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### THE ITALIAN WELFARE STATE IN A TIME OF CRISIS: A FOCUS ON ITALIAN HEALTH CARE ILLUSTRATING DIFFERENCES AND SIMILARITIES BETWEEN ITALY AND THE U.S.

#### Introduction

After World War II, many European countries have tried to put into effect their own constitutions and as a result, their own welfare states.<sup>1</sup> They invested and spent a significant amount of their national economic resources to guarantee social rights<sup>2</sup> to all citizens,<sup>3</sup> health care, retirement plans, and education. In order to guarantee the aforementioned rights, politicians decided to take on a huge amount of debt,<sup>4</sup> regardless of the fact that sooner or later it would be

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<sup>1</sup> Social rights' theoretical origins date back to the 1793 French Constitution. ANGELO MATTIONI & FRANCO FARDELLA, *TEORIA GENERALE DELLO STATO E DELLA COSTITUZIONE* 32-39 (2002). For a historical overview of socialist ideas, see e.g., GERHARD A. RITTER, *STORIA DELLO STATO SOCIALE* (2003); MAURIZIO FIORAVANTI, *COSTITUZIONALISMO. PERCORSI DELLA STORIA E TENDENZE ATTUALI* 116-23 (2009); Antonio D'ALOIA, *EGUAGLIANZA SOSTANZIALE E DIRITTO DISEGUALE* 39 (2002); See generally Silvia A. Frego Luppi, *SERVIZI SOCIALI E DIRITTI DELLA PERSONA* (2004).

<sup>2</sup> The rationale of social rights is based on the fact that poor people do not possess equivalent chances to succeed as wealthy people do. This is why the State has to play an active role in limiting the gap. See, e.g., MAURIZIO FIORAVANTI, *COSTITUZIONALISMO. PERCORSI DELLA STORIA E TENDENZE ATTUALI* 123-33 (2009); CARMELA SALAZAR, *DAL RICONOSCIMENTO ALLA GARANZIA DEI DIRITTI SOCIALI* 9-31 (2000). Similarly, Paul Starr rephrased the above mentioned concept by saying: "a right to the requirements of human development has no real meaning unless people recognize obligations to one another, mutually and through government, to ensure that the condition exists that make it possible for every person to have the opportunity to success in life." PAUL STARR, *REMEDY AND REACTION: THE PECULIAR AMERICAN STRUGGLE OVER HEALTH CARE REFORM* 248 (2011).

<sup>3</sup> See, e.g., RITA PILIA, *I DIRITTI SOCIALI* 13-15 (2005) (discussing the first implementation of social rights following the enactment of the 1919 Weimar Constitution).

<sup>4</sup> According to Thomas Jefferson, future generations are not responsible for the debt taken on by previous generations. James Madison begs to disagree. Taking on debt can be reasonable, as there are targets that can be

difficult to control.<sup>5</sup> On the other side of the world, the U.S. fears socialist programs.<sup>6</sup> However, this did not exempt the U.S. from having one of the largest public debts in the world.

This article not only tries to explore the Italian welfare state by focusing attention on the Italian health care system, but also proposes interesting discussion points from a comparative perspective.<sup>7</sup> On one side, Italy represents a classic socialist country. On the other, the U.S. is very capitalistic.<sup>8</sup> The 2008 economic crisis<sup>9</sup> imposed the need to reflect on the sustainability of the welfare state and its future development.<sup>10</sup>

Part I deals solely with Italy. It provides a history and a description of the Italian health care system. After that, it focuses on the constitutional reforms of 2001 and 2012.<sup>11</sup> Part II highlights differences and similarities between the U.S. and Italian welfare states. Starting with the Affordable Care Act, it subsequently analyzes the U.S. and Italian constitutional settings. Last of all, the article concludes by underlining the main points previously investigated. Both Italy and

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achieved only on a long-term plan where more than one generation is involved. Roberto Bifulco, *Il pareggio di bilancio in una prospettiva comparata: un confronto tra Italia e Germania*, IL FILANGIERI. COSTITUZIONE E PAREGGIO DI BILANCIO 249 (Vincenzo Lippolis ed. .,2011); see also AMLETO CATTARIN, DALLA SERVITÙ ALLA SOVRANITÀ. NO TAXATION WITHOUT REPRESENTATION 181 (2009).

