

Considerations on the state of US federalism at the end of the Biden presidency

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Abstract: *Considerazioni sullo stato del federalismo statunitense alla fine della presidenza Biden* - The status of American federalism in the second half of the Biden Presidency has been heavily influenced by the persistent polarization of the political party system and of the political arena. After the Republican Party won a narrow majority in the House of Representatives at the midterm election of 2022, the new phase of divided government promoted conflictual dynamics between the branches of the Federal Government, blocking or in any case hindering the legislative activity of the central government (except in areas of policy vital for National security and for ensuring the operational continuity of government agencies). At the same time, the evolution of the federal system has been marked by a significant exacerbation of political and institutional conflicts between the Federal government and the States, as well as between states governed by different parties, legitimizing the use of the term "culture war" for defining the current state of horizontal federal relations.

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1. Introductory remarks

The second half of the Biden presidency presents substantial continuity with his first two years in office with respect to both transformations of the political system and the structure of institutional relations.

From the first point of view, the outcome of the 2022 midterm elections, with the Republican Party winning a narrow majority in the House of Representatives and the Democrats preserving a fragile majority in the Senate, revived a phase of divided government. Subsequently, President Biden's decision not to run for a second term and his consequent status as a "lame duck" has further weakened his ability to implement his political vision.¹

The waning force of the Biden administration has been exacerbated by the constant polarization of political competition and the consequent accentuation of the conflictual dynamics at the expense of the search for compromise that has traditionally inspired the processes of political

¹ For some general reflections about the trouble history of Biden Presidency see G.F. Ferrari, *La Presidenza Biden e gli orizzonti futuri della democrazia americana*, in *Dir. Pub. Comp. Eur.*, 3/2024, Editorial, V-XII.

representation and the functioning of the US presidential form of government.

Specifically, the exasperation of political polarization, encouraged even more by Donald Trump's nomination as the Republican candidate in the November 2024 presidential election, has strongly eroded any space for institutional dialogue (and therefore compromise). This applies to both the horizontal relations between the branches of the Federal Government, and to the vertical relations between the federal government, the States, and the institutions of local government (for example, counties, cities, school districts), an important aspect for the purposes of this discussion.

Therefore, in analyzing the policies adopted in the second half of the Biden presidency in the context of the political and institutional conflicts directly affecting US federalism, it seems useful to follow the following process of exposition of the topics covered:

As a preliminary point, a reference to recent political developments is appropriate. The results of the 2022 midterm elections provide some fundamental indications in relation to the functioning of both the presidential form of the federal government and the system of intergovernmental relations.

From this point of view, the analysis of the legal data reflecting the evolution of US federalism under the Biden Presidency, will necessarily have to be placed in the broader context of the effects produced by the transformations of the political system on the functioning of the form of government and on the dynamics of the federalizing process.

Secondly, the main legislative policy guidelines pursued by the Biden Presidency in 2023-2024 will be discussed, once again underlining their repercussions in terms of the articulation of federal relations (with reference to the instruments of administrative and financial cooperation necessary for the implementation of the legislative program).

Thirdly, before stating the conclusions of the analysis, the specific profile of federal relations will be highlighted, focusing both on the dynamics of centralization/decentralization of federal policies, and on the competition between states and local governments. Starting from this last point of view, further attention will then be directed to what is commonly called the "culture war between states" with republican and democratic administrations.²

In practical terms, this cultural clash is translating into a series of opposing measures involving the exercise of the fundamental responsibilities of the States, which in turn are likely to interfere with those of the federal government and thus generate mechanisms of competition/cooperation with the latter, as well as with other States. The reference is to the conflicting choices made by States in main policy areas such as the protection of civil and political rights, environmental and health policies, and the response to illegal immigration.³

² See R. Bromley-Trujillo, P. Nolette, *The State of American Federalism 2022-2023: Escalating Culture Wars in the States*, in 53(3) *Publius: The Journal of Federalism* 325, 325-348 (2023).

³ The reference is to the main areas of policy or government activity, defined in a fundamental contribution of Lowi as different arenas of power in which various modes

The search for compromise has given way to a logic of rivalry and constant contraposition which, as we will see below, increasingly affects relations between States and local authorities and even those between States and the private sector on social issues.

Finally, our analysis will move on to some summary considerations aimed at highlighting the theoretical questions raised by the current evolutionary framework of intergovernmental relations, compared to the traditional classification paradigms of the US federal system.

2. Polarized politics and the second half of the Biden Presidency

In terms of the repercussions of the political dynamics on the fundamental binomial of presidentialism versus federalism (one of the most widely used keys to interpret the US constitutional system),⁴ the first element to consider is the ideological polarization of the political competition, as accentuated since the advent of Trumpism.⁵

This increasing political polarization appears to be changing the most widespread traditional ways of framing the relationships among the party system, the electoral system, and the American presidential form of government. Traditionally, the analytical framework applied to American federalism has been based on the broad political consensus around the values of liberalism that underlies the “spirit of American constitutionalism” with the consequent functioning of the institutional system in a shared

of interaction between groups and elite conductors V.T.J. Lowy, *American Business, Public Policy, Case-Studies, and Political Theory*, in 4 *World Pol.* 677 (1964).

⁴ If in fact it is true that, in principle, “The introduction of a federal system, even accentuated, has no repercussions on (nor is it conditioned by) the ‘model’ of the form of government (understood as the system of relations between constitutional bodies)”, R. Bin, *Federalism and the Form of Government*, in <http://www.robertobin.it/ARTICOLI/Firenze.htm>, p. 1, Nevertheless in the US constitutional system itself the combination of presidentialism and federalism constitutes an essential key to reading the evolutionary dynamics of the form of government itself, as well as the tendencies of the federalizing process. In general on the workings of the American parliamentary form of government see, S. Fabbrini, *Il presidenzialismo degli Stati Uniti*, Bari, 1993, 11. Most recently see G. D’Ignazio, *La forma di governo presidenziale e la progressiva “presidenzializzazione”*, in Id (cur), *Il sistema costituzionale degli Stati Uniti d’America*, Milan, 2020, 47.

⁵ On the effects of Trump leadership during his Presidency as well as on the transformations of the US political system and on the general functioning of the presidential government see, among others, G.C. Edwards III, *Changing Their Minds? Donald Trump and Presidential Leadership*, Chicago, 2021, R.S. Conley, *Donald Trump and American Populism*, Edinburgh, 2020, M. Rogoff, *The Constitution and the Trump Presidency: Legal and Political Perspectives*, in *Federalismi.it*, 17 gennaio 2018, 3-4, M. Hooghe, R. Dassonneville, *Explaining the Trump Vote: The Effect of Racist Resentment and Anti-Immigrant Sentiments*, in 51(3) *PS-Political Science and Politics* 528, 528-534 (2018); M. Patrono, A. Vidaschi, *Donald Trump e il futuro della democrazia americana*, Milano, 2022; A. Pierini, *Il presidenzialismo statunitense tra polarizzazione politica e conflitti istituzionali: verso un mutamento dei tradizionali paradigmi classificatori?*, in *Federalismi.it*, 19 ottobre 2022, 103.

commitment to pragmatism and compromise in the absence of strong ideological contraposition.⁶

Opposed to this perspective of pragmatic compromise is the analytical approach of those⁷ who tend to see in the history of the United States an unfolding of dialectical oppositions between conflicting political and cultural traditions from time to time: radical versus moderate, liberal versus populist, inclusive versus exclusive. This interpretive framework theorizes a clash between opposing visions of America, sowing the seeds for the periodic diffusion and/or emergence of nationalist and populist movements and tendencies, unified by a radical critique of the political and economic establishment and of the consequent concentration of economic power, along with the political dominance of the two-party system.⁸

What is true in any case is that the recent growth of ideological polarization is also an expression of a series of further profound transformations within the political system and more generally in American society, which in turn and with the contribution of the contingent effects of the cyclical recessions that have afflicted the global economy in the first two decades of the twenty-first century, have reshaped the electoral bases of the two large parties.⁹

⁶ From this point of view, the traditional position of the United States among the countries with a “politically homogenous society” (along with Great Britain, the Scandinavian countries, Switzerland, etc.) is important, following the observation that the two major parties traditionally share the founding principles of liberal democracy. This peculiar structure of the political system, which has been described as “pseudo-bipartisanship” (M. Duverger, *Institution Politique et droit constitutionnel*, Paris, 1990), in carrying out an effective function of mediating conflicts between institutional bodies, has at the same time contributed to ensuring the functioning of the State model based on the separation of powers conceived by the writers of the Constitution, according to a relationship of reciprocal cause and effect. For a similar view, still conceiving the United States as a “country without ideologies,” and characterized by a wide consensus for the postulates of liberal democracy, see the contributions of L. Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution*, San Diego, 1991, T. Lowi, *The State in Political Science: How We Became What We Study*, in 86 *Am. Pol. Sc. Rev.* 5, 5-24 (1992).

⁷ V.R. Brownstein, *The Second Civil War*, New York, 2008; B. Bonikowski, P. DiMaggio, *Varieties of American Populist Nationalism* in 81(5) *Am. Soc. Rev.* 949 (2016); Z. Han, H.V. Milner, K.J. Mitchener, *The Deep Roots of American Populism*, in https://sps.unibocconi.eu/sites/default/files/media/attachments/deeproots_hm20240305105048.pdf (2023), E. Le Frances, *Populism and the American Party System: Opportunities and Constraints*, in 18(2) *Perspect. Politics* 370 (2020); M. Diletti, *Divisi*, Roma, 2024.

