, in *World Resource Institute*, April 1, 2021.

²⁵ A. Rappoport, *The Biden administration seeks to raise \$2.5 trillion through corporate tax increases*, *The New York Times*, April 7, 2021.

²⁶ B. Everett, *Manchin proposed \$1.5T top-line number to Schumer this summer*, *Politico*, November 30, 2021, available at: <https://www.politico.com/news/2021/09/30/manchin-proposed-15t-topline-number-to-schumer-this-summer-514803>.

²⁷ J. Cassidy, *Joe Manchin Kills the Build Back Better Bill*, *New Yorker*, December 19, 2021.

The legislative history of the BBBA attests the growing polarization of American politics, even within political parties, which in the case materialized in the clash between the more radical and the more conservative areas of the Democratic party: the former in favor of a tax increase to finance the BBBA with federal funds, whilst the latter opposed to this framework. Indeed, the slim 50-50 majority experienced by Biden in the Senate during his first two years of office made it necessary for the reconciliation procedure²⁸ to be used for the vote on the package of measures related to the BBB agenda.

However, due to the initial opposition of the two Senators Manchin and Sinema, the Build Back Better Act passed the Democratic-controlled House of Representatives but struggled to gain the majority in the Senate. The Act was thus renegotiated in its cost by Manchin and the Senate majority leader Chuck Schumer. Eventually, despite the reduction of redistributive measures from the initial proposal of 2.3 trillion to 1.8 trillion of dollars, Senator Manchin rejected the Act anyway over, among other things, «risks of inflation».²⁹

4. The Infrastructure Investment and Jobs Act: tale of a success

While the Build Back Better Act was declared «dead» by the democratic Senator Joe Manchin, a different path characterized the legislative history of the Infrastructure Investment and Jobs Act,³⁰ a bill that, along with the BBBA, was originally part of the more general legislative framework called American Jobs Plan.

With the IJJA, also known as the Bipartisan Infrastructure Bill, President Biden managed to gain support both from the Democrats and part of the Republican party. Indeed, the bill passed both the Senate and the House with a large majority. In particular, after a four-months long amending process, the bill was passed 69–30 by the Senate on August 10, 2021. On November 5, 2021, the House approved the Act with a majority of 228–206, and ten days later, on November 15, it was signed into law by President Biden.³¹

The Infrastructure Investment and Jobs Act represents a long-term program to improve American physical infrastructure that provide for \$1.2

²⁸ The reconciliation procedure allows the Congress to pass legislation on taxes, spending, and the debt limit with only a majority (51 votes, or 50 if the vice president breaks a tie) in the Senate, avoiding the filibuster which requires 60 votes to overcome. See, B. Heniff Jr., *The Budget Reconciliation Process: The Senate's "Byrd Rule"*, in *Congressional Research Service*, November 22, 2016.

²⁹ M. Klein, *Manchin killed Build Back Better over inflation concerns*, The Conversation, December 20, 2021, available at: <https://theconversation.com/manchin-killed-build-back-better-over-inflation-concerns-an-economist-explains-why-the-2-trillion-bill-would-be-unlikely-to-drive-up-prices-174093>.

³⁰ Infrastructure Investment and Jobs Act, Public Law 117–58 (117th Congress), full text available at: <https://www.govinfo.gov/content/pkg/PLAW-117publ58/pdf/PLAW-117publ58.pdf>.

³¹ J. Tankersley, *Biden signs infrastructure bill, promoting benefits for Americans*, The New York Times, November 15, 2021.

trillion in federal spending, \$550 billions of which would be new federal spending to be allocated over the next five years.³²

Of those \$550 billions in new spending, \$110 billion will be allocated for roads and bridges, including \$40 billion for bridge repair and replacement; \$39 billion for public transportation programs; \$66 billion for railways; \$88 billion for energy, including \$73 billion for power grid upgrades, new transmission lines for renewable energy and research for new technologies like nuclear reactors and carbon capture and \$15 billion for electric vehicle and buses.