<sup>5</sup> In 1972, James O'Connor pointed out this issue. In a very forward-looking passage, he also highlighted how politicians, regardless of a budget surplus, would cut taxes or raise expenditures rather than decreasing the public debt. JAMES O'CONNOR, LA CRISI FISCALE DELLO STATO 219 (1982); see also GIOVANNI BOGNETTI, COSTITUZIONE E BILANCIO DELLO STATO. IL PROBLEMA DELLE SPESE IN DEFICIT 24 (Fulco Lancaster ed. .,2008).

<sup>6</sup> For example, President Ronald Reagan thought that Medicare "was part of a larger plot to bring socialism to America, all the more dangerous because of its seeming humanitarian rationale. Soon the government would be telling doctors where to practice. If Americans didn't rise up against "socialized medicine" and the Medicare bill, Reagan warned, "one of these days you and I are going to spend our sunset years telling our children, and our children's children, what it once was like in America when men were free." PAUL STARR, REMEDY AND REACTION: THE PECULIAR AMERICAN STRUGGLE OVER HEALTH CARE REFORM 45 (2011).

<sup>7</sup> Paolo Grossi, justice of the Italian Constitutional Court, spoke highly of comparative studies. Learning from differences leads to a greater enrichment. PAOLO GROSSI, MITOLOGIE GIURIDICHE DELLA MODERNITÀ 8-9 (2005).

<sup>8</sup> See, e.g., MILTON FRIEDMAN, CAPITALISM AND FREEDOM (2002). The 2008 crisis, however, led Richard A. Posner, and eminent supporter of capitalism, to revisit his views. RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009). Contrary to views typically held in the U.S., Europeans tend to consider capitalist ideas as threats to the delivery of social rights. See, e.g., Gianni FERRARA, SULLA RAPPRESENTANZA POLITICA. NOTE DI FINE SECOLO 53-54 (1998).

<sup>9</sup> See, e.g., GUIDO ROSSI, CAPITALISMO OPACO 2005; ALESSANDRO RONCAGLIA, ECONOMISTI CHE SBAGLIANO. LE RADICI CULTURALI DELLA CRISI (2010); VALERIO CASTRONOVO, IL CAPITALISMO IBRIDO. SAGGIO SUL MONDO MULTIPOLARE (2011); JOSEPH EUGENE STIGLITZ, BANCAROTTA. L'ECONOMIA GLOBALE IN CADUTA LIBERA (2010).

<sup>10</sup> See e.g., Claus Offe, *Alcune contraddizioni del moderno Stato assistenziale*, *Critica dello Stato sociale* (Antonio Baldassarre & Augusto Antonio Cervardi eds. .,1982); ARMANDO VITTORIA, IL WELFARE OLTRE LO STATO (2012); Zygmunt Bauman, *Fiducia e paura nella città* (2005); Enzo Bartocci, *Quale Stato sociale per il XXI secolo?*, LO STATO SOCIALE IN ITALIA. RAPPORTO ANNUALE? 276 (1997).

<sup>11</sup> For a detailed overview of the Italian constitutional setting, see ROBERTO BIN & GIOVANNI PITRUZZELLA, DIRITTO COSTITUZIONALE (2012); PAOLO CARETTI & UGO DE SIERVO, ISTITUZIONI DI DIRITTO PUBBLICO (2010); CARLO ROSSANO, MANUALE DI DIRITTO PUBBLICO (2012); ANTONIO BALDASSARRE, DIRITTI DELLA PERSONA E VALORI COSTITUZIONALI (1997).

the U.S are culturally very different.<sup>12</sup> As a consequence, their approaches to the challenges brought on by the economic crisis vary to some extent.

### **I. Italy**

The Italian budgetary policies marked a major turning point in the 1970s. Socialist ideas became more and more popular, and between the 1970s and 1992, the debt-to-GDP ratio went from 40.5% to roughly 108%.<sup>13</sup> Former President of the Italian Republic Francesco Cossiga claimed politicians never took into account how much money they were spending.<sup>14</sup> No one truly believed this matter was worthy of consideration. The result was easy to predict: Italian public debt recently exceeded 2,166.3 billion euros.<sup>15</sup>

An enormous public debt, coupled with the economic crisis, forces Italy to review the welfare state and government funding systems, which must be made compatible with the resources still available. As a matter of fact, Italy is progressively reducing the resources devoted to health care. The Legislature was forced to enact cost-cutting measures such as co-payments<sup>16</sup> and similar taxes. Universal coverage no longer guarantees free health care to every Italian citizen. The Italian government now offers just a few selected health treatments free of charge to specific categories of the population.<sup>17</sup>

This problem is one of the most urgent for Italy. Indeed, Italy's Parliament has changed the Italian Constitution ("IC") with the Legge costituzionale 20 aprile 2012, n.1 in order to ensure the sustainability of the public finances and compliance with the Treaty on Stability, Coordination

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<sup>12</sup> For a comparison between a very socialist country like Sweden and a capitalistic country such as the U.S., see STEVEN KELMAN, *REGULATING AMERICA, REGULATING SWEDEN: A COMPARATIVE STUDY OCCUPATIONAL SAFETY AND HEALTH POLICY* (1981).

