

The Challenge of “Fiscal Responsibility” in the Biden Era

by Giovanna Tieghi

Abstract: Important legacies have to be reclaimed once the fiscal policy is investigated: the ones which date back to intellectual minds - among which, specifically, philosophers and justices – who have strongly reminded the importance of focusing on sociocultural and institutional approaches when looking at fiscal issues. That seems to be the unavoidable premise to look at fiscal policy during the Biden era as a contemporary issue (far) beyond the tax law perspective; rather, as a constitutional topic. Proved that the US historical and constitutional framework encourages the mentioned outlook, the paper explores the topic contextualizing the Biden Presidency’s fiscal choices within the global trends in tax administration while taking into account the recent phenomenon of worldwide forms of democratic ‘regression’ and consequent needs. Upgrading the legal theory of comparative law from a fiscal-constitutional point of view, the incentive of this paper is focused on researching the value and the implications of the challenge of “Fiscal Responsibility” expressed by President Biden. Two different perspectives are taken into consideration: on one hand, his fiscal policy through the prism of the general legal theory; on the other hand, subsequently, the exploration of the proposed alternative, an operational vision expressed in the intentions of some legislative acts and in the provisional Fiscal Year 2022 and FY 2023. The proposal founded on the “responsibility tool” appears to be a useful starting point to question its realistic foundation, also considering the nexus between the Biden Administration and the US Department of Treasury. The investigation also examines the potential new role for constitutional implications. Strategic foresight to revitalize new constitutional demands beyond traditional fiscal policies?

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1. Comparative Introductory Remarks for the Investigation of Fiscal Policy in the Contemporary Global Era

As Joseph Schumpeter underlined at the beginning of the last century during a famous lecture he gave at the Wiener Soziologische Gesellschaft, published in 1918,¹ “The spirit of a people, its cultural level, its social structure, the deeds its policy may prepare – all this, and more is written in its fiscal history, stripped of all phrases. [They] who know [] how to listen to its message here discerns the thunder of world history more

¹ With the title *Die Krise der Steuerstaates* as issue number 4 of *Zeitschriften aus dem Gebiet der Soziologie*. An English translation, by Wolfgang F. Stolper and Richard A. Musgrave, appeared (1954) in *International Economic Papers* (no.4).

clearly than anywhere else The public finances are one of the best starting points for an investigation of society, especially though not exclusively of its political life”.²

This assumption is an everlasting cornerstone of remarkable importance, even from a comparative law perspective,³ for the inner constitutional values it expresses.⁴

As happened a century ago, in fact, the crisis of the fiscal state is still imposing a “sociologically important vista which the fiscal position opens before us and which is” – now, as then – “our main concern”.⁵ This way of looking at fiscal history, in fact, overlaps with up-to-date demands and trends to look at fiscal issues as a constitutional and institutional topic.⁶ That means, precisely, going back to Schumpeter’s outlook, “not only (to) offer(s) a much-neglected perspective on fiscal sociology, but (to) provide(s) an outstanding example of (his) capacity to view economic issues in their broader social context and to model the logic of events in these terms”.⁷

The paper is an attempt to encourage – and to revitalize – the mentioned approach in order to effectively look at present times while dealing with traditional fiscal policy issues. The US historical, cultural and constitutional framework along with their philosophical and institutional background encouraged the mentioned sociological outlook in contextualizing the fiscal choices of Biden Presidency within the global trends in tax administration. To the same extent, it is aimed to take into account the recent phenomenon of worldwide forms of democratic ‘regression’ and the consequent needs. Upgrading the legal theory of comparative law from a fiscal-constitutional point of view, more than limited only to statistics and economic data, though obviously not omitted,⁸ the incentive of this paper is definitely focused on researching the

² J.A. Schumpeter, *The Crisis of the Tax State*, enlarged version of the lecture, now in https://edisciplinas.usp.br/pluginfile.php/5322348/mod_resource/content/1/Crise%20do%20Estado%20Fiscal.pdf, 2.

³ And, specifically, considering the *Law in context* approach: W. Twining, *Law in Context: Enlarging a Discipline*, Oxford, 1997. For a broader view and for the implications related to comparative law topics and methodology, see G.F. Ferrari, *La comparazione tra necessità teoriche e limitazioni pratiche*, in *Casi & Questioni. Per i vent’anni della Rivista DPCE*, in *DPCE Online*, 1, 2020, and the debate arose for the celebration of the first 20 years of the national review DPCE.

⁴ T. Persson-G. Tabellini, *Constitutional Rules and Fiscal Policy Outcomes*, in 94 *The American Economic Review* 1, March 2004. On the topic emphasizing the dignity oriented dimension: G. Tieghi, *Fiscalità e Dignità umana nell’ottica della comparazione tra ordinamenti anglo-americano e messicano*, in *Dir. pubb. comp.eur.*, 3, 2018.

⁵ J. A. Schumpeter, *The Crisis of the Tax State*, quot., 1.

⁶ S. Holmes-R. Sunstein Cass, *The Costs of Rights. Why Liberty Depends on Taxes*, NY-London, 1999, 31. From an Italian perspective, see: M. Bertolissi, *Fiscalità Diritti Libertà. Carte storiche e ambiti del diritto costituzionale*, Napoli, 2015. For a specific outlook on the contemporary taxpayer’s rights: G. Tieghi, *Taxpayers Rights: A Constitutional Perspective*, in *federalismi.it*, 3, 2019.

⁷ R.A. Musgrave, *Schumpeter’s Crisis of the Tax State: An Essay in Fiscal Sociology*, in 89 *Jour. Evolutionary Economics* 2, 89 (1992).

⁸ Information about the nation’s finances is available at: Treasury, https://www.fiscal.treasury.gov/fsreports/rpt/finrep/fr/fr_index.htm; OMB’s Office of Federal Financial Management,

value and the implications of the challenge of the statement “Fiscal Responsibility”, expressed by President Biden. The proposal, founded on the “responsibility tool”, in fact, appears to be a useful starting point firstly, to question its realistic foundation, also considering the institutional nexus between the Biden Administration and the US Department of Treasury; secondly, to investigate the possible renewed role of fiscal policies and their global constitutional implications.