More than \$120 billion are then allocated to environmental projects: \$50 billion to help local communities in fighting the effects of climate change; \$55 billion to improve drinking water, including dedicated funding to replace lead pipes and dangerous chemicals; \$21 billion dedicated for environmental remediation to address past pollution that harms public health. Ultimately, \$65 billion are reserved for high-speed internet programs to make sure that every household can access reliable broadband service.

5. A new paradigm for American infrastructure

Biden's infrastructure plan has been described as a major shift in infrastructure investment programs, since the «IIJA isn't a stimulus bill; it's not a singular response to a specific economic crisis» but should rather be seen as «a longer-term patient approach to rebuilding American competitiveness through infrastructure».³³ Indeed, some substantive and procedural features of the IIJA make the Act innovative and a «once in a generation» opportunity for the American economy.³⁴

5.1. A bipartisan vision

First of all, despite the high cost for the federal budget, the initiative found bilateral support. According to President Biden the bill showed how, despite the polarization of American politics, both parties «can still come together to do big things, important things for the American people».³⁵ Indeed, 13 House republicans and 19 republican Senators voted in favor of the Bill, including the Senate Minority-leader Mitch McConnell.

³² Infrastructure Investment and Jobs Act, Public Law 117–58.

³³ A. Tomer, C. George, J.W. Kane, A. Bourne, *America has an infrastructure bill. What happens next?*, in *brookings.edu*, November 9, 2021.

³⁴ The White House, *Statement by President Joe Biden on the House Passage of the Bipartisan Infrastructure Investment and Jobs Act*, November 6, 2021, available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/statement-by-president-joe-biden-on-the-house-passage-of-the-bipartisan-infrastructure-investment-and-jobs-act/>.

³⁵ The White House, *Remarks by President Biden on the Senate Passage of the Bipartisan Infrastructure Investment and Jobs Act*, August 10, 2021, available at: <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/10/remarks-by-president-biden-on-the-senate-passage-of-the-bipartisan-infrastructure-investment-and-jobs-act/>.

Moreover, from a substantial point of view, the IIJA goes far beyond Trump's idea that funding for infrastructure programs would serve as a stimulus to private and local investment. The Act, in fact, centralizes on the federal budget the refinancing of ongoing programs, including state and local ones, as well as, as noted above, the funding of 550 billion in new projects and programs.

As noted by several experts in the field of infrastructure policy, «the proposal recognizes the economic moment and essentially says that it's time for the federal government to lead».³⁶ «Put it all together and the Biden proposal offers the most powerful ingredient when it comes to infrastructure reform: it sells a vision. The plan unapologetically calls out our next destination, whether that's safer streets or cleaner power. It offers sweeping investments to make such a vision real, from replacing aging pipes to delivering rural broadband. And it brings people - especially our workforce - along for the ride».³⁷

As a matter of fact, the plan is not limited to financial aim towards single specific program, but it also determines clear priorities for 10-years planning.

So, the idea behind this enormous spending bill is that America's infrastructure is not only to be rebuilt - or build it back -, but restoration and construction must be guided by future goals and visions, in particular: the need to improve environmental and economic sustainability of infrastructure, as well as providing a response to the climate crisis, while taking into account technological development and jobs creation.³⁸

5.2. Spending mechanisms: formula and competitive grants

One of the most innovative aspect of the IIJA is related to the spending mechanism of the federal budget. Indeed, the transfer of funds from the federal budget to States or local communities is based on two different types of funding, which are nevertheless federally administered: formula grant programs and competitive grant programs.³⁹

Formula grant programs allocate funding to recipients based on mathematical formula set by competent federal departments. These funds are distributed to States, federally recognized tribal recipient, and agencies. The funds may be then further assigned to localities and communities at State, tribal or agency discretion.

On the other hand, competitive grants allocate funding through discretionary grants, with the eligible candidate required to meet specific criteria and goals, and with the ultimate decision on who gets funding

³⁶ A. Tomer, *Biden's infrastructure plan replaces federal cynicism with a sweeping vision*, in *brookings.edu*, April 9, 2021.

³⁷ *Ibid.*

³⁸ C. Caleb, *Infrastructure Investment and Jobs Act*, ONU Institute for Civics and Public Policy, in 17 *Critical Questions* 1 (2021).