<sup>13</sup> ALESSANDRO SANTORO, *L'EVASIONE FISCALE. QUANTO, COME E PERCHÉ* 27 (2010). The U.S. public debt is extremely high as well. However, there is a substantial difference when it is compared to EU countries'. If the 15 members of the EU in 1974 are considered, before the formerly communist countries joined the Union, their GDP to gross world product (GWP) ratio was 36%. In 2011 that number decreased to 26%, and it is expected to decline to a mere 15% by 2020. With respect to the U.S., throughout this period the ratio was and is expected to be fairly stable at 26%. "Europe is falling further and further behind, sustaining its living standards by borrowing, dwindling as a force in the world." Daniel Hannan, *Why America Must Not Follow Europe*, 19 *ENCOUNTER BROADSIDE* 17 (2011). This prediction is probably true, which is why Italy needs a change in order to stop its recession. The longer politicians wait to dramatically reform the country, the harder it will be to get back on the right track.

<sup>14</sup> Gian Antonio Stella,<sup>14</sup> *Interview by Gian Antonio Stella with Francesco Cossiga*, *CORRIERE DELLA SERA MAGAZINE* (Jan. 29, 2009).

<sup>15</sup> Finanza e Mercati, *Bankitalia: il debito pubblico vola a maggio e tocca il record di 2.166 miliardi*, *IL SOLE 24 ORE* (July 14, 2014), <http://www.ilsole24ore.com/art/finanza-e-mercati/2014-07-14/bankitalia-debito-pubblico-vola-maggio-e-tocca-record-2166-miliardi-103158.shtml?uuid=ABOC2XaB>.

<sup>16</sup> Copayments aim to discourage citizens from requesting medical care too often. However, recently these sums rose above a reasonable threshold, endangering the poor's right to healthcare. For further details regarding copayments, see Corte Cost., 18 luglio 2012, n. 309.

<sup>17</sup> According to the CENSIS, a major Italian research institute founded in 1964, the quality of the services provided by Italian welfare state is dropping dramatically. More importantly, a survey shows that Italians expect the situation to get much worse. CENSIS, *GLI SCENARI DEL WELFARE. LE NUOVE TUTELE OLTRE LA CRISI. SINTESI DEI PRINCIPALI RISULTATI* (2012); see also Angela Testi, *Sostenibilità economica e tenuta unitaria del Ssn*, *TRENT'ANNI DI SERVIZIO SANITARIO NAZIONALE. UN CONFRONTO INTERDISCIPLINARE* 421 (Renato Balduzzi ed. 2009); Carlo Carboni, *I nuovi segnali, dove la vita è meno peggio*, *IL SOLE 24 ORE*, Nov. 26, 2012, at 1.

and Governance in the Economic and Monetary Union, also called the Fiscal Compact.<sup>18</sup> However, even if the Italian Constitutional Court has not decided upon any challenge regarding the amended Article 81, a former President of the Italian Constitutional Court,<sup>19</sup> Ugo De Siervo, declared that the latest amendment of the IC might not change the situation much. De Siervo said the Italian government will most likely be able to breach the principle of the balanced budget,<sup>20</sup> as it has done so in the past.<sup>21</sup>

Despite the evident lack of resources, several Italian scholars sustain the idea of non-“Cost of Rights”. In other words, constitutional rights are not conditioned on the available economic resources.<sup>22</sup> It is worthwhile to cite “The Cost of Rights,” taken from the title of a book written by Professor Cass Robert Sunstein and Professor Stephen Holmes, as they further elaborate on the idea:

Although the costliness of rights should be a truism, it sounds instead like a paradox, an offence to polite manners, or perhaps even a threat to the preservation of rights. To ascertain that a right has costs is to confess that we have to give something up in order to acquire or secure it. To ignore costs is to leave painful tradeoffs conveniently out of the picture.<sup>23</sup>

Sunstein and Holmes clearly point out that a welfare state implies high costs,<sup>24</sup> and they outline how these costs are closely linked to tax incomes<sup>25</sup> (i.e. “Why liberty depends on taxes”<sup>26</sup>).