The mentioned approach supports an updated analysis on the topic of fiscal policy, in general – i.e. from a general comparative law theory –,⁹ and specifically – if we focus on a precise legal system, like the one of the U.S.¹⁰ The aim is not to underestimate the historical context and moment to be examined: the Biden Era.¹¹ That is the first two years of the Biden Presidency and Administration.¹²

To promote and use that comprehensive comparative and interdisciplinary outlook with contemporary presidencies, therefore, still at a preliminary stage, the expression “fiscal policy” itself, in the English version, has to be investigated considering the global environment where it has to be applied, clearly in crisis.¹³ The fundamental aim is not to get caught up in the traditional, deflected idea of conceiving fiscal issues as

<https://www.whitehouse.gov/omb/management/officefederal-financial-management/>; and GAO, <https://www.gao.gov/federal-financial-accountability>.

⁹ R. Musgrave, *The Theory of Public Finance*, New York, 1959; K. Arrow, *Social Choice and Individual Values*, New York, 1963; A. Alesina-G. Tabellini, *Positive and Normative Theories of Public Debt and Inflation in Historical Perspective*, in *European Economic Review*, 36, 1992; V. Tanzi, *The Theory versus the Reality of Fiscal Policy*, *The Economics of Government: Complexity and the Practice of Public Finance*, Oxford, 2020 (online ed., Oxford Academic, 19 Nov., 2020); J. Gali, *Modern Perspectives on Fiscal Stabilization Policies*, in 51 *CEifo Economic Studies* 4, 2005.

¹⁰ L. R. Weinstock, *Introduction to US Economy: Fiscal Policy*, in *CRS - In Focus*, Nov. 3, 2020, at <https://crsreports.congress.gov/product/pdf>.

¹¹ Since the beginning: from S. A. Hodge, *Latest CBO Report on Incomes and Taxes Shows that the Federal Fiscal System is Very Progressive*, in *Tax Foundation, Fiscal Tax*, no. 742, Jan. 2021, at <https://files.taxfoundation.org/20210125095819/Latest-CBO-Report-on-Incomes-and-Taxes-Shows-that-the-Federal-Fiscal-System-is-Very-Progressive.pdf>, to K. Davidson, *Biden's era of big Government is over*, Nov. 17, 2022 at <https://www.politico.com/news/2022/11/17/biden-big-government-republican-congress-00066115>. To have an exhaustive overview of a curated selection of regulatory activities, see the one developed by experts in the Center on Regulation and Markets at Brookings: *Tracking Regulatory Changes in the Biden Era*, Nov. 18, 2022, at <https://www.brookings.edu/interactives/tracking-regulatory-changes-in-the-biden-era/>.

¹² J. Lemire, *Biden's First year: A Tale of 2 Presidencies*, at <https://www.politico.com/news/2022/01/19/joe-biden-first-year-two-presidencies-527352>; R. Berman, *What Joe Biden ha (and not has) Accomplished*, Nov. 7, 2022, at <https://www.theatlantic.com/politics/archive/2022/11/biden-2022-midterms-policy-record-approval/671941/>.

¹³ For a comparative global outlook, see: *Fiscal Policy: Lessons from the Crisis*, Banca d'Italia, Eurosistema, Feb. 2011, PUBLIC FINANCE WORKSHOP, Papers presented at the Banca d'Italia workshop held in Perugia, 25-27 March, 2010, at https://www.bancaditalia.it/pubblicazioni/collana-seminari-convegni/2011-0006/6_Fiscal_Policy.pdf?language_id=1. As regards the United States, see: G. Follette, B. Lutz, *Fiscal Policy in the United States: Automatic Stabilizers, Discretionary Fiscal Policy Actions, and the Economy*, from 125.

something not just complex, but even boring or, finally, exclusively related to the scientific legal field of tax law.¹⁴ To foster that belief, then, three basic assumptions have to be outlined as a pre-requisite of the legal reasoning here proposed.

1.1 Some Basic Assumptions for proper use of the comparative law methodology as “a shortcut for understanding the world” (also of fiscal policy)

The analysis of a foreign legal system in view of an operational comprehension of the diverse institutional settlement, requires a comparative outlook in its commitment as a “shortcut for understanding the world”.¹⁵ The comparative perspective, however, cannot skip an albeit brief and preliminary overview of the linguistic meaning of some concepts. The expression “fiscal policy”,¹⁶ is one of those. At least, in its double dimension: economic and legal.

That expression was apparently first used by Edwin R.A. Seligman,¹⁷ a prominent professor of public finance at Columbia University in the early part of the 20th century. He extended an emerging theory of progressive taxation to the international arena. His contribution immediately made evident the prism of features which include the importance of the government’s role in the economy. What the legal historian Ajay Mehrotra

¹⁴ A. Abreu-R. Greenstein, *Tax: Different, not Exceptional*, in 71 *Administrative Law Review*, 2019.

¹⁵ Chapter 1. Il metodo comparativo: *shortcut* per capire il mondo”: L. Pegoraro, A. Rinella, *Sistemi costituzionali comparati*, Torino, 2017, 1.

¹⁶ “Fiscal policy was intuitively understood to refer to the government purse and implied government action or intervention in the economy. What constituted fiscal policy at any point in time was highly responsive to the external pressure of politics and the public’s view of what economics is/was and should/could do. Thus, the history of fiscal policy is, in part, the history of changing conceptions of the government’s role in the economy”: these are the conclusive remarks of an analysis of the evolution of the meaning of “fiscal policy” as understood in the economics literature before the publication of Keynes’s General Theory see M. Johnson, *‘Fiscal Policy’ Before Keynes’ General Theory* (September 20, 2018), available at SSRN: <https://ssrn.com/abstract=3252526>. From an economic perspective: “Fiscal policy is the means by which the government adjusts its budget balance through spending and revenue changes to influence broader economic conditions. According to mainstream economics, the government can affect the level of economic activity—generally measured by gross domestic product (GDP) — in the short term by changing its levels of spending and tax revenue. This In Focus presents an introduction to fiscal policy. For a more in-depth look at fiscal policy, its effect on the economy, and its use by the government, refer to CRS Report R45723, *Fiscal Policy: Economic Effects*, by Marc Labonte”: Weinstock, *Introduction to US Economy: Fiscal Policy*, quot., IF11253.