⁸ The same populist tendencies have found periodic expression in both presidential leadership, like those of Andrew Jackson in the 1830s and of Theodore Roosevelt in the 1900s), and in movements like the People's Party in the 1890s. More recently there has been some minor populist parties and leaderships capable of influencing the result of elections, including presidential ones (think of the famous cases of Ross Perot, leader of the Reform Party of conservative populist orientation, who presented himself as a candidate in the 1992 elections and was decisive for the defeat of the incumbent President George Bush, and Ralph Nader, leader of the Green Party of progressive populist orientation, who in turn ran for office in 2000 and was instrumental in the defeat of the Democratic candidate Al Gore).

⁹ The reference (see M. Rogoff, *Top. Cit.* 3-4), is to a combination of elements such as the migratory flows, particularly massive both of the Hispanic-speaking population

On the level of political process, therefore, there is no doubt that the tendency toward ideological polarization constitutes an inducement to that “simplification of social pluralism” typical of populism and to the consequent constant contraposition between two political-social blocks with contrasting identities (cultural, religious, ethnic) and opposing economic interests, finally giving rise to a fundamental dualism between interests/demands expressed by “the people” as against those of political minorities, whether they are part of the economic-financial elite and/or carriers of identities different from the majoritarian identity of the community-nation State and capable of undermining the unity of the people and placing themselves outside of the national community.¹⁰

All of these tendencies appear, therefore, to favor evolution toward forms of “unequal democracy” with features of illiberal authoritarianism, the effect of which is to cast doubt on the coordinates of the traditional theoretical framework applied to stable democracies in the western legal tradition.¹¹

coming across the border with Mexico, and above all of members of non-European communities and of non-Christian religion, which have undoubtedly contributed to the construction of a strongly multicultural society full of contradictions. Secondly, it is necessary to consider the sharpening of economic inequalities, even more aggravated by the financial crisis of 2007-2008 that tore apart the predominantly white working and productive American middle class, together with the more general crisis of entire sectors of the traditional economy as a result of technological progress, the globalization of trade and the weakening of the traditional system of industrial relations. Inequalities all the more incentivized by the tendency, which has always prevailed during what has been defined as a globalized economy based on “turbocapitalism” or “finance-capitalism”, to the concentration of wealth in a few hands and to the explosion of the remuneration systems of the great managers”. Thirdly, the great transformations of the political arena resulting from the massive use of modern technologies and social networks and the growing role assumed by very popular radio and television commentators (such as those operating on the Fox News channel) are important. All elements capable of favoring the radicalization and trivialization of the political message, the politicization of journalistic news, the polarization of cultural politics. Finally, reference can only be made to the flow of enormous financial resources intended for parties and politicians, where with the Citizen United Ruling of 2010, the Supreme Court, through the more penetrating protection of the Freedom of Speech referred to in the First Amendment, allowed the broad liberalization of party funding. In general, on the accentuation of the social and racial conflict induced by immigration and the global economic crisis, see J. McCoy et al., *Polarization and the global crisis of democracy: Common patterns, dynamics, and pernicious consequences for democratic polities* in 62(1) *American Behavioral Scientist* 16 (2018); A. Russell Hochschild, *Strangers in Their Own Land: Anger and Mourning on the American Right*, New York, 2016; K.J. Cramer, *The Politics of Resentment*, Chicago, 2016; J. Gest, *The New Minority: White Working Class Politics, Immigration and Inequality*, New York, 2016; J.P. Van Ramshorst, *Anti-immigrant Sentiment, Rising Populism, and the Oaxacan Trump Source*, in 17(1) *J. Latin Am. Geography* 253 (2018), in <https://www.jstor.org/stable/44861362>; J.B. Judis, *The Populist Explosion: How the Great Recession Transformed American and European Politics*, New York, 2016.

¹⁰ P. Norris, R. Inglehart, *Cultural Backlash Trump, Brexit, and Authoritarian Populism*, New York, 2019.

¹¹ R. Toniatti, *Democrazia illiberale e forma di stato costituzionale di diritto nel costituzionalismo euro-atlantico: contingenze elettorali o cambio di paradigma?*, in *DPCE online*, 2020/3, 3955.

So, in considering the institutional effects of political polarization on the functioning of the US system of government, we are increasingly faced with the problem, highlighted by political scientists such as Sartori,¹² Linz¹³ and Lijphart, of the incompatibility of presidentialism and party competition characterized by intense ideological opposition.¹⁴ On the other hand, polarization appears likely to introduce elements of tension and conflict into the traditional cooperative structure of federal-state relations consolidated following the advent of the pluralistic democratic State.

Inserted within this general framework, therefore, the results of the 2022 midterm elections confirmed the strong ideological polarization of the election campaign while at the same time they partially contradicted the forecasts and polls that preceded the election (as the polls had agreed in predicting a sharp drop in consensus for the Democratic Party with the consequent loss of its majorities in both houses of Congress). In fact, for the first time since 1986, the ruling president's party did not lose the midterm elections, maintaining the majority in the Senate (thanks to the election of three independent senators supported by Democratic voters) and reducing the size of the Republican majority in the House of Representatives.

The result of the elections demonstrated, therefore, the substantial resilience of the Democratic Party both at the federal and state levels. On the one hand, the Democrats retained a fragile majority in the Senate, also gaining a Pennsylvania senate seat, while the Republican Party won a narrow majority in the House of Representatives, not such, therefore, as to guarantee constant control of the same. On the other hand, the Democratic

¹² G. Sartori, *Ingegneria costituzionale comparata*, Bologna, 1995, 99. For the author the set of intrinsic characteristics of the US political system - constituted by its bipartisan structure, the non-ideologized nature of the parties, the decentralized, non-rigid and hierarchical organization of the latter, resulting in weak discipline of the members of representative bodies, thus favouring consociative logics also through the constant use of local concessions - has made it possible that "the American system works, or has worked, despite its constitution, not thanks to its constitution" This, in so far as the same dualism inherent in the form of presidential government and the consequent absence of institutional link-up mechanisms which would make it possible to align the composition and the representative derivation of Parliament and the Government, frequently leads to situations of so-called "divided government". In these the President, not being able to count on the support of the majority in one or both branches of the Congress, sees his power to see implemented in legislative place his political agenda considerably diminished. Thus, it is necessary to try and win majorities that cross the parties and necessarily include party members from the opposite side. It is, however, evident that such a structurally split and antagonistically divided system exposes the dynamics of the functioning of presidentialism to risks of paralysis and institutional gridlock, risks all the more accentuated e.g. in Latin - American countries where the fragmentation of political systems (as highly exposed to overturns) and the weakness of the pluralistic framework of the same South American democracies, has led to frequent degeneration processes of the presidential form of government.

¹³ See J.J. Linz, *The Perils of Presidentialism*, in 1(1) *J. Democr.* 51 (1990); J.J. Linz, A. Valenzuela (eds), *The Crisis of Presidential Democracy: The Latin American Evidence*, Baltimore, 1994, it. transl., *Il fallimento del presidenzialismo*, Bologna, 1995; see also, S Mainwaring, *Presidentialism, Multipartyism, and Democracy: The Difficult Combination*, in 26(2) *Comp. Pol. Stud.* 198 (1993).

¹⁴ On this point, see G. Ieraci, *Presidenti, governi e parlamenti - Analisi comparata delle istituzioni di vertice in 27 democrazie contemporanee*, Trieste, 2010, 83.

Party also showed vitality and resilience at the state level, reducing the gap with the Republican Party in controlling the state governments.¹⁵

The overall effect, likely to influence the evolution of federal relations, therefore appeared to be twofold, once again involving both the horizontal structuring of powers between the branches of the Federal Government and the vertical structuring of intergovernmental relations. Horizontally, the split between moderate and radical components within each major Party was exacerbated; a split that, as is well known, has further favored situations of significant institutional instability, even decision-making paralysis – as for example in the election and the revocation of the Speaker of the House of Representatives, for which 15 votes were needed, with important concessions to the most radical groups of the Republican Party such as the House Freedom Caucus.

On 3 Ottobre 2023, in light of the constant opposition of the Freedom Caucus, the House, for the first time, voted to remove its speaker through a motion to vacate the chair filed by Representative Matt Gaetz of Florida.

The following October 25th, after a further phase of institutional chaos during which the Republican Party presented 4 successive candidates for the office, the current Speaker Mike Johnson of Louisiana was finally elected.

This situation of constant exasperated interparty political conflict (as well as intra-party within the GOP) led to the repeated difficulties in reaching a Congressional agreement temporarily funding measures necessary to avoid a government shutdown¹⁶. An agreement was finally reached in March 2024 after Congress had previously repeatedly extended the effects of the Continuing Resolution approved on November 15, 2023, which had temporarily kept the government open until January 19, 2024.¹⁷

As is well known, the same difficulties in agreeing on the funding necessary for the implementation of the Biden Administration's program resulted in a long delay for additional security funding for the defense of Ukraine, funding for border security with Mexico, and reauthorization for Federal Aviation Administration (FAA) and the National Flood Insurance Program (NFIP).

In conclusion, in terms of the horizontal division of powers within the federal government, we are faced with a worsening of institutional gridlock and decision-making paralysis, resulting from divided government (all the more so with fragile opposing majorities in both houses of Congress) and the ongoing climate of intra- and inter-party ideological polarization.

The effects of the political framework emerging from the 2022 elections on the dynamics of federal-state relations appear equally significant

¹⁵ Democrats took control of state legislatures in Michigan and Minnesota, while holding governorships in Michigan, Wisconsin, and Pennsylvania. Additional wins in Maryland and Massachusetts meant that Democrats gained four trifectas

¹⁶ Under the Anti-deficiency Act, failure to agree on the approval of the federal budget law before the start of a new fiscal year (the Fiscal Year ends annually on September 30) results in the blocking of administrative activities, whereas in the event of lack of financial coverage, only activities related to the safety of human life or the protection of property can be continued.