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<sup>18</sup> See, e.g., IL FILANGIERI, COSTITUZIONE E PAREGGIO DI BILANCIO (2011). With respect to this constitutional reform, it is important to note that the Parliament passed the Legge costituzionale 20 aprile 2012, n. 1 under strong pressure exerted by a non-elected government led by Mario Monti.

<sup>19</sup> For a basic understanding of the structure of the Italian Constitutional Court, see ANTONIO RUGGERI & ANTONINO SPADARO, LINEAMENTI DI GIUSTIZIA COSTITUZIONALE (2009); ELENA MALFATTI ET AL., GIUSTIZIA COSTITUZIONALE (2011).

<sup>20</sup> Economists have been arguing for decades on whether a balanced budget should be ensured or not. On one hand, classical economists tend to agree with this idea. On the other, Keynesians see the need for active monetary and fiscal policies. Paul Krugman, an eminent supporter of Keynesianism, recently wrote that the debt crisis has been overemphasized. Paul Krugman, *The Fiscal Frizzle. An Imaginary Budget and Debt Crisis*, N.Y. Times, July 20, 2014, [http://www.nytimes.com/2014/07/21/opinion/Paul-Krugman-An-Imaginary-Budget-and-Debt-Crisis.html?partner=rssnyt&emc=rss&\\_r=1](http://www.nytimes.com/2014/07/21/opinion/Paul-Krugman-An-Imaginary-Budget-and-Debt-Crisis.html?partner=rssnyt&emc=rss&_r=1).

<sup>21</sup> Ugo De Siervo, Professor of Constitutional Justice, Catholic University of the Sacred Heart in Milan, Italy, Ugo De Siervo’s Lecture (2012).

<sup>22</sup> Positive rights would be merely conditioned on the intervention of the Legislature. See OMAR CHESSA, LA MISURA MINIMA ESSENZIALE DEI DIRITTI SOCIALI: PROBLEMI E IMPLICAZIONI DI UN DIFFICILE BILANCIAMENTO 1177 (Giur. cost., 1998); see also PAOLO CARETTI, I DIRITTI FONDAMENTALI 489-92 (2011); Stefano Rodotà, IL DIRITTO DI AVERE DIRITTI (2012); Michele Ainis, *I soggetti deboli nella giurisprudenza costituzionale*, 30 POL. DIR. 25, (1999); CARLO COLAPIETRO, LA GIURISPRUDENZA COSTITUZIONALE NELLA CRISI DELLO STATO SOCIALE, LA GIURISPRUDENZA COSTITUZIONALE NELLA CRISI DELLO STATO SOCIALE 370-84 (1996). Contrarily, some scholars began paying attention to the economic resources needed to deliver rights. See DONATO MESSINEO, LA GARANZIA DEL “CONTENUTO ESSENZIALE” DEI DIRITTI FONDAMENTALI. DALLA TUTELA DELLA DIGNITÀ UMANA AI LIVELLI ESSENZIALI DELLE PRESTAZIONI (2012).

<sup>23</sup> STEPHEN HOLMES & CASS ROBERT SUNSTEIN, THE COST RIGHTS: WHY LIBERTY DEPENDS ON TAXES 24 (2000).

<sup>24</sup> Several European countries, such as Italy, have mostly financed their welfare states by taking on debt. Terenzio Cozzi, referring to the ideas proposed by John Maynard Keynes, pointed out how Keynes was very concerned of expansionary monetary policies funding consumption expenditures rather than investment measures. Terenzio Cozzi, *Introduzione a J.M. KEYNES, Teoria generale dell’occupazione, dell’interesse e della moneta*, Il Sole 24 Ore 10 (2010).

### **A. The right to health care**

Article 32 Paragraph 1 of the IC states: “The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent.” This constitutional article is the only one that defines a right as fundamental, due to the fact that the fathers of the IC decided to give particular importance to health care. They believed it represented the main core of a socialist country.<sup>27</sup> The first part of this article will provide a general synopsis of the history and structure of Italian health care.<sup>28</sup> In order to understand where Italy is headed, it is crucial to understand the basis of its health care service.