¹⁷ H. D. Henderson-Edwin R. A. Seligman, *Essays in Taxation*., in 32 *The Economic Journal* 126, 1 June 1922; A.K. Mehrotra, *How Historical Political Economy Laid the Foundation for the Income Tax: Edwin R.A. Seligman, Henry Carter Adams and the “Ability to Pay”*, Berkley, CA, May 2001, at https://escholarship.org/content/qt73x263bc/qt73x263bc_noSplash_4920b024d4159d2867cd1e816b228396.pdf?t=qk18.

called the ‘early Columbia school of taxation and economic development,¹⁸ helps to get an idea of the debate on the – often underestimated –¹⁹ precise nexus with the constitutional foundations of a legal system and the way it protects the citizen’s liberties.²⁰ More: with human rights.²¹

“The fiscal policy looks”, he initially wrote, “merely to the needs of the administration; the socio-political policy looks at the relations of social classes to each other, and the best methods of satisfactorily adjusting these relations”.²² Afraid of Adolph Wagner’s doctrine of socio-political taxation – and the subsequent outcome of Socialism – Seligman warned that “from the principle that the state may modify its strict fiscal policy by considerations of general national utility to the principle that it is the duty of the state to redress all inequalities of fortune, is a long and dangerous step”.²³ Actually, Gerhard Colm wrote that “it is almost impossible to think of fiscal policy, as it is understood in the modern world, without thinking of John Maynard Keynes, and particularly the General Theory. In fact, he gave the concept of fiscal policy a new meaning and the operations of government finance a new perspective”:²⁴ that is, moving it away from the tax or the revenue side of the budget to include both revenue and spending. A more comprehensive notion that, though used “to engineer a variety of national economic outcomes”, laid its foundation on what we can recall as an economic theory of democracy.²⁵

These preliminary insights which derive from a linguistic analysis of the legal and economic significance of the expression of fiscal policy, allow the outlining of the three basic assumptions useful for the purpose of this investigation. First and foremost, to draw an updated framework of the US context.

First of all, the unquestionable importance of the constitutional nature of the relationship between governors and governed in a given historical period:²⁶ meaning, a nexus rights-obligation.²⁷

¹⁸ M. Woker, *Edwin Seligman, initiator of global progressive public finance*, in 13 *Journal of Global History* 3, 2018.

¹⁹ On the contrary, for the thesis of fiscal policy as “integral part of constitutional law” see M. Bertolissi, *Fiscalità Diritti Libertà. Carte storiche e ambiti del diritto costituzionale*, Jovene, Napoli, 2015, VIII).

²⁰ G. Tieghi, *Fiscalità e diritti nello Stato costituzionale contemporaneo. Il contribuente partner*, Napoli, 2012.

²¹ Topic recently addressed at the international level during the 6th *International Conference on Taxpayer Rights: “Taxpayer Rights, Human Rights: Issues for Developing Countries”* (Pretoria, South Africa, 5-8 October 2021). On the matter, recently: G. Tieghi, *A Human Rights-based Model Enhancing Comparative Law Methodology in the Tax Field*, in *DPTI*, 2, 2018, vol. XV.

²² E.R.A. Seligman, *Progressive Taxation in Theory and Practice*, in 9 *Publications of the American Economic Association* 12, 68 (1894).

²³ E.R.A. Seligman, *The Theory of Progressive Taxation*, in 8 *Publications of the American Economic Association* 1, 52 (1893).

²⁴ G. Colm, *Fiscal Policy*, in *The New Economics: Keynes’ Influence on Theory and Public Policy*, 450, New York, 1950.

²⁵ A. Downs, *An Economic Theory of Democracy*, New York, 1957.

²⁶ Looking at their content, from a very operational perspective the Reports of the Office of Tax Policy are aimed precisely to promote the understanding, by the citizens

Second, the relevance of some peculiar legacies – including the one by Schumpeter – needs to be reclaimed once the fiscal policy is investigated from a global perspective. Specifically, also the contemporary ones have strongly reminded the importance of focusing on sociocultural and institutional approaches when looking at fiscal issues and policies.²⁸

Third, the need for a constitutional approach to explore the issue of fiscal policy in the US System: a specific pattern including a popular message, that is also the *leitmotif* of American constitutional history: taxation, and the act to pay taxes, as a means of civic culture, to build institutional order.

2. An American Focus within Global Trends in Tax Administration: the US constitutional framework

As regards the third assumption, it is worth focusing on the following sentence, which is also the inscription engraved on the exterior of the IRS Building in Washington D.C.: “Taxes are what we pay for a civilized society”.

This basic belief has been expressed multiple times over decades, before²⁹ and after³⁰ the well-known dissenting opinion Justice Oliver Wendell Holmes wrote in 1927, in the Court case of *Compañía General de*

firstly, of the US Internal Revenue Code and specific tax proposals; at <https://home.treasury.gov/policy-issues/tax-policy/office-of-tax-policy-reports>.

²⁷ In the tax field, that means the application of the US National Taxpayer Bill of Rights: Each and every taxpayer has a set of fundamental rights they should be aware of when dealing with the IRS. Explore your rights and our obligations to protect them”: IRS, *The Taxpayer Bill of Rights*, at <https://www.irs.gov/taxpayer-bill-of-rights>. For a comparative recent outlook, see J. Kokott – P. Pistone, *Taxpayers in International Law. International Minimum Standards for the Protection of Taxpayers' Rights*, London, 2022.

²⁸ Among contemporary scholars, *e.x multis*: S. Geringer, *Dissemination of Tax Good Governance Standards by the EU and the OECD: A Comparative Analysis of Changes in Treatment and Tone*, 2022; K. Brooks, *An Intellectual History of Comparative Tax Law*, in 57 *Alberta L. Review* 3, 649 (2020); M.A. Livingstone, ; *Tax and Culture: Convergence, Divergence and the future of Tax Law*, Cambridge, 2020; V. Thuronyi, *What can we learn from Comparative Tax Law*, in *Tax Notes*, 2004; G. Peters, *The Politics of Taxation: A Comparative Perspective*, Cambridge, 1991.