¹⁷ After that the Congress had already passed a temporary stop-gap measure to avoid a government shutdown on September 2023 by issuing legislation that kept the government open until November 17, 2023.

to the extent that, as will be seen in greater detail below, there has been a strong political contrast between the governments of the 22 states entirely controlled by Republicans (both as regards the Governor and the two houses of the legislature) and the 17 states totally in Democratic hands.

Hence the possibility for the State governments themselves to use the legislative level and the power of constitutional revision according to a strictly majoritarian logic, pursuing the political objectives corresponding to the radical agenda of the party controlling the institutions of state government.

This situation of acute institutional conflict has therefore been reflected first on the level of horizontal relations between States, where these conflicts have been described as a culture war. The term aptly highlights precisely the tendency towards the extreme use of state powers (legislative, executive and judicial) for the pursuit of ideologically inspired political choices in such fields as election law, environmental policy, and civil rights. These are clearly matters that, although falling within traditional state functions, are still likely to interfere with federal policies.

From another point of view, the accentuation of political polarization expressed in the legislative and administrative guidelines promulgated by the States is at the same time encouraging institutional conflict with local government administrations that refuse to get in line with the aforementioned guidelines.

In the following part of the discussion, both above-mentioned profiles will be analyzed.

3. The legislative policy guidelines pursued in the second half of the Biden presidency

Although the first half of the Biden presidency was heavily influenced by the Coronavirus pandemic emergency, the Democratic majority in Congress (albeit narrow in the Senate), as well as the strong internal divisions within the Republican Party, made it possible to pass some fundamental legislative measures intended to combat the emergency itself and to relaunch/support the economy.¹⁸ The reference is to laws such as the *American Rescue Plan* and the *Infrastructure Investment and Jobs Act* of 2021 and the *Inflation Reduction Act* of 2022. Similarly, also during 2022, some important bipartisan bills were approved, the result of the broad consensus regarding the need for

¹⁸ On relations between the Government and the Congress during the first half of Biden Presidency, see G.F. Ferrari, *President Biden and the Congress*, in *DPCE Online*, Special issue, *The American Presidency After Two Years of President Biden*, 2023, 3.

legislation on matters of great concern to public opinion, as in the case of the *Bipartisan Safer Communities Act*¹⁹ and the *Respect for Marriage Act*.²⁰

The same legislative policy guidelines were then accompanied by "soft" administrative action, with less recourse to executive orders, which instead had been particularly used as a tool of government under the first Trump presidency. In fact, as of June 6, 2024, President [Biden](#) had signed 138 executive orders, 184 presidential office memoranda, 622 proclamations, and 126 notices. Thus Biden issued an [average](#) of 41 executive orders per year in office, the third-lowest average among the seven presidents since 1981. Trump's average [was the highest in this time frame, with 55 executive orders, and Barack Obama's](#) average the lowest with 35.

In the past two years, however, this situation has become considerably complicated. The accentuation of the political clash both between parties and between the different components of the GOP has inevitably complicated the possibility of reaching bipartisan agreements in Congress on shared legislative policy guidelines. The only agreements reached have therefore led to the approval of the funding and fiscal policy measures necessary for the very functioning of the government itself, as well as those essential for the strengthening of defense policies and the protection of national borders.

Measures have therefore been adopted in crucial matters such as intelligence and national security (see *Artificial Intelligence Reforming Intelligence and Securing America Act* - Public Law 118-49—Apr. 20, 2024) and the fight against organized crime and drug trafficking.

On these interventions, there has been a tendency to bipartisan consensus, which has attenuated the dominate logic of opposition in horizontal relations between states.

Furthermore, these are essentially matters whose nature (and the related administrative implementation of legislative policy choices) necessarily requires a strong centralization at the federal level, thus implying a reliance on the powers of direction and control of the federal government over the states.

In fact, the centralized and cooperative framework of the public intervention programs results from a series of provisions in which the federal government directs and controls the state programs with regard to the purpose and/or destination of the allocated funds, the impact of the regulations adopted, and the provision of technical and informational assistance to the subjects responsible for the implementation of the programs.

¹⁹ Public law 117-159—June 25, 2022 136 stat et seq. 11001. it was emergency legislation that followed a mass shooting that killed nineteen children in an elementary school in Uvalde, Texas. The law contains a series of provisions directed at the expansion of community mental health services, of the access to health care services in schools (Sec. 1103) of pediatric mental health care access grants (Sec. 11005), and of gun control laws.

²⁰ We can remind also the *Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act* of 2022, or even as "the PACT Act", with which the Congress that authorized \$797 billion in spending to significantly expand and extend entitlement to healthcare and disability compensation for veterans who were exposed to toxic substances during military service.

Especially indicative in this regard are the provisions of the *Federal Aviation Administration Reauthorization Act* (FAARA), passed to amend title 49, United States Code (BILLS-118hr3935enr), to reauthorize and improve the Federal Aviation Administration and other civil aviation programs, and for other purposes.²¹

The provisions contained in the *Testing, Rapid Analysis, and Narcotic Quality Research Act* of 2023 (or the “TRANQ” Research Act of 2023 PLAW-118publ23) go in the same direction, in which the forms of information and technological exchange between the federal and state and local agencies are strengthened (A) to detect and identify new psychoactive substances such as xylazine and (B) for identification and development of technologies and methods to identify new psychoactive substances by Federal, State, and local agencies.

It must also be said that even the other important legislative interventions in funding and fiscal matters preserve the traditional cooperative structure of public intervention programs in the US economy, providing for the widespread use of administrative and financial cooperation instruments between the federal government and state and local governments. The provisions of the *Fiscal Responsibility Act* of 2023 (PLAW-118publ5), and the *National Defense Authorization Act for Fiscal Year 2024* (PLAW-118publ31) go in this direction.²²

In conclusion, even in regulatory acts that touch on different matters and with highly technical content (e.g. *Consolidated Appropriations Act*), the tendency of the federal level to exercise a more penetrating power of direction and control over state and local governments on issues of strategic importance for the development of the federal union (e.g. transport,

²¹ The legislative intention of this bipartisan act is further specified in the statement issued on May 9, 2024 by the US Senate Committee on Commerce, Science and Transportation, according to which, «Legislation sets national priorities to strengthen aviation safety standards, grow air traffic controller & safety inspector workforce, implement safety technology on runways & in cockpits. Gives flyers new rights to hassle-free refunds, no-fee family seating & 24/7 customer service; improves accessibility & triples fines for airline consumer violations. Grows infrastructure investments in airports of all sizes, ensures small, rural communities remain connected with air service. Internet site <https://www.commerce.senate.gov/2024/5/senate-overwhelmingly-approves-faa-reauthorization-act#:~:text=Reduces%20Runway%20%E2%80%9CClose%20Calls%E2%80%9D%3A,as%20Airport%20Surface%20Detection%20Equipment%20> (

²² In the *Consolidated Appropriations Act*, 2024 (BILLS-118hr4366enr), for example, the appropriations intended to finance administrative cooperation instruments (interagency agreements) and intergovernmental cooperation, necessary for the implementation of programs such as those of the Economics and Statistics Administration of the Department of Commerce (Sec. 110), those for the identification, investigation, and prosecution of individuals associated with the most significant drug trafficking organizations, transnational organized crime, and money laundering organizations. The provisions contained in the *Fiscal Responsibility Act* of 2023 (PLAW-118publ5) go in the same direction as those aimed at introducing Timely and unified federal reviews. As well as those contained in the *National Defense Authorization Act for Fiscal Year 2024* (PLAW-118publ31) as they are aimed at strengthening tools for coordinating the action of the Federal Administration with those of the state (e.g. SEC. 1092. Red Hill Health Impacts - SEC. 2853 Plan and report on critical infrastructure systems at military installations).

intelligence, public health) has been confirmed; power that is expressed both with the allocation in favor of states and state agencies of funds aimed at pursuing goals set by the federal government, and through the identification of objectives or best practices that impose themselves on the action/legislation of local governments, also through the establishment of mixed (federal-state) control and supervision authorities, that is, models of cooperation and coordination between the two levels.

However, this centralizing tendency has been limited by two countervailing factors: first, the impossibility of extending the political agreement reached on national security to other matters, such as voting rights,²³ reproductive rights (in particular after the Dobbs ruling) and immigration; second, the repeated interventions of the United States Supreme Court aimed at reshaping the division and balance of powers between federal and state governments in a restrictive way for the federal government.²⁴

4. The Continuing Conflict Involving Federal Relations

We now examine the dynamics of the horizontal dimension of interstate relations and those between states and local governments, taking into account, once again, the repercussions of the increasingly polarized and conflictual political framework.

Specifically, the prevailing trend in elections for the representative bodies of the state governments towards the complete control of the latter by a single party (with a single-party majority controlling both houses of the bicameral state parliaments as well as the monocratic executives headed by the Governors), is determining effects on the functioning of state governments, which run contrary to the increasingly recurrent effects, at the federal level, of divided government.

As mentioned above the combination of the radical political agenda at the center of the programmatic platform, especially of the Republican Party (also favored by the mechanism of primary elections for the choice of candidates) and the conquest by the same Party of full control of most state governments, constitutes a factor directing the activity of state government towards polarization and contraposition of party objectives and programs. At the same time, the same trend towards the spread of conflicts in federal relations has constantly led Republican-led states to adopt a series of policies that are obstructive to the implementation of the programmatic objectives underlying the political agenda of the Democratic Federal Administration.

²³ See D. Zecca, *Biden's voting rights ambitions: an effort doomed to fail?* in *DPCE Online*, Special issue, *The American Presidency after two years of President Biden*, 2023, 285-306.

²⁴ This tendency has been finally confirmed by the recent decision 1 28 giugno 2024, *Loper Bright Enterprises et al. v. Raimondo*, 603 U.S. ____ (2024), with which the Supreme Court has overruled the previous orientation based on self-restraint as expressed in the supervision control over the exercise of the regulatory powers by the federal agencies, as expressed in the *Chevron* decision. For a comment, see G.F. Ferrari, *Loper Bright: cronaca di una morte annunciata*, in *DPCE online*, 3/2024, 2115 ff. See also G. Romeo, *Statutory stare decisis e tenuta del precedente wrongly decided: una lettura di Loper Bright Enterprises v. Raimondo*, in *DPCE online*, 3/2024, 2131 ff.