### **B. A historical overview of the Italian health care system**

During the ‘70s, the Italian Legislature decided to powerfully implement the welfare state. At this time, a large share of the Italian population was in favor of the socialist ideas that were putting pressure on politicians, who ultimately enacted the Legge 27 luglio 1967, n. 685. Regardless of the law’s genuine intentions, this law was strongly criticized by some scholars and politicians. Former Prime Minister Amintore Fanfani described the reform as “a book of dreams

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<sup>25</sup> It is also important to note that tax income is strictly connected to the gross domestic product. The more a state produces, the higher the number of available resources will be. More precisely, corporations represent a framework for taking together people who pursue profit. However, it is worth adding that “the business corporation should be viewed as something far more significant than merely a shareholder profit maximizer.” ALAN PALMITER & FRANK PARTNOY, *CORPORATIONS: A CONTEMPORARY APPROACH* 97 (2010). Business organizations might be considered an extension of the welfare state. Article 41 of the IC states that “private economic enterprise is free. It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes.” Constitutional doctrine never underlined the importance of this article, as it never truly cared for the cost of rights. Article 41 represents the bedrock of the welfare state as enterprises imply profits, tax incomes and, last of all, rights. The common good has always been interpreted as something other than profit, while profit itself calls for common good. Nowadays, in Italy, private economic enterprise is no longer free. Tax rates are so high that in 2013, 14,000 Italian enterprises went bankrupt. See GIUSEPPE BERGONZINI, *I LIMITI Costituzionali quantitativi dell’IMPOSIZIONE FISCALE*, vol. I, 7 (2011); Antonio Pedone, *EVASORI E TARTASSATI. I NODI DELLA POLITICA TRIBUTARIA ITALIANA* 129 (1979). Competing in a globalized market seems to be impossible. Thousands of enterprises relocated abroad as that was the only chance they had to survive. See *Record di fallimenti e liquidazioni*, *Il Sole 24 Ore* (Mar. 5, 2014), available at <http://www.ilsole24ore.com/art/impresa-e-territori/2014-03-05/record-fallimenti-e-liquidazioni-084515.shtml?uuid=ABDiis0>.

<sup>26</sup> As a matter of fact, this is the second part of the book’s title. Gaspare Falsitta, a leading Italian tax law scholar, agrees with this idea. GASPARE FALSITTA, *MANUALE DI DIRITTO TRIBUTARIO. PARTE GENERALE* 5 (2010). It is also worth mentioning that one of the major Italian problems is tax evasion. Piero Gobetti describes it as a cultural problem. PIERO GOBETTI, *LA RIVOLUZIONE LIBERALE. SAGGIO SULLA LOTTA POLITICA IN ITALIA* 158 (1974). If Italians evaded as little as U.S. citizens between 1970 and 1992, the Italian debt to GDP ratio in 1992 would have been 30 points lower. ALESSANDRO SANTORO, *L’EVASIONE FISCALE. QUANTO, COME E PERCHÉ* 26 (2010); see also GIUSEPPE BERGONZINI, *EVASIONE FISCALE: UN PROBLEMA DI DIRITTO COSTITUZIONALE* 153-55 (2011).

<sup>27</sup> This concept is shared by most Italian doctrines. See, e.g., ALESSANDRO CATELANI, *LA SANITÀ PUBBLICA, TRATTATO DI DIRITTO AMMINISTRATIVO* 45 (Giuseppe Santaniello ed. 2010).

<sup>28</sup> For further discussion, see Alessandro Catelani, *LA SANITÀ PUBBLICA* 2-5 (Giuseppe Santaniello ed., 2010); Nicola Aicardi, *LA SANITÀ, TRATTATO DI DIRITTO AMMINISTRATIVO. DIRITTO AMMINISTRATIVO SPECIALE, TOMO I*, 633 (Sabino Cassese ed., 2003); Rosario Ferrara, *L’ORDINAMENTO DELLA SANITÀ* (2007). See generally Alfonso Quaranta, *IL SISTEMA DI ASSISTENZA SANITARIA* (1985); N.E. Vanzan Marchini, *VENEZIA LA SALUTE E LA FEDE* (2011).

where you can find everything, even the winning numbers of the lottery.”<sup>29</sup> With respect to health care,<sup>30</sup> the Regions were technically able to spend incautiously. Their expenditure autonomy was not correlated to revenue autonomy. This power was entirely exercised by the State.<sup>31</sup> This setting led costs to skyrocket as Regions were incentivized to spend carelessly.<sup>32</sup> No Region was accountable for the costs of the medical treatments provided.<sup>33</sup>

The Legge 27 luglio 1967, n. 685 presented further imperfections. The national health care service as a whole was neither uniformly regulated nor well-organized. Therefore, a few years later, by passing the Legge 23 dicembre 1978, n. 833, the Italian Parliament conceived the Servizio Sanitario Nazionale (SSN, which can be considered the equivalent of the department of HHS). The Italian territory was divided into Unità Sanitarie Locali (USL), whose duty was to locally implement the directions issued by the SSN. Pursuant to Article 15, the Assemblee Generali (general assembly), whose members were local politicians, selected by the members of the Comitato di Gestione (board of directors).<sup>34</sup> Although the Legislature aimed to bring democratic control to the health care system, the involvement of politicians in the process made the system corrupt and far from cost-effective.<sup>35</sup>