²⁹ 1848, *Journal of the Senate of the State of Ohio: Being the First Session of the Forty-Sixth General Assembly*, Volume XLVI, Appendix to Senate Journal, Report of the Minority of the Judiciary Committee, Relative to House Bill No. 18, In Senate – January 21, 1848, 74-75, Chas. Scott's Steam Press, Columbus, Ohio; 1852, *Journal of the House of Representatives of the State of Vermont*, October Session, 1851, Appendix: Report of the Committee Appointed by the Governor to Take into Consideration the Financial Affairs of the State, 368-369, Printed by Chauncey Goodrich, Burlington, Vermont; 1863, State of New York, *Report on the Assessment Laws by the Joint Select Committee Appointed by the Legislature of 1862*, Transmitted Feb, 2, 1863.

³⁰ Chicago Tribune, *Roosevelt Bids for Aid in New England Areas by William Fulton*, 1, Article subsection: *Discusses Taxation*, 6, Column 2, Chicago, Illinois, October 22, 1936; Roosevelt, *The Public Papers and Addresses of Franklin D. Roosevelt: In Multiple Volumes*, Volume Title: *The Constitution Prevails*, 1937, Speech Date: June 1, 1937, Speech Title: *The President Urges Legislation to Prevent Tax Evasion*, 238, Random House, New York, 1938.

Tabacos de Filipinas v. Collector of Internal Revenue,³¹ when the Justice used that phrase.

What are the implications on contemporary US fiscal policy and choices? It seems more profitable to reply to that question by mentioning a historical, meaningful event.

When Justice Felix Frankfurter, Justice of the Supreme Court in 1939 – that is four years after Justice Holmes' death – published his book *Mr. Justice Holmes and the Supreme Court*, and also wrote a paper for the Atlantic Monthly magazine,³² he both times included the following story about Justice Holmes: "A secretary, who exclaimed 'Don't you hate to pay taxes!', was rebuked with the hot response: 'No, young feller. I like to pay taxes. With them I buy civilization'".³³

These words, and especially the final part regarding the 'purchase' of civilization through the economic contribution to one's own State, seem to be the unavoidable premise to facilitate the review of fiscal policy during the Biden era, marked by the covid-19 and the economic crisis. And it is properly the contextualization of Biden's fiscal policies in that precise historical environment and moment that supports the conviction that fiscal policy has to be considered, now more than ever, as a contemporary institutional issue, far beyond the tax law perspective. Rather, a constitutional topic, dealing with fundamental rights, with constitutional values to be safeguarded, with the need for institutional cooperation between States and the national government, with institutional conflicts and political polarization, and with an ongoing search for effective constitutional guarantees.

Those words reveal, in the end, the essence of a new deal in the relationship between the State and the citizens-taxpayer,³⁴ and support the current attempt to understand the direct impact of fiscal policy on the protection of taxpayers' rights and the duty to contribute to help create the conditions for his/her duty to pay taxes. A great legacy for the present times.

Not by chance, indeed, the research question proposed with this paper, is related to the challenge of looking at the Biden administration's fiscal policy through a core concept: fiscal *responsibility* (par. 4).

³¹ The longer excerpt was: "It is true, as indicated in the last cited case, that every exaction of money for an act is a discouragement to the extent of the payment required, but that which in its immediacy is a discouragement may be part of an encouragement when seen in its organic connection with the whole. Taxes are what we pay for civilized society, including the chance to insure": 1927, [FindLaw database], U.S. Supreme Court Case, *Compania General de Tabacos de Filipinas v. Collector of Internal*, 275 U.S. 87, Argued and Submitted Oct. 18, 1927; Decided Nov. 21, 1927, [Dissenting opinion by Oliver Wendell Holmes, Jr.].

³² F. Frankfurter, *Justice Holmes Defines the Constitution*, in *The Atlantic Monthly*, 484, quote 495, Column 1, Boston, October 1938.

³³ F. Frankfurter-A. MacLeish, *Law and Politics: Occasional Papers of Felix Frankfurter, 1913-1938*, New York, 1939, 78.

³⁴ G. Tieghi, *Taxpayer and Human Rights: The Taxpayer Advocate and the Challenge of Contemporary Democracies Towards New Constitutional Forms*, in *Dir. pubb. comp.eur.*, 4, 2014.

3. An American Focus within Global Trends in Tax Administration: The Biden Era

The specific focus on the Biden era obliges us to consider, of a certain impact for the purpose of the present paper, the fact that this Presidency was marked, in the beginning, also by a troubled historical transition. Traditionally, instead, a “peaceful transition of power from one set of rulers to another is” conceived as “the essence of democracy”.³⁵

That leads to taking into account, on the one hand, the crucial impact of the actual highly polarized political context and public opinion; on the other hand, the untapped potential³⁶ related to the expiration of the Budget Control Act 2011 for the Fiscal Year 2022;³⁷ finally, and most importantly, the need – globally shared – to use fiscal policy to rehabilitate the inner soul of contemporary democracies in crisis³⁸ also through a forward-looking approach by their tax administrations focused on some main issues.

The “responsibilities of tax administrations”, in particular, is one of the main topics discussed in the Chapter “Responsibilities and collection” of the *Tax administration 2022 Comparative Information on OECD and other Advanced and Emerging Economies* published last June 2022;³⁹ it is directly

³⁵ “The United States has enjoyed the consensus that elections are the means to change leadership of the country for more than two centuries. The 2020-2021 transition of the presidency marks an exception to that consensus”: J.P. Pfiffner, *The Violent Transition of the Presidency, 2020-2021*, in *Korean Journal of Policy Studies*, 110 (2021); J.P. Zoffer, *The Law of Presidential Transitions*, in 129 *The Yale Law Journal* 8, 2020; G. Tieghi, *The words of a President matter”: Presidential Concession, prassi costituzionale e dissenso*, in *DPCE Online*, 1, 2021.

³⁶ CBO, *The Budget and Economic Outlook: 2020 to 2030, January 2020*, 20-21, at <https://www.cbo.gov/publication/56073>. According to CBO, “Laws governing the construction of the budget baseline require CBO to assume that discretionary appropriations in future years will match current funding, with adjustments for inflation”. CBO, *Additional Information About the Budget Outlook: 2021 to 2031*, March 2021, 6, at <https://www.cbo.gov/publication/56996>. On the topic, see L. Testa, *Budget constraints between President and The Congress*, in this volume.