It is also inherent in the increased competition and conflict between levels of government that there is more frequent resort to the judicial branch for the solution of the disputes involving application of the federal principle.²⁵ These referrals to the judiciary have been accompanied, in turn, by a renewed interventionism of the courts, above all the U.S. Supreme Court, increasingly called upon to decide conflicts of competence between the central government and member states in crucial matters such as the protection of individual rights, immigration, environmental protection, and electoral matters.

Finally, the role assumed by state jurisdictions has also necessarily increased, to the extent that the failure to reach those political agreements between the branches of the federal government that are necessary to give the aforementioned matters a uniform regulation under federal law is having the inevitable effect of expanding the power of state administrations and jurisdictions to intervene to regulate, by interpreting and applying state law, the spaces left unoccupied by federal law.²⁶ A prime example is the failure of the Biden Administration to win Congressional approval of the renewal of the *Voting Rights Act* and the consequent interventions of individual states to curtail the voting rights of Blacks.

There appear to be many sectors in which the ongoing conflictual dynamics have come to the fore, starting with the fundamental issues of civil and political rights, in relation to which the effects of the so-called culture war between States and between the latter and the Federal Government have been evident. Especially indicative in this regard are the increasingly strong conflicts in legislative policy, as well as in the management of administrative regulation in matters of great impact on public opinion such as political rights, reproductive rights and the control of illegal immigration.

4.1 Voting Rights

We have already discussed the tendency of state legislatures of the Republican-controlled states to approve a series of laws aimed at stiffening electoral procedures, both in terms of regulating the actual conduct of electoral operations and in terms of limiting the use of new instruments, such as *early voting* and remote voting, aimed at increasing voter turnout²⁷. The formal justification for these measures is the need to guarantee the regularity and integrity of the electoral operations themselves, but with the practical effect of reducing electoral participation by disadvantaged categories of voters such as the elderly and minorities, as well as young

²⁵ R. Bromley-Trujillo, M.A. Dichi, *The State of American Federalism 2023–2024: Judicialization of Gridlocked Politics*, in 46(3) *Publius* 435 (2024), in which we read “U.S. federalism allows for the contestation of the power, and a central empirical task for federalism scholars is tracking and mapping that balance of power. Typically, scholars depict federalism’s tug of war in vertical terms, as the centralization or decentralization of power”.

²⁶ R. Bromley-Trujillo, M. A. Dichi, *op. cit.*, 436.

²⁷ R. Woodward-Burns, *Federal Judges, States Legislators, and State Voting Rights Rollback Get access Arrow*, in 53(3) *Publius: The Journal of Federalism* 465 (2024).

people²⁸. A series of data collected by the Brennan Center²⁹ has revealed conflicting orientations between states regarding the regulation of the right to vote and the electoral process.

First of all, there has been the proliferation of bills aimed at strengthening state powers to repress crimes of election tampering.

For example, in Texas, two bills passed by the state Senate but then abandoned would have authorized the prosecution of people who voted illegally, if it was determined that they were aware that they were not eligible to vote³⁰. Some state legislatures have also moved to criminalize voter mobilization, although most attempts to do so have not become law. Florida has enacted a law that will dramatically increase financial penalties for voter registration organizations in the event of mistakes and impose a \$50,000 fine on the organization that employs non-U.S. citizens in the collection of voter registration forms.³¹ The governor of Wyoming vetoed a bill that would have prohibited anyone but an election official from submitting a vote application by mail, while Arkansas enacted a law making it a crime for an election official to submit a vote application by mail unless accompanied by a specific voter request.³² An Arizona bill would have made it a crime to deliver a ballot by mail without following the proper voter identification procedure.³³

Similarly, the increasing attribution to state legislatures, rather than to independent Commissions, of the redrawing of congressional electoral districts (*redistricting*, a function carried out periodically on the basis of the updated censuses of the inhabitants residing in the States) seems to lend itself to the partisan exercise of an administrative function (encouraging again forms of *gerrymandering* in the design of the districts).³⁴

From this point of view, it must be said that the Supreme Court, in the face of the attempt to take to the extreme the "independent state legislature theory" according to which the Constitutions and Courts of the States lack

²⁸ <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-june-2023>.

²⁹ <https://www.brennancenter.org/>.

³⁰ <https://www.texastribune.org/2023/05/24/texas-felony-illegal-voting/>, <https://gov.texas.gov/news/post/governor-abbott-announces-over-1-million-ineligible-voters-removed-from-voter-rolls>. For normative references look at <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=88R&Bill=HB1243>.

³¹ <https://www.flsenate.gov/Session/Bill/2023/7050>.

³² For Wyoming see <https://fastdemocracy.com/bill-search/wy/2024/bills/WYB00004930/>, for Arkansas <https://www.arkleg.state.ar.us/Bills/Detail?id=HB1513&ddBienniumSession=2023%2F2023R>.

³³ <https://legiscan.com/AZ/bill/SB1141/2023>.

³⁴ Risks, those highlighted above, that are all the more made current by the concurrent restrictive interpretation, also made by the Roberts Court, of the powers of the federal government under the *Voting Rights Act* to circumscribe and limit the exercise of the regulatory power of the States in the matter of elections. See e.g. *Shelby County v. Holder*, 570 U.S. 529 (2013), *Abbott v. Perez*, 585 U.S. ____ (2018), and *Brnovich v. Democratic National Committee*, 594 U.S. ____ (2021). In the last two rulings on the subject, however, the Supreme Court has reiterated the existence of some limits to the power of the legislatures of the states to dictate rules regarding federal elections, as in the case of the *Moore v. Harper* 600 U.S. 1 (2023).

authority to impose limits on the power of state legislatures to dictate redistricting rules for federal elections, it has adopted some decisions with which it has mitigated the same tendency, reaffirming the need for judicial review *in subiecta materia*. Specifically, in the case of *Moore v. Harper*, the Court reaffirmed the power of the Courts to review the congressional map drawn by a state legislature.³⁵ In that specific case, however, involving the state of North Carolina, the previous ruling of the Supreme Court of the State, which had held that there *was* an unconstitutional partisan gerrymandering in the congressional map drawn by the Republican-majority legislature after the 2020 census, was overturned by the U.S. Supreme Court in April 2023 after the election of a Republican majority of the congressional representatives from North Carolina. Similarly, in the case of *Allen v. Milligan* judges in Washington upheld Section 2 of the *Voting Rights Act* (VRA), which prohibits the adoption of any law, practice or division into constituencies that may result in violations of voting rights based on the ethnicity of citizens.³⁶ The Supreme Court has in fact confirmed the approach taken by a lower court that had suspended the electoral map of Alabama, redrawn following the 2020 census, for violation of Section 2 of the VRA.³⁷

Nevertheless, discrimination in access to voting continues. In 2018, for example, the Georgia Senate passed laws that reduced voting hours in Atlanta (where African Americans are 54% of the population) and limited early voting on weekends. The latter measure was seen by many as a not-so-subtle attempt to target nonpartisan "Souls to the Polls" events organized by black churches to get their parishioners to vote on Sunday after church. Both Georgia Senate measures were later rejected by the State Assembly.³⁸

Thus, as a counterbalance to the adoption of restrictive and discriminatory measures by some states, others have adopted their own *Voting Rights Act*.

Back in 2002, California had set the *standard* when it passed the first state VRA in the country, [seeking to address](#) "the ongoing damage of vote dilution caused by racial polarization in general voting systems throughout California," according to a *Lawyers' Committee Information Sheet* on the legislation. One of the provisions of California's VRA provides a streamlined way for voters of color to contest the general election. In recent years, many other states have approved their own VRAs: Washington in 2018, Oregon in 2019, Virginia in 2021, New York in 2022, and Connecticut in 2023. Several other states have also recently expressed interest or taken steps to enact their own VRAs. In recent legislative sessions, lawmakers introduced VRAs in [Maryland, Michigan](#), Illinois, and [New Jersey](#), while [Washington](#)

³⁵ Read the text on Sillabus, https://www.supremecourt.gov/opinions/22pdf/21-1271_3f14.pdf.

³⁶ For a comparative analysis read on Sillabus https://www.supremecourt.gov/opinions/22pdf/21-1086_1co6.pdf.

³⁷ See comment by S. Filippi, *Allen v. Milligan: The US Supreme Court (unexpectedly) confirms its jurisprudence on Section 2 of the VRA*, <https://www.diritticomparati.it>, 6 July 2023.

³⁸ <https://www.naacpldf.org/why-state-and-federal-voting-rights-legislation-go-hand-in-hand/>.

[enacted improvements that enhance](#) its current voting rights law in April of 2024.

Some of the recently passed and proposed state VRAs contain voter protection provisions that go beyond federal law. For example the New York and Connecticut VRAs, NYVRA and CTVRA respectively, contain a "[democratic canon](#)" that [directs](#) courts to interpret electoral and voting laws liberally in favor of protecting voter rights and ensuring that minority groups "have equitable access to participate fully in the electoral process."³⁹

4.2 Reproductive rights

Regarding the protection of right to reproductive choice, the effects of the decision in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. ____ (2022) on States' abortion policies have come to light.⁴⁰

In practice, following the reversal of the decision in *Roe v Wade* which had recognized abortion as a constitutionally fundamental right protected by the federal Constitution and the consequent devolution of the regulation of the matter to the States⁴¹, a competitive dynamic of a conflictual type has been generated between the various states.⁴²

In states governed by the Democratic Party, or in any case with predominantly progressive electorates, there has been the approval of amendments to their respective Constitutions, preceded by the holding of special referendums aimed at guaranteeing the right to freedom of choice in matters of reproduction and abortion, precisely on a state basis (see Art. I Sec. 1.1 California Const. Added Nov. 8, 2022, by Prop. 1. Res.Ch. 97, 2022. Effective December 21, 2022, Art. I § 22 Ohio Const.).⁴³ This, in such a way as to introduce limits to the discretion of the state legislature in introducing restrictive disciplines of the same law.