This being said, the Legge 23 dicembre 1978, n. 833 is still considered a crucial piece of legislation as it truly puts into effect the Article 32 Paragraph 1 of the IC.<sup>36</sup> Article 1 Paragraph 3 clearly describes the main purposes of this major reform. The Italian health care service aims to treat mental as well as physical diseases regardless of personal wealth in order to promote

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<sup>29</sup> LIVIO PALADIN, *PER una storia costituzionale dell'ITALIA REPUBBLICANA* 206 (2004).

<sup>30</sup> For further information regarding the history of the Italian health care system, see GABRIELE PESCATORE ET AL., *LEGGI AMMINISTRATIVE FONDAMENTALI* 1263 (2001).

<sup>31</sup> Although in the U.S., the word “state” refers to one of those entities which share sovereignty with the federal government, in Italy it is the equivalent of the U.S. federal government. Article 114 of the IC states: “The Republic is composed of the Municipalities, the Provinces, the Metropolitan Cities, the Regions and the State. Municipalities, provinces, metropolitan cities and regions are autonomous entities having their own statutes, powers and functions in accordance with the principles laid down in the Constitution. Rome is the capital of the Republic. Its status is regulated by State Law.”

<sup>32</sup> Nowadays, the necessity to not waste resources becomes impellent. *See, e.g.*, ANTONIO GALDO, *NON SPRECARRE* (2008).

<sup>33</sup> Regions were created in 1970, a significant time after the Italian Republic was born. For more information concerning the history of the early Italian Regions, *see* the Legge 16 maggio 1970, n.281.

<sup>34</sup> Art. 15 Cost.

<sup>35</sup> *See, e.g.*, NICOLA AICARDI, *LA SANITÀ* 637 (Sabino Cassese ed. 2003); ROBERTO NANIA & PAOLO RIDOLA, *I DIRITTI COSTITUZIONALI* 209 (2001). For further information regarding inefficient Italian bureaucracy, *see generally* MARCO ROGARI, *BUROCRAZIA FUORILEGGE* 8 (2001); ISIDORO TROVATO, *Allarme. La burocrazia? Una tassa da 26 miliardi*, *CORRIERE ECONOMIA*, Jan. 28, 2013, at 16.

<sup>36</sup> According to Chiara Tripodina, since the Italian Constitution was passed in 1948, the right to health care was not completely implemented until the enactment of the Legge 23 dicembre 1978, n. 833. CHIARA TRIPODINA, Art. 32 321, *COMMENTARIO BREVE ALLA COSTITUZIONE* (SERGIO BARTOLE & ROBERTO BIN eds., 2008).

substantive equality of opportunities.<sup>37</sup> Article 3 Paragraph 2 claims that the State is empowered to determine “minimum essential treatments to be guaranteed anywhere in the country.”<sup>38</sup> Universal coverage was offered to all Italian citizens and a vast number of medical treatments were provided for free. It is easy to understand how this health care system was not economically sustainable.<sup>39</sup>

A revision was needed. The Italian Parliament enacted the Legge 23 ottobre 1992, n. 421, delegating to the government the power to legislate over health care. A few months later, the government passed the Decreto Legislativo 30 dicembre 1992, n. 502. Economic resources had to be spent more efficiently.<sup>40</sup> Although access to health care had to be affordable to all citizens, only the poor were exempt from paying a fee.<sup>41</sup> More importantly, the Legislature was now aware that local politicians could not be in a position to play a key role in allocating resources. This situation turned the USL into the Azienda Unità Sanitaria Locale (AUSL). Among the major changes, the AUSL possessed and still possesses legal personality and administrative and financial autonomy. It cannot take on debt, but for a few exceptions determined by the law. It also changed the relationship between the State and the Regions. The State decided it was time to allow broader regional control over health care.<sup>42</sup> The State only kept the right to step in whenever it found that the health care delivery was not uniformly provided throughout the country.