³⁷ “In 2011, during a period in which many Members of Congress expressed concern over rising budget deficits, the Budget Control Act of 2011 (BCA, P.L. 112-25) established legal limits on the amount of discretionary spending that could be provided each fiscal year. Under the BCA, for each fiscal year, two separate spending limits were in effect: one for defense discretionary spending and one for nondefense discretionary spending. To enforce the spending limits, the law required that if discretionary appropriations were enacted that exceeded a statutory limit for a fiscal year, an automatic process, referred to as sequestration, would be triggered to eliminate the excess spending. The discretionary spending limits were in effect from FY2012 through FY2021. Such statutory limits could be re-established through the enactment of legislation”: Congressional Research Service (CRS), *Expiration of the Discretionary Spending Limits*, by M.S. Lynch and G.A. Driessen, updated November 18, 2022, at <https://crsreports.congress.gov/product/pdf/R/R46752>.

³⁸ M.S. Kuo, *The End of Constitutionalism as We Know It? Boundaries and the State of Global Constitutional (Dis)Ordering*, in *Transnational Legal Theory* 1, 2010.

³⁹ OECD, *Tax Administration 2022. Comparative Information on OECD and other Advanced and Emerging Economies*, Tax Administration Series, 2022 Edition, June 23, 2022: “The OECD's Tax Administration Comparative Information Series, which commenced in 2004, examines the fundamental elements of modern tax administration systems and uses an extensive data set, analysis and examples to

connected with the resources of the tax administration and their ability to manage the COVID-19 wave also from an institutional side.⁴⁰ This edition of the TAS traces a path towards E-Administration⁴¹ to address the current budgetary challenges.⁴² It accurately highlights, actually, two broad major issues in the drive towards digital transformation which are also crucial from a fiscal policy perspective. Specifically, the first, “engaging with taxpayers”, expressly demonstrates – even through the connection with the second, “compliance management” – the ongoing path⁴³ towards the appropriation of an institutional responsibility towards the citizens-taxpayers. From the U.S. perspective, that means, precisely, to «engage in an open dialogue about alternative ways»⁴⁴ to accomplish the mission of the State of protecting the taxpayer’s dignity. These are the operational efforts that in the United States, thanks to the US Taxpayer Advocate Service – structured within the IRS –, especially thanks to its former almost twenty-year National Taxpayer Advocate (NTA) Nina Olson, made that system, and its fiscal policy choices, much before any other, the worldwide promoter.⁴⁵

highlight key trends, recent innovations and examples of good practice. The primary purpose of the series is to share information that will facilitate dialogue among tax officials and other stakeholders on important tax administration issues, including identifying opportunities to improve the design and administration of their systems both individually and collectively”, at <https://www.oecd.org/ctp/administration/tax-administration-23077727.htm>.

⁴⁰ Since this year, the *Tax Administration Series* has moved to an annual publication that could support monitoring the diverse levels of intervention by tax administrations all over the world.

⁴¹ OECD, *Inventory of Tax Technology Initiatives*, 2022, <https://www.oecd.org/tax/forum-on-tax-administration/tax-technology-tools-and-digital-solutions/>.

⁴² “Budgetary constraints continue to impact tax administrations. While the majority of administrations report increasing operational expenditures in absolute terms, this may not show the whole picture, as administrations are dealing with increased responsibilities, the pressures of technology change and the changing structure of their workforce. There is also significant variation in the amount of operational and capital expenditure on information and communication technology. While this may often be due to different sourcing and business approaches, it also raises the question as to whether expenditure levels in some cases may be somewhat low to support the demands for more sophisticated services, the ongoing digital transformation of tax administrations as well as enhancing resilience to respond to future crises”: Executive Summary, in OECD, *Tax Administration 2022*, quot., at <https://www.oecd-ilibrary.org/sites/1e797131-en/index.html?itemId=/content/publication/1e797131-en>.

⁴³ In line with ten years ago: «...actively involving and engaging taxpayers, their representatives and other stakeholders, in order to achieve a better understanding of the taxpayer’s perspective and to cooperate with third parties»: Forum on Tax Administration (FTA), *Information Note. Right from the Start: Influencing the compliance environment for small and medium enterprises*, January 2012, at www.oecd.org/site/ctpfta/49428016, 3.

⁴⁴ National Taxpayer Advocate (NTA), *2013 Annual Report to Congress*, vol.2, at www.taxpayeradvocate.irs.gov/2013AnnualReport, 15.

⁴⁵ G. Tieghi, *Taxpayer and Human Rights: The Taxpayer Advocate and the Challenge of Contemporary Democracies Towards New Constitutional Forms*, in *Dir. pubb. comp.eur.*, 4, 2014.

4. “Fiscal Responsibility”: Some Preliminary Insights on the New Challenge in the Biden Era

Within the context described, the fascinating core concept of “Fiscal Responsibility” (from now on, F.R.) has become the motto of the Biden Administration and has been recently confirmed this year, looking at a substantial call, to be conceived as “a clear message to the American people that we — what we value”.⁴⁶

During Biden’s Remarks announcing the 2023 Fiscal Year Budget last March 28, 2022, in fact, he underlined that the budget he was going to release was aimed to send a peculiar message on what that Administration values: “First, fiscal responsibility”. The following statement of intent was: “We can also restore fiscal responsibility”.

This approach, fostering the budget *value* of F.R. and pushing on a communitarian commitment to *restore* it, declines significant trends in two different directions: from one side, a new standard to be accomplished during the “turbulent chapter of the past 20 months”, including the Covid⁴⁷ pandemic, as the Secretary of the Treasury, Janet Yellen admitted.⁴⁸ On the other side, a new goal of protection of the “integrity of the financial system”.⁴⁹

This attitude, strengthened day-by-day, is supported by well-designed language terminology in view to emphasize the two words: choosing the “*responsibility tool*” instead of the *accountability* one,⁵⁰ it highlights crucial issues of remarkable interest from a constitutional perspective. In fact:

a) it goes back to a specific idea of fiscal policy that looks at the “role of government in the American economy” as “far beyond its activities as a regulator of specific industries”. As underlined, “The government also

⁴⁶ “The budget I’m releasing today sends a clear message to the American people that we — what we value. First, fiscal responsibility”: *Remarks by President Biden Announcing the Fiscal Year 2023*, March 28, 2022, at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/28/remarks-by-president-biden-announcing-the-fiscal-year-2023-budget/>.