On the other hand, in states with a predominantly conservative electorate, amendments to their respective constitutions have been approved which have provided for the express denial of recognition of the right to abortion (see Louisiana, Alabama, Tennessee). An orientation that goes hand in hand with that of the approval of ordinary laws that strongly restrict the

³⁹ For a more in-depth study, see at <https://www.usa.gov/voting-laws>.

⁴⁰ R. Bromley-Trujillo, M.A. Dichi, *op. cit.*, 436, for a complete view <https://fullerproject.org/story/how-major-abortion-laws-compare-state-by-state-map/>.

⁴¹ A. Buratti, *La Corte Suprema e la "disincorporation" del diritto all'aborto*, in *Riv. Dir. Comp.* 3/2023, 1-14. V. Barsotti, *Not only Dobbs v. Jackson. Abortion Laws and Private Enforcement*, in *DPCE Online*, Special issue, *The American Presidency after two years of President Biden*, 2023, 249-260.

⁴² See M.K. Mayer et al., *Dobbs, American Federalism, and State Abortion Policymaking: Restrictive Policies Alongside Expansion of Reproductive Rights*, in 53(3) *Publius: The Journal of Federalism* 378 (2023); R. Michalski, *How to Survive the Culture Wars: Conflict of Laws Post-Dobbs*, in 72 *Am. U. L. Rev.* 949 (2023); R. Toniatti, *La sfida di Dobbs al mainstream constitutionalism e il ruolo degli stati membri: prove di resistenza di una poliarchia*, in *Riv. Biodiritto*, 1/2023, 46 ff.

⁴³ See https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CONS&article=I.

same freedom of choice in reproductive matters. Contrary examples have come from the generally conservative states of Kansas and Kentucky, where referendums have approved protection of freedom of choice.⁴⁴

Presently twenty-one states ban abortion or restrict the procedure earlier in pregnancy than the standard set by *Roe v. Wade*, which governed reproductive rights for nearly half a century.⁴⁵ On the other hand, in states with a predominantly progressive orientation, laws have been approved extending abortion services by health facilities, guaranteeing the use of the abortion pill, as well as the availability and exchange of health information for obtaining abortions (also, as in Minnesota, by allowing the use of Telehealth to provide reproductive services in states with restrictive abortion laws).⁴⁶

In the last two years, the Supreme Court has again chosen to hear and decide two abortion cases, this time putting a halt to further attempts to introduce restrictions on freedom to choose at the federal level, see the decision in *Food and Drug Administration v. Alliance for Hippocratic Medicine*⁴⁷ (unanimous decision of June 13, 2024) upholding recent F.D.A. guidelines for distributing a commonly used abortion pill by mail and telemedicine, finding that the plaintiffs did not have standing to sue. Similarly, in *Moyle v. United States*⁴⁸ of June 27, 2024, the Supreme Court dismissed a case about emergency abortions in Idaho, temporarily allowing women to receive an abortion when their health is at risk. The decision reinstated a lower-court ruling that paused the state's near-total ban on abortion.⁴⁹

4.3 Immigration policies

Another area of strong dualism/conflict of political and administrative orientation between the federal government, states and local authorities (thus involving both the vertical and horizontal dimensions of interinstitutional relations) is that of immigration policies.⁵⁰

From this point of view, in fact, the last two years have seen the accentuation of the political clash between some states, specifically the conservative-oriented southern states, Florida and Texas, and the federal government and/or other states and local administrations with a more

⁴⁴ Read R. Bromley-Trujillo, M. A Dichi, *op. cit.*, 438 – 440.

⁴⁵ <https://supreme.justia.com/cases/federal/us/410/113/>, <https://constitutioncenter.org/the-constitution/supreme-court-case-library/roe-v-wade>, <https://www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade-decision-overturn>.

⁴⁶ <https://pmc.ncbi.nlm.nih.gov/articles/PMC11333862/>.

⁴⁷ https://www.supremecourt.gov/opinions/23pdf/23-235_n7ip.pdf.

⁴⁸ https://www.supremecourt.gov/opinions/23pdf/23-726_6jgm.pdf.

⁴⁹ Source: A. Liptak, A. VanSickle, A. Parlapiano, *The Major Supreme Court Decisions in 2024*, in *The New York Times*, July 2, 2024, <https://www.nytimes.com/interactive/2024/05/09/us/supreme-court-major-cases-2024.html>.

⁵⁰ See R. Scarciglia, *President Biden's Immigration Policies: Between Continuity and Discontinuity*, in *DPCE Online*, Special issue, *The American Presidency after two years of President Biden*, 2023, 177-190.

permissive orientation in relation to border control and illegal immigration.⁵¹

On the federal level, February 2024 saw the failure of congressional negotiations aimed at reaching the approval of a bipartisan bill containing a series of provisions strengthening security at the southern border of the United States and control over illegal immigration (provisions in turn included in the larger emergency spending bill - *The Emergency National Security Supplemental Appropriations Act*).⁵² The same fate befell similar provisions taken up in a bill called the *Border Act*, also rejected by the Senate on May 23, 2024.⁵³

At the same time, the consequent border control initiatives taken by the Federal Administration in the exercise of its prerogatives have also met with strenuous opposition from the Republican-governed southern states. Exemplary in this sense is the attempt by President Biden to relieve the pressure at the border through the expansion of the use of his "parole" authority⁵⁴ in January 2023 to permit up to 30,000 individuals from Cuba, Haiti, Nicaragua, and Venezuela to legally enter the United States each month and to remain here for up to two years.⁵⁵

The new policy provoked the reaction of a coalition of 20 Republican-led states that see it as an abuse of the president's authority and have challenged it in the courts. Furthermore, led by the Republican governors of Florida and Texas, opponents of Biden's approach helped transport these migrants to big cities controlled by Democrats thousands of miles from the border.

On June 18, 2024, the Department of Homeland Security (DHS) announced a key step toward fulfilling President Biden's commitment to promoting family unity in the immigration system.⁵⁶ On Aug. 19, 2024, DHS implemented Keeping Families Together, a process for certain noncitizen

⁵¹ <https://immigrationforum.org/article/where-texas-goes-the-nation-follows-republican-controlled-state-legislatures-and-immigration-enforcement/>.

⁵² The bill would have provided for emergency funding. \$20 billion for DHS, Justice Department, State Department and other agencies, the creation of a new border expulsion authority, the rapid review of asylum cases and more restrictive standards, the maintaining of humanitarian parole, an increase in green cards over five years, protections for children who age out of H-1B status, Guarantees government-funded legal representation for unaccompanied children ages 13 and under who are in removal proceedings. to follow the legislative process <https://www.congress.gov/bill/118th-congress/house-bill/815>.

⁵³ <https://www.congress.gov/bill/118th-congress/senate-bill/4361>.

⁵⁴ Parole is an exercise of DHS's discretionary authority under section 212(d)(5)(A) of the *Immigration and Nationality Act* (INA) to allow certain noncitizen "applicants for admission" to be present in the United States on a temporary, case-by-case basis for urgent humanitarian reasons or significant public benefit.

⁵⁵ Source: W.A. Galston, *The collapse of bipartisan immigration reform: A guide for the perplexed*, in *The Brookings Institution*, February 8, 2024, in <https://www.brookings.edu/articles/the-collapse-of-bipartisan-immigration-reform-a-guide-for-the-perplexed/> which adds that : "This authority does not provide a pathway for parole recipients to remain in the country permanently, and immigration officials may revoke parole status at any time.

⁵⁶ <https://www.dhs.gov/news/2024/06/17/fact-sheet-dhs-announces-new-process-promote-unity-and-stability-families>.

spouses and noncitizen stepchildren of U.S. citizens to request parole in place under existing statutory authority.⁵⁷

With regard to this same policy, 16 Republican-led states filed a lawsuit against the Department of Homeland Security and other Biden administration officials and got a judge's order by the U.S. District Court for the Eastern District of Texas that has extended the temporary injunction restraining implementation of the policy until September 23 to allow for legal briefs and a potential hearing.

Finally, the federal government and the State of Texas have clashed over the state's restriction of immigration across the border with Mexico, implemented on the initiative of Republican Governor Greg Abbott.

These restrictive policies began with "Operation Lone Star," launched in 2021 with the use of the Texas National Guard and other state personnel to conduct border security operations and the deployment of numerous barriers on both land and water⁵⁸. This was followed in 2023 by the enactment of Texas's controversial immigration law, Senate Bill 4 (SB4), which allows Texas police to arrest people for illegally crossing the Mexico border.⁵⁹ The State sued the Biden administration for allegedly violating Article IV, Section 4, of the U.S. Constitution by failing to protect Texas against an "invasion" of undocumented migrants and pledged to continue to use state military and law enforcement personnel to prevent migrant crossings.⁶⁰

The Biden administration immediately challenged the legislation before the federal court, asking the Supreme Court to block and strike down the Texas law, arguing that it violates the federal authority over immigration matters. At present, the implementation of Senate Bill 4 (SB4) has been temporarily blocked by an administrative stay issued by Justice Samuel Alito. So, the effect of the temporary order granted by the Supreme Court Justice is to freeze the legal implementation of the legislation until the lower courts consider the merits of the case against SB4.