³⁹ McKinsey & Co., *A new era of U.S. infrastructure grants*, May 20, 2022, available at: <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/a-new-era-of-us-infrastructure-grants>.

lying on various U.S. federal executive departments, such as the Department of Transportation (DoT) or the Department of Energy (DoE).

For instance, the \$40 billion for bridges financed by the IJA will be allocated by a combination of both formula and competitive grants. In particular, \$27.5 billion are allocated by formula grants which provides \$45 million minimum per state per year, with a formula for additional funding based on the number of bridges per state; \$12.5 billion through competitive grants in which state, local and tribal governments can participate.

These procedures create a triangulation between federal funding, federal governance by agencies, States and local governments that must spend the funds. In particular, it becomes clear that after the passage of the bill, the success of this huge legislative initiative now lies in the ability of federal agencies to implement the law, create new federal programs, and distribute funds effectively, especially with regard to competitive grants. For their part, State and local governments are called to design and project new physical infrastructure, organize maintenance and construction work, hire workers, and spend the funds efficiently.

And in fact, the major innovative aspect of the IJA that will finally be analyzed concerns precisely the relationship between federal government and States created by this regulatory framework.

5.3. State governments in the IJA

As already explained, the big difference between Biden's Infrastructure Investments and Jobs Act and the previous administrations' infrastructure policy relies on the pivotal role played by the federal government in funding infrastructure plans, projects, and programs, as well as in the governance role entrusted to federal executive agencies.⁴⁰

It is evident how Biden has arranged an infrastructure investment plan whose protagonist remains the federal government.⁴¹ This is true not only for the allocation of funds and the allocation decisions of competitive grant programs, but especially in supervising States and local communities spending, as well as in imposing specific requests and criteria for accessing funds, especially for competitive grants, which are entrusted to executive federal departments.

After the allocation of budget to the competent department, the agency will design program and plan how the program will work concretely. For competitive programs, agencies decide how they will review applications and the specific criteria that must be met by recipients (e.g. States) to access funds.

For these programs, the agencies will review applications and then discretionarily decide which recipient to award funds.⁴² But also, for non-competitive programs agencies are called to establish a formula to decide

⁴⁰ E. Monks, S. Vajjhala, *Transformative infrastructure funding is here. The application process for getting it still needs work*, in *brookings.edu*, July 11, 2022.

⁴¹ M. Hunt, *US federal government tasked with delivering Biden's landmark infrastructure law 'on time, on task and on budget'*, in *Global Government Forum*, October 19, 2022.

⁴² The White House, *IJA Maps of Progress*, November 2022, available at <https://www.whitehouse.gov/build/maps-of-progress/>.

how much money recipients get. For both competitive and non-competitive grants agencies provide for conditions of the awards and recipients are requested to report on funding, results, and the meeting of the awards conditions.

Indeed, in order to allocate funds to recipients (States and local communities) agencies are bound to consider criteria linked to equity, union membership of workers, climate impact and sustainability of projects.⁴³

For these reasons, sixteen Republican governors recently sent a letter to President Biden.⁴⁴ The governors, while acknowledging on the one hand the potential positive impact of the Infrastructure Investment and Jobs Act, lamented on the other the risk of excessive regulatory burdensome, inefficient coordination between federal and state level, and unnecessary restrictions emerging from the centralization of regulation in the hands of executive federal agencies. They specifically asked for «the Office of Management and Budget (OMB), along with the respective federal agencies charged with implementation, draft regulations and guidance» to defer to the States and «to confer them maximum regulatory flexibility».⁴⁵

Governors are also prospecting the possibility that the funds granted under specific conditions and standard could be struck down by courts due to the fact that restrictions on the use of funds not authorized by statute could exceed Congress's power under the Spending Clause of the U.S. Constitution.⁴⁶

Moreover, according to GOP governors «excessive new discretionary grant programs would circumvent the planning process and potentially cause a programming and oversight nightmare».⁴⁷ In exposing this possibility, the letter specifically refers to case law related to the federal funds provided under the American Rescue Plan Act (ARPA) and subjected to the specific condition of tax mandate.⁴⁸

⁴³ C. Martín, A.M. Perry, A. Barr, *How equity isn't built into the infrastructure bill—and ways to fix it*, in *brookings.edu*, December 17, 2021.