⁴⁷ “Coronavirus Disease 2019 (COVID-19) has caused a deep recession in the U.S. economy, and several stimulus bills have been enacted in response. Fiscal stimulus has included direct cash transfers to consumers, forgivable loans to small businesses, and increased unemployment benefits, among others. The deficit totaled \$3.1 trillion in FY2020, equal to 14.9% of GDP—the highest share of GDP since the end of World War II. The stimulus enacted in FY2020 is projected to increase FY2020-FY2030 deficits by \$2.6 trillion”: L. R. Weinstock, *Introduction to US Economy: Fiscal Policy*, quot.

⁴⁸ J. L. Yellen, *Message from the Secretary of the Treasury, FY 2021 Agency Financial Report*, Nov. 15, 2021, 4, at <https://home.treasury.gov/system/files/266/Treasury-FY-2021-AFR.pdf>.

⁴⁹ J. L. Yellen, *Message from the Secretary of the Treasury, FY 2021 Agency Financial Report*, quot., 4.

⁵⁰ “Responsibility relates to the completion of a task, whereas accountability relates to the subsequent examination of its success, processes and other consequences”: IET, *The difference between Responsibility and Accountability at work*, at <https://uk.indeed.com/career-advice/career-development/responsibility-vs-accountability>.

manages” - and this is the point - “*the overall pace of economic activity*”. This expression defines a broader institutional outlook of the significant nexus of Law & Economics and includes all the potentialities of the interdisciplinary approach of “Law and...”:⁵¹ starting from Law and Culture, up to fostering tax education.⁵²

b) it combines “two main tools for achieving these objectives: fiscal policy, through which it determines the appropriate level of taxes and spending; and monetary policy, through which it manages the supply of money”;⁵³

c) it emphasizes the nature of taxation from a range of perspectives including ethics, history, political science, economics, and law, and fosters tax morale;⁵⁴

d) it highlights the importance of transparency between the behavior of the government and that of the people-taxpayers so as to build a step-by-step “economically and fiscally responsible path forward – addressing the long-term fiscal challenges facing (our) country while making investments”;⁵⁵

e) it confirms the ongoing efforts to acquire a new constitutional culture people/taxpayers-oriented: the one clearly expressed by the message of the former NTA, which contains a real provocation for all contemporary democracies dealing with complex tax systems and their far-flung tax authorities. For such democracies, she stated, taxpayer rights «serve as a bulwark against the organization’s tendency to arrange things in ways that are convenient for itself, but actually dehumanize»⁵⁶ taxpayers. And that means, effectively, that taxpayers’ rights «then, help ensure that taxpayers are treated in a humane manner».⁵⁷

At the same time, that approach clearly expresses, on the other side, the controversial challenge to be faced to make that tax system fairer. The nuance of the F.R. in its challenging dimension, for the purposes of the paper, has to be accurately taken into account as the debate very strongly has pointed out during these first two years, mainly considering:

⁵¹ Referred to G. Calabresi new book (*The Future of Law & Economics. Essays in Reform and Recollection*, New Haven & London, 2016) in M.M. Cati, “Law and...” an opened door to a new world of knowledge, June 18, 2018.

⁵² G. Tieghi, *A Challenging Scientific Path: The Academic Value of TRs for a Contemporary, Skilled and Comparative Law Education*, in 4 *Journal of Tax Administration –JOTA 2*, 2018, *Special Issue: Taxpayer Rights*.

⁵³ Precisely, while “seeking to maintain high levels of employment and stable prices”: *US Economy. Monetary and Fiscal Policy*, at <https://usa.usembassy.de/economy-policy.htm>.

⁵⁴ L. Andriani-R. Bruno-E. Douarin-P. Stepien-Baig, *Is Tax Morale Culturally Driven?*, in 18 *Journal of Institutional Economics* 1, 2022.

⁵⁵ *President Biden’s Economic Strategy and Fiscal Responsibility Decreasing Deficit by More than \$1.3 Trillion – Largest one-year Decline in U.S. History*, March 28, 2022, at <https://www.whitehouse.gov/omb/briefing-room/2022/03/28/president-bidens-economic-strategy-and-fiscal-responsibility-decreasing-deficit-by-more-than-1-3-trillion-largest-one-year-decline-in-u-s-history/>.

⁵⁶ N.E. Olson, *Laurence Neal Woodworth, Memorial Lecture, May 9, 2013*, in NTA 2013 *Annual Report to Congress*, in www.taxpayeradvocate.irs.gov/2013AnnualReport, ii.

⁵⁷ N.E. Olson, *Laurence Neal Woodworth, Memorial Lecture, May 9, 2013*, cit., ii.

a) that fiscal policy is a crucial part of the economic framework⁵⁸ and, in the United States, it is directed by both the executive and legislative branches;⁵⁹ that has implied, for the new Biden Administration, a clear awareness of the tax policy agenda that the new President-elect had laid out on the campaign trail, which immediately expanded the discussion on a “Change in course”⁶⁰ and its implications, or how the composition of the new Congress and the priorities of key decisions-makers may shape his agenda;

b) federal budget debt and rising deficit trends;

c) the increasing gap between spending and taxes⁶¹ and the risk of leveraging fiscal and monetary policy to bolster the economy as well as tackling problems like inflation;⁶²

d) that the big issue that has dominated since the 2021 debate over tax and spending policy is progressivity. While President Biden laid out an ambitious policy agenda with several temporary tax credit expansions and programs such as childcare, infrastructure, health care, and climate change, every fiscal policy discussion has been marked by the question of how tax spending policy should increase the burden on high-income households and to what extent such policies should benefit low-income households.⁶³

The overview of some of the most troubling issues leads to a fundamental question: considering the context, how did Biden Administration operate to pragmatically foster F.R. competing direction views to effectively structure responsible fiscal policy as a concrete priority?