4.4 Environmental policies

In the area of environmental policy, the need to strengthen intergovernmental collaboration that led the Biden Presidency to make extensive recourse to normative instruments for the introduction of uniform policies at federal level has been strongly opposed by Republican led States.⁶¹

Of course, environmental policy is a regulatory and administrative matter that requires the federal, state and local governments to work together in the development of national minimum standards to protect

⁵⁷ Source US Citizenship and Immigration Service, in <https://www.uscis.gov/keepingfamilies-together>

⁵⁸ D. Poretz, *Operation Lone Star: The Spectacle of Immigration Federalism*, New York, 2022.

⁵⁹ E. Berman, C. Mirasola, *Texas, Military Federalism, and the Southern Border*, in *Lawfaremedia*, April 8, 2024, <https://www.lawfaremedia.org/article/texas-military-federalism-and-the-southern-border>.

⁶⁰ About <https://casetext.com/case/texas-v-biden-3>.

⁶¹ R. Bromley-Trujillo, P. Nolette, *op. cit.*, 340.

human health and the environment, and on the implementation of any federal mandates regarding those standards, as well as in the implementation of national environmental regulatory programs.⁶²

In our preceding analysis we underlined how the present tendency to political polarization combined with the significant role of subnational governments in environmental regulation has been strongly influencing intergovernmental relations in the implementation of federal environmental programs.⁶³

One of the most recent examples is the Justice40 Initiative, which President Biden launched with executive order 14008, “Tackling the Climate Crisis at Home and Abroad”, 86 Fed. Reg. 7619⁶⁴ (Feb. 1, 2021) providing for the commitment of the federal government to climate action and environmental justice. It was followed in April 2023, by an additional executive order, “Revitalizing Our Nation’s Commitment to Environmental Justice for All,” which reinforced the administration’s commitment to a “whole-of-government approach to environmental justice.”⁶⁵

By this initiative the Federal government has made it a goal that 40 percent of the overall benefits of certain federal investments in climate, clean energy, affordable and sustainable housing, and other investments flow to disadvantaged communities marginalized by underinvestment and overburdened by pollution.⁶⁶

Also in this case, the implementation of the covered programs is meeting the resistance of Republican-led States that have challenged the Biden administration’s environmental justice agenda⁶⁷. The Republican challenge to federal authority has taken the form of refusal to cooperate with

⁶² See M.R. Christiansen, J.C. Macey, *Long Live the Federal Power Act’s Bright Line*, in 134 *Harv. Law Rev.* 1360 (2021).

⁶³ About the modern approach by governments in environmental see G. Grimaldi, *Political Ecology And Federalism Theories, Studies, Institutions*, in *Centro Studi sul Federalismo*, 2012, https://www.csfederalismo.it/images/pdf/2412_Download_PDF_Grimaldi.pdf.

⁶⁴ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

⁶⁵ V.U. Outka, *Federal-State Conflicts Over Environmental Justice*, in *Center for Progressive Reform Online Symposium Series 2023*, 2023, available at SSRN: <https://ssrn.com/abstract=4698688> or <http://dx.doi.org/10.2139/ssrn.4698688>.

⁶⁶ V. Sec. 223 Justice40 Initiative (a) Within 120 days of the date of this order, the Chair of the Council on Environmental Quality, the Director of the Office of Management and Budget, and the National Climate Advisor, in consultation with the Advisory Council, shall jointly publish recommendations on how certain Federal investments might be made toward a goal that 40 percent of the overall benefits flow to disadvantaged communities. The recommendations shall focus on investments in the areas of clean energy and energy efficiency; clean transit; affordable and sustainable housing; training and workforce development; the remediation and reduction of legacy pollution; and the development of critical clean water infrastructure. The recommendations shall reflect existing authorities the agencies may possess for achieving the 40-percent goal as well as recommendations on any legislation needed to achieve the 40-percent goal.

⁶⁷ <https://www.whitehouse.gov/briefing-room/statements-releases/2024/07/24/fact-sheet-biden-harris-administration-delivers-environmental-justice-with-cleaner-air-clean-water-and-healthier-communities/>.

EPA in adopting and implementing environmental policy decisions and challenging its decisions concerning polluting limitations and facilities.⁶⁸

4.5 Other Policy Areas

Further examples of the culture war between States and within them in the field of civil rights involve freedom of education and the right of parents to make choices regarding their children's education.

In some states, such as Florida⁶⁹ and Virginia, measures (laws and executive orders) have been adopted to introduce and/or extend bans on the teaching of "inherently divisive concepts," like Critical Race Theory. In addition, there have been an increasing number of book bans adopted by state and local authorities (school boards) of books that are also considered to be an expression of ideologies and historical reconstructions that encourage the rupture of the country's shared historical memory.⁷⁰

Similarly, opposing trends⁷¹ have been evident in relation to the rights of people belonging to the LGBTQ community. In some states (particularly in the South, measures have been approved limiting the right of gender identity and sexual orientation itself (such as those preventing transgender individuals from receiving gender affirming care); while in other states, led by Democrats (such as Michigan) gender identity and sexual orientation have been added to their anti-discrimination laws.⁷²

⁶⁸ For the examples of the opposition by Louisiana and Alabama see V.U. Outka, *op. cit.*

⁶⁹ See *Stop the Wrongs to Our Kids and Employees Act* (Stop W.O.K.E. Act), also referred to as the Stop W.O.K.E Act, which prohibits teachings of race-based history, in businesses, schools and universities, that makes individuals feel to blame for past racial wrongs.

⁷⁰ For a substantial defence of these measures, see R. Koganzon, *Against Ventriloquizing Children: How Students' Rights Disguise Adult Culture Wars*, in The Yale Law Journal Forum, October 28, 2024, 76 ss., criticizing the partisan motives that underlie the attempt to extend for instrumental reasons constitutional rights to minors, like the "children's freedom to read" and the "students' First Amendment rights". Criticizing this transformation of partisan preference of the adults into rights, the Author assumes that "The problem arises when adults, despairing of enacting their partisan policy preferences by legislative means, try to transform their preferences into someone else's rights". Since *West Virginia State Board of Education v. Barnette* - 319 U.S. 624 (1943) the debate about substantive social values concerning education and childrearing protection can be more honestly and fruitfully understood as political contests between shifting coalitions of adults—parents, school boards, teachers, administrators—seeking an edge in twentieth- and twenty-first-century culture wars. The conclusion is that: "For our purposes, this category of children's rights returns us, more or less, to a vision of education on which Justice Thomas has insisted for the past twenty years: the tradition of democratic government of the schools and the in loco parentis government of students within them" (p. 99).

⁷¹ See J. Taylor and others., *American Federalism: A Blessing and a Curse for Transgender Rights Get access Arrow*, in 54(3) *Publius: The Journal of Federalism* 511 (2024).

⁷² A contrary example is the Supreme Court's decision at 303 *Creative LLC v. Elenis*, 600 U.S. 570 (2023), struck down a law of Colorado prohibiting discrimination against LGBTQ individuals (emended in 2008) for violation of the Free Speech Clause of the First Amendment to the United States Constitution. In a 6–3 decision, the Court found for a website designer, ruling that the state of Colorado cannot compel the designer to

5. Concluding Remarks: Permanent Conflict between Different Ideas and Forms of Federalism

The series of examples described above provide confirmation of a fundamental constant: that the current trend towards the strengthening of ideological polarization and political opposition at all institutional levels is producing a series of effects, not only on the functioning of the presidential form of government but also on the operation of the US federal system.

From this point of view, the general framework of the federalizing process appears to be confirmed even at the end of the second half of the Biden Presidency.⁷³ As is well known, the two years since the 2022 mid-term elections have been a period characterized by the constant need to deal with emergency political/economic contingencies such as those resulting from the pandemic crisis first and then from the wars in Ukraine and the Middle East (with consequent cycles of recession and subsequent high inflation).

It has been seen, therefore, how, on the one hand, the need to resort to emergency regulations and interventions to manage difficult domestic and international political situations has certainly favored greater investments in sectors such as national security and foreign policy, as well as *Welfare*, environmental protection, and education. All of these are sectors in which the federal government tends to centralize the powers of regulation and the implementation of the programs themselves.

On the other hand, it must be acknowledged that federal relations have suffered the impact of the concurrent exasperation of both vertical and horizontal conflict between institutional actors ensconced in political polarization.

This ideological exasperation has encouraged the paralysis of Congress's legislative activity, except for matters crucial for national security and the continued functioning of the State, and it has constantly affected the dynamics of intergovernmental relations, both vertical and horizontal.

Finally, the adverse climate of the culture war has inevitably led to an increase in conflicts between the legislative policy objectives and administrative choices pursued by the federal government and the policy objectives of the various states as well as a parallel increase in attempted resolutions of these conflicts by recourse to federal and state judiciary branches.

There appear to be several effects of this evolution in the system of intergovernmental relations, starting with the theoretical debate regarding the analytical models to be used to classify the different "ideas and forms of

create work that would have been against her Christian faith to make sites for same-sex marriages.

⁷³ For an evaluation of American federalism during the first half of Biden Presidency see also A. Pierini, *The ambivalence of US federalism under the Biden Administration: between the "Third Reconstruction" and new challenges by the States to cooperative federalism in an era of political polarization*, in *DPCE Online*, Special issue, *The American Presidency after two years of President Biden*, 2023, 55-76.

federalism,⁷⁴ and the various centralizing and decentralizing trends in contemporary federal systems.