⁴⁴ J. Choi, *GOP governors press Biden administration for control of infrastructure implementation*, The Hill, January 19, 2022, available at: <https://thehill.com/homenews/state-watch/590430-gop-governors-press-biden-administration-for-control-of-infrastructure/>.

⁴⁵ The letter was signed by the governors of: Alabama, Alaska, Arkansas, Georgia, Indiana, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah.

Governors Letter on IJJA, January 19, 2022, available at: <https://www.rga.org/wp-content/uploads/2022/01/Joint-Letter-to-President-Biden-Requesting-IJJA-State-Flexibility-1-19-22.pdf>

⁴⁶ Article I, Section 8, Clause 1 of the U.S. Constitution.

⁴⁷ *Governors Letter on IJJA*, January 19, 2022, cit.

⁴⁸ The ARPA tax mandate says that a State cannot receive funds to «either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase».

Indeed, in November 2021, the United States District Court, Northern District of Alabama, permanently enjoined the U.S. Department of Treasury from enforcing the spending restriction on funds provided to the States under the American Rescue Plan Act.⁴⁹

By granting permanent injunction, the federal district court reasoned that some restrictions under the ARPA lack the clarity required for Congress to exercise its power under the Spending Clause of the U.S. Constitution because «the States are unable to make an informed choice about the costs of receiving ARPA funds».⁵⁰

In a similar lawsuit filed by Kentucky and Tennessee before the United States District Court Eastern District of Kentucky, the justices enjoined the Secretary of Treasury from seeking enforcement of the tax mandate as a condition to access federal funding under ARPA. In this case, the federal court stated that «[T]he Constitution recognizes limitations on the States but does not abolish the States' residuary and inviolable sovereignty».⁵¹

So, for that very reasons, according to the republican governors, the same fate could befall to the competitive grant programs provided to States under the IIJA, if States are bound to meet criteria discretionarily decided by federal agencies.

However, it is worth mentioning that the Supreme Court has – so far – constantly upheld the imposition of some conditions on federal spending.⁵² As a matter of fact, in *United States v. New York* (1992)⁵³ the Supreme Court stated that the conditions on receipt of federal funds must bear «some relationship» to the purpose of the funding.

Moreover, in *South Dakota v. Dole* (1987)⁵⁴ the Supreme Court elaborated a test for considering the constitutionality of conditions imposed upon States spending of federal funds, evaluating whether the spending promotes the «general welfare» and whether the condition is «unambiguous», related «to the federal interest in particular national

See, *ARPA Provision Barring State Tax Cuts Blocked*, Wolters Kluwer, December 21, 2021, available at: <https://www.wolterskluwer.com/en/expert-insights/arpa-provision-barring-state-tax-cuts-blocked>.

⁴⁹ N.D. Ala. 2021, *State of West Virginia, et al v. U.S. Department of the Treasury, et al.*

⁵⁰ *Federal court blocks ARPA tax mandate enforcement*, January 7, 2022, <https://www.grantthornton.com/insights/alerts/tax/2022/salt/general/federal-court-blocks-arpa-tax-mandate-enforcement-01-07>

⁵¹ E.D. Ky. 2021, *Commonwealth of Kentucky, et al v. U.S. Department of the Treasury, et al.*

⁵² J.L. Entin, *The American Rescue Plan Act and State Tax Cuts*, in 38 *Journal of Taxation of Investment* 15 (2021). More broadly, E. Chemerinsky, *Protecting the Spending Power*, in 4 *Chapman Law Review* 89 (2001) and E.M. Maltz, *Sovereignty, Autonomy and Conditional Spending*, in 4 *Chapman Law Review* 107 (2001).

⁵³ *New York v. United States*, 505 U.S. 144 (1992). Similarly, *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 143–44 (1947); *Steward Machine Co. v. Davis*, 301 U.S. 548, 589–90 (1937). See D. Binder, *The Spending Clause as Positive Source of Environmental Protection: Primer*, in 4 *Chapman Law Review* 153 (2001).