⁵⁸ “Economists search for lessons in our history, and the past year has provided a crucial one: Bold fiscal policy matters. A government that can execute it well matters. Together, they can improve American lives on a mass scale, and shift our economic trajectory in a better direction”: J. L. Yellen, *Message from the Secretary of the Treasury, FY 2021 Agency Financial Report*, quot., 4.

⁵⁹ “(...) generally tax policy originates in Congress, not the White House, so any new tax laws enacted in the Biden administration will necessarily also carry the imprimatur of the legislative branch with its many competing interests and priorities”: Deloitte, *A change in course: Tax Policy implications of the Joe Biden Presidency*, Jan. 2021, at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-biden-election-results.pdf>, 4.

⁶⁰ Deloitte, *A change in course: Tax Policy implications of the Joe Biden Presidency*, quot.

⁶¹ Economic Policy Institute, *New Toll examines how U.S. taxes and spending affect income inequality*, Feb. 21, 2020, at <https://www.epi.org/press/new-tool-examines-how-u-s-taxes-and-spending-affect-income-inequality/>.

⁶² “We know there are serious challenges ahead. Inflation is too high, and it remains our Administration’s top priority to rein it in”: J. L. Yellen, *Message from the Secretary of the Treasury, FY 2022 Agency Financial Report*, Nov. 15, 2022, at <https://home.treasury.gov/system/files/266/Treasury-FY-2022-AFR.pdf>. Going back, on the matter, see, R. Reed, *Weighing President Biden’s first year: the Economy and Monetary Policy*, Jan. 18, 2022, at <https://hls.harvard.edu>.

⁶³ See the *Committee for a Responsible Federal Budget*, Reports, and updated data, at <https://www.crfb.org/>.

4.1 From Fiscal Year 2022 to the Fiscal Year 2023 Budget: Two years of efforts in the Fiscal Responsibility direction.

During the first year, diverse swift and effective policy actions were taken by the current Administration in response to COVID-19 to save the U.S. economy from the pandemic, including the *American Rescue Plan (American Rescue Plan Act - ARPA)*.⁶⁴ What emerges is that “the pandemic highlighted longstanding structural issues that were weighing (our) US economy down”: the Secretary has recently underlined, specifically, the ones of sluggish productivity growth; soaring inequality, with deep disparities in race and geography; vulnerability to supply chain stocks; and the growing impacts of climate change. Most importantly, she has defined the economic plan tackled by the Biden Administration to address these structural issues as “advanced and ambitious”.⁶⁵

From a constitutional perspective the last definition, that is the comprehension of “structural” issues, gives a clear idea of fiscal policy activity as definitely something much broader than tax measures that could be envisaged from a tax law point of view. We are dealing with institutional issues which involve the whole system and underpin the socio-cultural fiscal policy. Moreover, the significant changes that this law has made are equally important for our purposes.⁶⁶

In the same direction pointed the President’s Budget released on May 28, 2021, aimed to bring the economy closer to full employment, reducing inequality, and measuring the debt burden more accurately. “Where we choose to invest”, underlined President Biden, “speaks to what we value as a Nation. This year’s Budget, the first of my Presidency, is a statement of values that define our Nation at its best”.⁶⁷ Once again, the statement of values introduced an integrity approach that created the basis for discussing, in the following year, the forward-looking economic agenda that this Administration signed into law in 2022.

For a deeper analysis of that first Presidential Budget, and in particular, of the aim to generate “shared prosperity and putting (the) country on a sound fiscal course”⁶⁸ some peculiar trends in the effort to achieve fiscal responsibility need to be highlighted. They mark the general tendency to “responsibly balances these needs and risks by charting an

⁶⁴ “The American Rescue Plan is delivering direct relief to the American people, rescuing the American economy, and starting to beat the virus”: The White House, *American Rescue Plan*, at <https://www.whitehouse.gov/american-rescue-plan/>. H.R.1319 - *American Rescue Plan Act of 2021*, 117th Congress (2021-2022), at <https://www.congress.gov/bill/117th-congress/house-bill/1319/text>.

⁶⁵ L. Yellen, *Message from the Secretary of the Treasury, FY 2022 Agency Financial Report*, quot., 4.

⁶⁶ To have an overall idea: \$1,400 per person, temporarily extended tax credits for paid sick leave, and the employee retention credit, and inclusion of significant, but temporary tax credit expansions.

⁶⁷ Office on Management and Budget, *FACT SHEET: The President’s Budget for Fiscal Year 2022*, May 28, 2021, 1 at <https://www.whitehouse.gov/wp-content/uploads/2021/05/FINAL-FY22-Budget-Overview-Fact-Sheet.pdf>.

⁶⁸ Office on Management and Budget, *FACT SHEET: The President’s Budget for Fiscal Year 2022*, quot., 5-6.

economically and fiscally sound course for the near term and the long term”.⁶⁹

In his ongoing and everlasting efforts to prioritize fiscal responsibility, in the second year, Biden marked the deficit decrease by more than \$1.3 Trillion, the “Largest One-Year Decline in U.S. History”.⁷⁰ He gave evidence of the outcome in controlling the pandemic as a justification for the continuous lowering of the deficit and of the consequent impact of investments (producers and advanced technologies); of the impact of the *Inflation Reduction Act*, which seems to tackle the climate crisis while also creating greater equity in the economy. On the matter, all the details in the FY 2022 *Agency Financial Report*, already mentioned.

“Taken collectively”, the Secretary affirmed last November 2022, “this trifecta of legislation that the President has signed into law over the past year—the Bipartisan Infrastructure Law, the CHIPS and Science Act, and the Inflation Reduction Act—constitute among the most important economic investments we’ve ever made in putting working families on the surer footing and building a fairer and more inclusive economy”.

It is a common opinion that the complexity of the issues and, specifically, their investigation within the special context following a global pandemic should be considered almost as a new starting point for any jurisdiction. What is to be rigorously evaluated is the twofold effort to simultaneously restore both the economy and the moral integrity of the nation. And it is precisely in between the two dimensions that the constitutional perspective of investigation can help identify new potential foresight for a New Deal, far beyond the tax legal system, on the one side, and the worrying political conflict, on the other.