From this perspective, it must be emphasized that the exasperated polarization of relations between central government and states, and among the states, is leading to an interpretation and application of the federal principle increasingly shaped by political interests and instrumental to the implementation of the opposing objectives of central and state governments. The result is a series of pushes and pulls towards the centralization or decentralization of the activities of regulation and implementation of public policies, from time to time determined by ideological reasons and/or political expediency, rather than by an evaluation of the best allocation of the related functions, in terms of efficiency, cost-effectiveness and better response to the general interests of the communities involved.⁷⁵

At the end of the Biden presidency, therefore, it could be said that the conflictual dialectic between the federal administration and the strenuous Republican opposition expressed both in the Congress and in the various Republican State administrations has reenacted the traditional contraposition of two opposing ideas of the conformation and correct functioning of the American federal system. On one side, the vision advanced by the democratic federal administration aimed at extending the reach of the federal government in the service of a progressive political agenda whose priorities are increased socio-economic equality, prevention of invidious discrimination and the protection of civil and political rights, as well as environmental protection and preservation. In brief, a set of objectives pursued in large part by way of grand-scale infrastructure programs and

⁷⁴ D.J. Elazar, *Exploring Federalism*, Tuscaloosa, 1987, it. transl. *Idee e forme di federalismo*, Milano, 1995, 162 ff.; Id., *Federalism*, in *Encyclopædia Britannica*, 9° vol., Chicago, 1978, *ad vocem*, 202).

⁷⁵ For the purpose of developing a descriptive theoretical framework of these current trends, political science doctrine has appropriately come up with definitions such as “opportunistic federalism” (see, T. Conlan, *From cooperative to opportunistic federalism: Reflections on the half century anniversary of the commission on intergovernmental relations*, in 66(5) *Publ. Adm. Rev.* 633 (2006). More recently, see T. Conlan, P.L. Posner, *American federalism in an era of partisan polarization: The intergovernmental paradox of Obama’s “new nationalism”*, in 46(3) *Publius* 281 (2016); J.H. Adler, *The Administrative Presidency Encounters Opportunistic Federalism*, 44 *Reg.* 59 (2021)) or “kaleidoscopic federalism” (T.A. Birkland, K. Taylor, D.A. Crow, R. De Leo, *Governing in a Polarized Era: Federalism and the Response of U.S. State and Federal Governments to the COVID-19 Pandemic*, in 51(4) *Publius* 650 (2021), and finally “Polarized and Punitive Intergovernmental Relations” (D.M. Konisky, P. Nolette, *The State of American Federalism 2021–2022: Federal Courts, State Legislatures, and the Conservative Turn in the Law*, in 52(3) *Publius* 353 (2022)). These definitions are aimed at underlining the absence of a single prevailing interpretation of the federal principle (in a dual or cooperative sense) and the consequent fragmentation of the choices adopted in the conformation of relations between the federal government and the states (as from time to time characterized by polarization, inaction, indecisiveness, convolution, and collaboration”). V.E.J. Benton, *Intergovernmental relations in the early twenty-first century: Lingering images of earlier phases and emergence of a new phase*, in C.W. Stenberg, D.K. Hamilton (ed), *Intergovernmental relations in transition: Reflections and directions*, New York, 2018, 15–36; Id. *Challenges to federalism and intergovernmental relations and takeaways amid the COVID-19 experience*, in 50(6-7) *Am. Rev. Public Adm.* 536 (2020).

criticized by conservative Think Tanks as “whole government approach”.⁷⁶ This agenda has been reasonable though partially successful in achieving approval and implementation, first with important legislative measures approved during the first half of the Biden term during the pandemic emergency and by resort to administrative instruments such as executive orders, regulatory actions, and grants. A key factor in the Biden administration’s success in actuating its program has been its appeal to an idea of federalism founded on the renewal and reinforcement of cooperative structure of the system of intergovernmental relations. This, firstly by the important legislative measures approved during the first two years of the Presidency in order to counter the pandemic emergency and then relying mainly on administrative instruments such as executive orders, regulatory actions, and grants. In this context, it has been also essential to recall the idea of federalism based on the revival and strengthening of the cooperative structure of the system of intergovernmental relations:⁷⁷ a model based on the grants’ system and the necessary collaboration between the Federal Government, the States and Local Authorities in the co-administration of federal programs.

The opposite view, championed by the Republican led State administrations and generally by the most conservative wing of the GOP, has as its central feature an idea of federalism instrumental to the enhancement of the nexus between the protection of individual liberty and a competitive, rather than cooperative, political order.

In sum, developments in recent years have shown a growing tendency towards the advancement, on one side, of a “communitarian” vision of federalism as a system that allows for the expression of the different traditions and cultural identities prevailing in the various member states; and on the other side, towards the promotion of a competitive federalism,⁷⁸ both a vertically (centro><peeriphery) and horizontally (state><state).

As regards horizontal competition between the states, a prime example is the dialective between red (Republican) states, such as Texas and Florida,

⁷⁶ D. Ditch, *Funding Leftism, Making Power Grabs: The Biden Administration’s Bureaucratic Radicalism*, in *The Heritage Foundation*, 3824/2024, <https://report.heritage.org/bg3824>. For a critic of the rise of federal administrative state with its tendency to the encroachment on state and local affairs, and the purpose to restore the constitutional constraints on government that safeguard liberty, see D. Katz, *Federalism in Crisis: Urgent Action Required to Preserve Self-Government*, in *The Heritage Foundation*, Special Report, 248/2021, <http://report.heritage.org/sr248>.

⁷⁷ On the general model of cooperative federalism, see the famous essays by E. Corwin, *The Passing of Dual Federalism*, in A.T. Mason, G. Garvey (eds), *American Constitutional History. Essays by E.S. Corwin*, New York, 1964, and M. Grodzins, *Centralization and Decentralization in the American Federal System*, in R. Goldwin (cur), *A Nation of States*, Chicago, 1961; Id., *The American System: a New View of Government in the United States*, Chicago, 1966.

⁷⁸ For the theoretical bases of the competitive federalism model, see the numerous studies of economists, such as Y. Qian, B.R. Weingast, *Federalism as a Commitment to Preserving Market Incentives*, in 11(4) *J. Ec. Persp.* 83 (1997); A. Breton, *Towards a Theory of Competitive Federalism*, in 3(1-2) *Eur. J. Polit. Econ.* 263 (1987); Id., *Federalism and Decentralization, Ownership Rights and the Superiority of Federalism*, in 30(2) *Publius* 1 (2000); W.E. Oates, *The New Federalism: An Economist’s View*, in 2(2) *Cato J.* 473 (1982); P. Salmon, *Decentralization as an Incentive Scheme*, in 3(2) *Oxf. Rev. Econ. Policy* 24 (1978).

whose administrations have earned a reputation as promoters of a private business model with reduced welfare benefits and lower taxes coupled with a permissive regulatory approach (for example, on environmental policy). The effect of the implementation of this model has been to favour a migration of capital and labor from the “Blue” states, led by California, New York, Illinois, and Massachusetts, which are known for their reference for a social-democratic model.⁷⁹ We have also seen how similar competitive interstate dynamics are destined to grow more intense by effect on the opposing choices made by the various States in essential policy areas such as migration,⁸⁰ social welfare, and civil and political rights.

6. Main Institutional Repercussions

Based on the experience of the by now four years of the Biden Administration, it seems clear that the conflicts between the to opposing views of federalism outlined above can exert a strong influence on the entire system of intergovernmental relations in so far as the conflicts involve three essential elements of the federal system: so-called legislative federalism (the division of legislative powers between the central government and the States), jurisdictional federalism (the double level of protection for the civil rights of citizens), and the double level division of administrative functions.

In view of the limited scope of this article, our concluding observations will focus on three questions of a general nature.

First, it must be emphasized that the recent jurisprudence of the Supreme Court has played a fundamental role in restricting the scope and impact of federal government intervention, in the pursuit of a more stringent application of the principle of the separation of powers between the branches of the central government and between the central government and the States. As we have seen, the role of the judicial branch has been increasingly decisive in light of the growing vertical and horizontal polarization that has led inevitably to a jurisdictionalization of those same institutional conflicts

In effect, during the last year of the Biden presidency the jurisprudence of the Supreme Court has succeeded in expanding judicial control over the exercise of regulatory powers on the part of federal agencies in the name of anchoring to more precise parameters of legality the Congressional delegation of powers to those agencies, and, in so doing, limiting agency discretion in the exercise of their powers. It is from this perspective that we must consider the series of judgments by the federal courts, criticizing the previous orientation of self-restraint in the judicial supervision of the

⁷⁹ M. Greve, *The State of Competitive Federalism*, in *AIER*, November 07, 2024, <https://aier.org/article/the-state-of-competitive-federalism/>.

⁸⁰ C.M. Swain, V.M. Yetter, *Federalism and the Politics of Immigration Reform*, in A. Jenkins, S.M. Milkis (eds), *The Politics of Major Policy Reform in Postwar America*, New York, 2014.

exercise of regulatory powers by federal agencies, as expressed in the Chevron decision.⁸¹

In its recent jurisprudence, in fact, the Supreme Court, after adopting a more penetrating review of the same powers, by enforcing the so-called "Major Questions Doctrine" (this doctrine imposes a limit on the discretionary power of federal agencies to assume "decisions of vast economic and political significance") has finally arrived at the reversal of the so-called Chevron doctrine,⁸² with its recent decision in *Loper Bright Enterprises v. Raimondo*.⁸³

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

However, considering the federal administrative state, the permanent cooperative structure of the system of federal relations, resulting from the constant overlapping of functions of regulation, administration and financing of public programs and policies exercised by the different levels of government involved (central, state, local), necessitates an ongoing strict cooperation among federal administrative agencies and state legislatures.⁸⁴

⁸¹ *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). In this regard, it was appropriately observed that "In the United States, the regulatory function of authorities (rulemaking) and that seeking the adoption of individual measures (adjudication) are subject to a unitary discipline, therefore the limits of judicial review are not normally analyzed in relation to the type of activity carried out. For a long time, U.S. courts have taken a remarkable deferential approach to acts issued by U.S. courts. independent agencies, carrying out a control of minimum intensity and limited to the profiles of illegality or strict reasonableness, without ever substituting its own judgment for that of the agencies. The approach of deference, exemplified by the well-known judgment of the Supreme Court in the Chevron case, presupposes that the legislature has entirely delegated to the authorities, endowed with a wide degree of independence and technical specialization in the matters within their competence, the decision of all cases included in the matters falling within their sphere of action, so that the authorities would always be in a privileged (and unquestionable) position, with respect to the courts, with regard to the interpretation and application of the rules conferring the powers of rulemaking" (E. d'Orlando, *Politica e tecnica nella produzione normativa*, in *DPCE Online*, 2/2022, 396).