⁵⁴ *South Dakota v. Dole*, 483 U.S. 203 (1987). However, in this case the issue was whether the Congress exceed its spending powers, or violate the Twenty-first Amendment, specifically by passing legislation conditioning the award of federal highway funds on the states' adoption of a uniform minimum drinking age.

projects or programs», not unconstitutional *per se* and «not overly coercive».⁵⁵

6. Conclusions

One year after its entry into force, the Infrastructure Investment and Jobs Act has already shown significant achievements. According to a document released in November 2022 by the White House, during the first year the Administration has announced over \$185 billion in funding, and 7000 projects started reaching more than 4000 communities across all 50 States.⁵⁶

Consequently, Biden's physical infrastructure policy can rightly be considered the greatest success of his administration so far, and probably of the entire presidential term. In the recent mid-term elections, the House majority became Republican,⁵⁷ a fact that renders a consideration of spending bills of such magnitude unlikely, if not even impossible.⁵⁸

Much has been said about how little the IJA weight in during the last election campaign, to such an extent that the issue was not even perceived by voters.⁵⁹ Indeed, despite the economic size of the plan, concrete results will be visible years from now on. And yet, the IJA is not without criticisms. The federal government's role in programming IJA spending and the discretion in the allocation of funds by federal departments and agencies necessitate nonpartisan collaboration between federal and state levels.

In this regard, it is worthy to acknowledge the attempt to follow up on the collaborative, and yet rare, spirit between Democrats and Republicans, but also between the democratic administration and republican governors. The same collaboration from which the Act was born one year ago.

In the aftermath of enacting the Infrastructure Investment and Jobs Act, President Biden appointed through an Executive Order⁶⁰ a Task

⁵⁵ *Ibid.*

⁵⁶ G. Peters, J.T. Woolley, *Joseph R. Biden, What They Are Saying: One Year Anniversary of Bipartisan Infrastructure Law*, November 15, 2022, available at: <https://www.presidency.ucsb.edu/documents/what-they-are-saying-one-year-anniversary-bipartisan-infrastructure-law>.

⁵⁷ R. Cowan, *Republicans win U.S. House majority, setting stage for divided government*, Reuters, November 17, 2022, available at: <https://www.reuters.com/world/us/republicans-one-seat-away-winning-house-us-midterm-vote-2022-11-16/>.

⁵⁸ M.A. Genovese, *One Term, Two Presidencies: Biden's Prospects under Divided Government*, History News Network, The George Washington University, January 15, 2022.

⁵⁹ T. Snyder, *Biden won on infrastructure. Democrats are struggling to get voters to care*, Politico, June 11, 2022, available at: <https://www.politico.com/news/2022/11/06/biden-infrastructure-democrats-voters-00064694>

⁶⁰ Executive Order 14052 on Implementation of the Infrastructure Investment and Jobs Act, November 15, 2021, available at:

Force to act as a conduit and connection between governors and federal departments to wisely direct funds where needed, with the aim of overcoming risks, including bureaucratic ones, associated with the centralized administration of the IIA funds. The governors themselves were then asked to appoint state representatives within the National Governors Association to interface with the Task Force at times of friction between federal administrative level and States.

The magnitude of the plan and the political decision to federally provide for the largest public infrastructure investment in American history undoubtedly necessitated a degree of centralization in the administration and allocation of funds.

However, as claimed by some governors, it is essential that in the implementation phase the States be given room for maneuver and decision-making, in the view proper to the U.S. federalist approach: a federalist system that is one of dual sovereignty.⁶¹

Sergio Sulmicelli
Facoltà di Giurisprudenza
Università di Trento
sergio.sulmicelli@unitn.it

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/11/15/executive-order-on-implementation-of-the-infrastructure-investment-and-jobs-act/>

⁶¹ T. Jefferson Letter to G. Washington, February 15, 1791, Opinion on Bill for Establishing a National Bank: «I consider the foundation of the Constitution as laid on this ground that “all powers not delegated to the U.S. by the Constitution, not prohibited by it to the states, are reserved to the states or to the people” To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition».