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<sup>37</sup> Although this is merely a literal translation, the ideas proposed clearly refer to a paramount legal concept in the Italian doctrine: substantive equality of opportunities. This value is protected by Article 3 Paragraph 2 of the IC which states: “It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.” Most of the Italian doctrine considers this paragraph the bedrock of constitutional positive rights. *See, e.g.*, PAOLO CARETTI, I DIRITTI FONDAMENTALI 190 (2011); MAURIZIO FIORAVANTI, COSTITUZIONALISMO. PERCORSI DELLA STORIA E TENDENZE ATTUALI 123 (2009); SALVATORE MANNUZZU, IL FANTASMA DELLA GIUSTIZIA 78 (1998); ANDREA ROVAGNATI, SULLA NATURA DEI DIRITTI SOCIALI 18-24 (2009); GIUSEPPE FRANCO FERRARI, LE LIBERTÀ 98-101 (2011). Rita Pilia disagrees with this idea. RITA PILIA, I DIRITTI SOCIALI 30 (2005).

<sup>38</sup> Later in the article, the reader will be able to note how the “minimum essential treatments” eventually turn to be called “basic level of benefits” (livelli essenziali delle prestazioni). This etymological change is due to the Decreto Legislativo 30 dicembre 1992, n. 502. A few years later, this concept was also included in the 2001 constitutional reform.

<sup>39</sup> GIORGIO BOBBIO & MARIANO MARTINI, IL DIRITTO SANITARIO: INTRODUZIONE ED EVOLUZIONE DELLA DISCIPLINA 11 (2010).

<sup>40</sup> For a detailed analysis of the problems involving the Legge 23 dicembre 1978, n. 833 and the need for a selection of health treatments provided free of charge, *see* ANGELO MATTIONI, DALLA LEGGE ISTITUTIVA DEL SERVIZIO SANITARIO NAZIONALE AI PROVVEDIMENTI DI RIORDINO. MODELLI A CONFRONTO, ORA IN SOCIETÀ E ISTITUZIONI. UNA RACCOLTA DI SCRITTI 635 (2005); Filippo Pizzolato, UNIVERSALISMO E SELETTIVITÀ 60-63 (2009).

<sup>41</sup> For further details, *see also* Guido Carpani, ACCORDI E INTESI TRA GOVERNO E REGIONI NELLA PIÙ RECENTE EVOLUZIONE DEL SSN: SPUNTI RICOSTRUTTIVI 35-39 (Renato Balduzzi ed. 2009).

<sup>42</sup> *See* Michele Castelli, EHMA ANNUAL CONFERENCE 2009, *Healthcare Organizations Evaluation Program in an Italian Region (Regione Lombardia)*, available at <http://www.ehma.org/files/Michelle%20Castelli.pdf>.

A few years later, the government issued another piece of legislation under Parliament's delegation. All the previous efforts to reduce health care expenditures were not enough. This led to the enactment of the Decreto Legislativo 19 giugno 1999, n. 229, also named "Decree Bindi," who was the minister of health care at the time.<sup>43</sup> This reform aimed to follow the path paved by the Legge 23 dicembre 1978, n. 833 and the Decreto Legislativo 30 dicembre 1992, n. 502.<sup>44</sup> It gave further autonomy to the AUSL. After receiving legal personality, these public institutions now operated under the guidance of independent managers. Moreover, although the administrative jurisdiction still applied, the AUSLs began to look more like private, rather than public, entities.

Last of all, the Legislature decided to introduce Piani Sanitari Regionali (Regional Health Care Projects). By establishing democratic control over regional representatives, Regions could provide better health care than before. Regions were also entitled to make proposals for the "Piano sanitario nazionale" (national health care project).<sup>45</sup>

### **C. The 2001 constitutional reform**

2001 was a crucial year. A significant constitutional reform occurred as the Parliament decided it was time to modify Title V in order to substantially increase the Regions' autonomy. While in the past the Regions' legislative powers were extremely limited, pursuant to the new Article 117: "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations ...."<sup>46</sup>

Power can now be exercised by the State, the Regions subject to concurring legislation where the State identifies general principles, and the Regions are bound to comply with these requirements. Similarly to the U.S. 10<sup>th</sup> Amendment, Article 117 of the IC also affirms that "the Regions have legislative powers in all subject matters that are not expressly covered by State legislation."<sup>47</sup>

When dealing with "health protection," concurring legislation applies.<sup>48</sup> The definition given by the new Article 117 is broader than the one adopted in the past. Previously, this Article

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<sup>43</sup> See Paola Poli, *COME SI È GIUNTI ALLA TERZA RIFORMA SANITARIA. DECRETO BINDI*, available at <http://www.movimentodeicittadini.it/dirsol/des28/decreto.htm>.