⁸² *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984), that sanctioned an approach of considerable deference on the part of the courts for acts emanating from *independent agencies*, in that it held in favor of minimal court review limited to establishing a rational basis for the administrative action without ever substituting the court's judgment for that of the agencies, endowed with ample independence and specialized technical expertise in the material of their competence.

⁸³ 603 U.S. ____ (2024), according to the Court the *Administrative Procedure Act* requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous.

⁸⁴ A.S. Zimmerman, *Ghostwriting Federalism*, in 133 *Yale L. J.* 1802 (2024).

Furthermore, and here we come to the second of our concluding observations, the new “resurgence of the States”⁸⁵ in the jurisprudence of the Supreme Court has opened the way to a series of important modifications in the general relationship between federalism and democracy.

The reference in this case is to the considerable broadening of the discretion left to State legislatures in regard to election procedures, where the Supreme Court has validated, with few exceptions, a series of state laws aimed at making election procedures more rigid (with the effect of restricting access to voting) and reducing the control of the federal government over the redistricting of Congressional voting districts (in so far as such measures have again been devolved to the State legislatures). This tendency, which goes hand in hand with the previously discussed movement toward the imposition of State-based majoritarian control over the recognition and protection (or denial of protection) of fundamental civil rights (see reproductive rights).

This judicially sanctioned resurgence of State powers has been criticized as a utilization of the structures and rules of procedural democracy to weaken and finally topple the democratic foundation of the Constitutional order by favoring one political adversary over the other.⁸⁶ Hence the objective of strengthening the use of the federal principle but, at the same time, moving it in a direction contrary to that inspired by constitutional progressivism and theorized by Judge Brandeis in the 30s of the twentieth century,⁸⁷ namely, the vision of States as “laboratories of democracy” and institutional innovation, able to guarantee the experimentation at a decentralized level of instruments and programs for the protection of rights intended, then, through a circulation of models, to be transposed at the federal level.

Instead, it now appears to be legitimate to speak of “democratic erosion” and the consequent weakening of the “myth of federalism” and /or the “demythification” of the principle itself in its traditional configuration, dating back to the Founding Fathers, for whom “federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”⁸⁸

Finally, it seems right to highlight how, as always, the overall accentuation of polarization and political conflict in the two-fold dimension of the horizontal relationships between the Constitutional branches of the federal government and vertical dimension of the relations between the

⁸⁵ A. O’M. Bowman, R. C. Kearney, *The Resurgence of States*, Cambridge, 1986.

⁸⁶ C. Shapiro, *Democratic Federalism and the Supreme Court: Keynote Address at the 2023 Ira C. Rothgerber Jr. Conference*, in 95(2) *Un. Colorado L. Rev.* 359 (2024); J.M. Grumbach, *Laboratories against Democracy* (subtitle: How National Parties Transformed State Politics), Princeton, 2022; A. Acharya, M. Blackwell, M. Sen, *Deep Roots: How Slavery Still Shapes Southern Politics*, Princeton, 2018.

⁸⁷ One famous citation is the passage from the dissenting opinion of Justice Brandeis in the case of *New York Ice Co. v. Liebermann*, 285 U.S. 262, 311 (1932) which emphasized that «it as one of the happy accidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country».

⁸⁸ *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting). See *New York v. United States*, 505 U.S. 144, 181 (1992); *Bond v. United States*, 564 U.S. 211, 221 (2011).

levels of government, becomes a factor of instability capable of affecting the profound functional bonds between federalism and presidentialism as the fundamental structural principles of the American system of government. All of this has inevitable repercussions for the overall evaluation of the current functioning of the institutional framework introduced by the Constitution of 1787.

Here, therefore, the great theoretical debate returns to the forefront, now more than ever destined to be reopened with the upcoming second presidency of Donald Trump⁸⁹, which will feature the contraposition of those who praise the American system as a “masterpeice of Consitutional engineering”⁹⁰ and those who, on the contrary, emphasize the great the inherent weaknesses of presidential systems (in so far as they lack adequate mechanisms of institutional collaboration able to reduce the risks of conflict, up to the point of paralysis – deadlock – deriving from the dualism in the very form of government) and subscribe to the observation according to which “the American system works, or has worked, despite rather than thanks to its Constitution.”⁹¹

In effect, in the same analyses, the examination of the combination, as it was shaped by the Constitution of 1787, between a system of government founded on “separate institutions competing for shared powers,”⁹² (achieving in this way a more rigid separation of powers with respect to the Parliamentary system developed in England, tempered by the application of *checks and balances*) and the concurrent vertical division of powers, achieved through the application of the federal principle, leads to opposite conclusions concerning the comparative evaluation of such a model of organization of the State compared to other systems historically developed in other institutional contexts.

On the one hand, precisely on the basis of the unitary consideration of the fundamental institutional profiles mentioned above, there are those⁹³

⁸⁹ Recalled by C. Martinelli, *Il ruolo del Parlamento nei sistemi presidenziali maturi*, in R. Tarchi (cur), *Parlamenti e Parlamentarismo nel Diritto Comparato, Atti del V Convegno Biennale dell'Associazione di Diritto Pubblico Comparato ed Europeo, Roma Tre – 25 e 26 ottobre 2018*, in *Itinerari della Comparazione – Quaderni della Rivista Dpceonline*, Milano, 2020, 35 ff.

⁹⁰ G. Bognetti, *Lo spirito del costituzionalismo americano. I. La Costituzione liberale*, Torino, 1998, 29.

⁹¹ G. Sartori, *Ingegneria costituzionale comparata*, Bologna, 1995, 103.

⁹² 16 Cfr. C.O. Jones, *The Separated Presidency: Making it Work in Contemporary Politics*, in A. King (ed), *The New American Political System*, Washington D.C., 1990, 3.

⁹³ S.G. Calabresi, *Does Institutional Design Make a Difference?*, in 109(3) *Nw. U. L. Rev.* 578 (2015). On the one hand, in fact, the federal articulation of the legal system appears to be decisive in guaranteeing at the same time the establishment of a strong central government capable of better managing the fundamental functions in the field of foreign policy, defence and security, as well as those necessary for the creation and preservation of a single market (moreover destined to extend through the free trade area created through the NAFTA Treaty) and, on the other hand, enhancing the role and autonomy, first and foremost constitutional, of the States, while at the same time promoting the freedom of the latter to experiment and compete in terms of spaces for democratic participation, the protection of rights, and the management of fiscal, economic and social policies. On the other hand, again with a view to strengthening a strong and at the same time decentralized government such as the United States,

who have supported and relaunched the thesis of the primacy of the US constitution in terms of delineation of the model of organization of the State, identifying mainly in the federal structure of the latter and in the division of powers typical of the presidential form of government, the two key structural principles capable of determining those effects of stability and institutional functionality at the basis of the same positive evaluation of the institutional structure outlined by the Founding Fathers.

On the other side are those who, even before Trump's rise to power, underlined the risks deriving from the "tendency to extremism" and political polarization, as accentuated by the "ever more polarized traits of the electorate, where highly mobilized activists on the left and right flank the relatively passive electorate in the center" (with a final option for German parliamentarism).⁹⁴ These critics also emphasize the dangers for the democratic system deriving from the combination of these above-described effects, that is, on the one hand, the renewed tendency of the States to restrict access to political rights and to distort political representation by gerrymandering while at the same time restricting the recognition and protection of civil rights, and, on the other hand, the assumption of the federal Presidency by a populist leader not counterbalanced by a weak and highly divided Congress, and therefore capable of eroding the system of checks and balances essential to the conservation of the democratic foundations of the institutional arrangement.

It seems safe to say, therefore, that all the aforesaid risks will inevitably continue to manifest themselves, in ways even more pervasive, during the next four years.

further elements characterizing the model of division, this time horizontal, of powers, take on importance, as they are aimed at introducing limits and counterweights of an institutional nature with respect to the role and powers of the President. In this regard, the definition of "Constrained Presidentialism" has been used, precisely in contrast to the tendencies towards the excessive power of Presidents manifested in other systems characterized precisely by a hyper-presidential form of government (as recently in Turkey) or in which there has been real degeneration induced by the advent of presidential regimes (as happened in South America in the second half of the twentieth century).

⁹⁴ V.B. Ackerman, *Tutti i poteri del Presidente*, Bologna, 2012, 32-33. Or Id., *The Decline and Fall of the American Republic*, Cambridge (Mass.)- London, 2010. Along the same lines see S. Levinson, *Our Undemocratic Constitution*, Oxford, 2006, 79 ff., Report by V. Williamson, *Understanding Democratic Decline in the United States*, Brookings, October 17, 2023, <https://www.brookings.edu/articles/understanding-democratic-decline-in-the-united-states/> according to which: "The United States is experiencing two major forms of democratic erosion in its governing institutions:

Strategic manipulation of elections. Distinct from "voter fraud," which is almost non-existent in the United States, election manipulation has become increasingly common and increasingly extreme. Examples include election procedures that make it harder to vote (like inadequate polling facilities) or that reduce the opposing party's representation (like gerrymandering).

Executive aggrandizement. Even a legitimately elected leader can undermine democracy if they eliminate governmental "checks and balances" or consolidate power in unaccountable institutions. The United States has seen substantial expansions of executive power and serious efforts to erode the independence of the civil service. In addition, there are serious questions about the impartiality of the judiciary" (p. 2-3).

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