5. The ‘Responsibility Tool’ at a Crossroad: An Illusion? (A Diachronic Comparative Perspective)

When focusing on the Biden era within today’s U.S. context; when contemplating the legal and institutional nexus between the executive

⁶⁹ For a summary of the specific issues and proposals: a) the aim to keep the cost of Federal debt payments well below historical levels throughout the coming decade in view of the reduction of the deficit; b) the proposal to reform the tax system by changing the rules of the road for the largest corporations and highest income Americans; c) the American Jobs Plan reforms the corporate tax code to incentivize job creation and investment; d) the American Families Plan revitalizes tax enforcement to ensure that high-income Americans pay the tax they owe under the law; e) the two plans together are paid for over 15 years; f) the full set of proposals in the President’s Budget reduce the annual deficit by the end of the ten-year budget window and every year thereafter. Finally, in the second decade, the President’s Budget proposals were aimed to cut deficits by over \$2 trillion: Office on Management and Budget, *FACT SHEET: The President’s Budget for Fiscal Year 2022*, quot., 5-6.

⁷⁰ The White House, March 28, 2022, *Remarks by President Biden announcing the Fiscal Year 2023 Budget*, at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/28/remarks-by-president-biden-announcing-the-fiscal-year-2023-budget/>.

body and the Department of the Treasury, the concrete emergencies, and the inflation hitting highs never seen for generations, it is clear that the Biden Administration has had - and still has - to face 'contemporary Tragic Choices' in trying to reframe its agenda. We easily come to this conclusion if we observe contemporary U.S. institutions from a diachronic comparative perspective.

This scenario, in fact, fits perfectly within a broader theoretical mainstream: operational efforts have to be framed within what Guido Calabresi defined as a general theoretical account of how societies cope with decisions they consider as tragic.⁷¹

Therefore, the inner question that underlies the paper now comes to the surface: does fiscal responsibility end to be just an illusion, or should the tragic fiscal decisions that tax administrations, and executive bodies – with Congress – have to make lead us to draw our attention on something deeper? Isn't it the case to acknowledge the crucial turning point that any fiscal decision crashes with fundamental values and liberties, so as to become tragic from a constitutional point of view?

"The U.S.", according to CBO's extended baseline projections, "faces a challenging fiscal outlook (...) which show budget deficits and federal debt held by the public growing steadily in relation to a gross domestic product over the next three decades".⁷² That is consistent with three specific deviations due to evidence and data published last November 16, 2022:⁷³ a) the significant increase in debt over the decade; b) the increase in the deficit over the next decade; c) interest spending is expected to rise to record levels.

How about fiscal responsibility? Do we have to admit that the priority of Biden's Administration requires a u-turn in order to be effective or, has it even gone so far as to be considered irresponsible?

The current President of the Committee for a Responsible Federal Budget last May defined Biden's fiscal policy, as "a good start", but, she underlined, "now is the moment to pivot towards reducing debts and ensuring any costs are fully paid for".⁷⁴ Moreover, the cause of the concerns is the pending three bills: the American competitiveness bill; the retirement security bill, and the restaurant relief bill.

The process progressively arrived at last late November 2022, when budget experts from the Committee for a Responsible Federal Budget, Concord Coalition, Progressive Policy Institute, and R Street Institute sent a letter⁷⁵ calling on Congress and the Administration to take a step toward

⁷¹ G. Calabresi-P. Bobbit, *Tragic Choices. The Conflicts society confronts in the allocation of tragically scarce resources*, New York, 978.

⁷² CBO, *The 2022 Long-term Budget Outlook*, Report, July 27, 2022, at <https://www.cbo.gov/publication/57971>.

⁷³ Budget & Projections, *New Projection: Federal Debt will Reach Record Levels Sooner Than Expected*, Nov. 16, 2022, at <https://www.crfb.org>.

⁷⁴ Budget & Projections, *Biden Administration should do more before taking Credit for Fiscal Responsibility*, May 4, 2022, at <https://www.crfb.org>.

⁷⁵ Retrieved at https://www.crfb.org/sites/default/files/media/documents/No_New_Borrowing_2022_Letter.pdf.

fiscal responsibility by agreeing not to engage in new loans for the rest of 2022.

The debate on the matter is implicitly becoming increasingly interesting in a constitutional investigation, at least for the fact that it allows us to see whether a theory really fits into the real world, and, precisely, into the current legal system of the United States. Any priorities to be addressed in the path to a fiscally responsible future?

6. Revitalizing New Constitutional Demands Beyond Traditional Fiscal Policies?

Two years of Presidency, two years of hardship. But, however, towards a potentially new idea of *responsibility*. Which one? The one which comes from the needs of the people in a period of crisis.

The first two years, waving the troubles described, have had the quality to address the subject through a new lens. President Biden's priority for fiscal responsibility has brought to light the historical dilemma of rights and duties in a broader context than that which characterized the debate on contemporary fiscal policy, prior to his administration. The dichotomy of responsibility-irresponsibility has become part of the register of the debate on this specific policy as never before, unveiling the founding values of the constitutional approach to tax issues. And that, up to the inclusion of the new concept of responsibility connected with a more institutional dimension of the fiscal framework, properly in the traditionally considered inhuman field of tax law.

Considering the updated outcomes of a "troubling picture of fiscal irresponsibility", in fact, the reference point has become the one pointed out by the latest CBO long-term budget outlook: the need for a "serious dose of fiscal *sobriety*, not a new spending binge".⁷⁶

Indirectly, it fosters the upgrade to the constitutional perspective suggested by the following, crucial statement: «Public policy decisions should not be made on the basis of some imaginary hostility between freedom and the tax collector, for if these two were genuinely at odds, all of our basic liberties would be candidates for abolition».⁷⁷ The path is marked by all its unavoidable obstacles, and limits but, last but not least, new potentialities.

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⁷⁶ CBO, *The 2022 Long-term Budget Outlook*, Report, July 27, 2022, quot.

⁷⁷ S. Holmes-R. Sunstein Cass, *The Costs of Rights. Why Liberty Depends on Taxes*, quot., 31.