<sup>44</sup> For further information, see e.g., ANGELO MATTIONI, *DALLA LEGGE ISTITUTIVA DEL SERVIZIO SANITARIO NAZIONALE AI PROVVEDIMENTI DI RIORDINO 635* (2005).

<sup>45</sup> GIORGIO BOBBIO & Mariano Martini, *IL DIRITTO SANITARIO: INTRODUZIONE ED EVOLUZIONE DELLA DISCIPLINA 23* (2010); see also Gianluca Fiorentini, *SOSTENIBILITÀ FINANZIARIA E POLITICA DEL SERVIZIO sanitario nazionale 181-185* (Renato Balduzzi ed. 2009).

<sup>46</sup> Art. 117 Cost, available at [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*



merely spoke of “health care,” which led to a narrow application.<sup>49</sup> Today, Regions can regulate anything related to “health protection” which, by its broader definition, includes a wider array of services, such as Environmental Law.<sup>50</sup>

Also related to health care, Article 117 Paragraph 2 Letter M now affirms that the State possesses the power “[to determine] the basic level of benefits<sup>51</sup> relating to civil and social entitlements to be guaranteed throughout the national territory.”<sup>52</sup> In light of this passage, the Italian doctrine, as well as the Constitutional Court jurisprudence, gives a broad definition to the “basic level of benefits,”<sup>53</sup> which eventually favored the State over the Regions.<sup>54</sup> Indeed, since “health protection” must provide a “basic level of benefits,” the State can step in to provide elements of “health protection” when a Region fails to provide the levels of service mandated by the State (i.e. the basic level of benefits).<sup>55</sup> Many scholars are pleased by this action. In their

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<sup>49</sup> *Id.*

<sup>50</sup> See ALESSANDRO CATELANI *LA SANITÀ PUBBLICA* 45 (Giuseppe Santaniello ed. 2010).

<sup>51</sup> This concept was introduced for the first time in 1992. Pursuant to Decreto Legislativo 19 giugno 1999, n. 229 which modified Article 1 of the D. Lgs. 30 dicembre 1992, n. 502, the State has the duty to identify a “basic level of benefits” as well as the resources needed to provide uniform medical treatments for a predetermined period set in the Piano Sanitario Nazionale (National Health Care Plan). These treatments have to be provided either for free or for a fixed copayment called “ticket sanitario.” Although a few scholars argue that these payments are unconstitutional as they will jeopardize the right to health care for the poor, in Corte Cost., 24 maggio 2006, n. 203, the Constitutional Court ultimately stated that those fixed fees are constitutional. The Italian justices not only specified the necessity to ensure a balanced budget, underlining that these rights have a cost, but they also pointed out that the quantification of the fees belongs to the State. It would not be reasonable to correlate basic level of benefits to be guaranteed all over the country with diversified copayments established by each Region. If this were to happen, Italian citizens would be treated differently depending on where they live.

<sup>52</sup> This “basic level of benefits” should not be confused with the “essential core of benefits” which the Italian Constitutional Court defined as a set of rights which must be guaranteed, regardless of available economic resources. See, e.g., Corte Cost., 7 luglio 1999, n. 309; Corte Cost., 26 settembre 1990, n. 445; Corte Cost., 13 novembre 2000, n. 509; Corte cost., 26 maggio 1998, n. 185; MASSIMILIANO CATTAPANI, *I LIVELLI ESSENZIALI DELLE PRESTAZIONI* 31-42 (Giorgio Bobbio & Marilena Morino eds., 2010); VITO MARINO CAFERRA, *DIRITTI DELLA PERSONA E STATO SOCIALE. IL DIRITTO DEI SERVIZI SOCIO-SANITARI* 22-25 (2004); ROBERTO NANIA & PAOLO RIDOLA, *I DIRITTI COSTITUZIONALI* 765 (2001). ENZO BALBONI, *LIVELLI essenziali: il nuovo nome dell'EGUAGLIANZA? EVOLUZIONE DEI DIRITTI SOCIALI, SUSSIDIARIETÀ E SOCIETÀ DEL BENESSERE, LA GARANZIA DEI DIRITTI SOCIALI NEL DIALOGO TRA LEGISLATORI E CORTE COSTITUZIONALE* 232 (Paolo Bianchi ed. 2006.); See generally FILIPPO PIZZOLATO, *IL MINIMO VITALE. PROFILI COSTITUZIONALI E PROCESSI ATTUATIVI* (2004). Although this idea appears admirable, Bryan Hilliard reasonably claims that “the burden falls upon advocates of this definition to explain and defend what is meant by ‘adequate’ or ‘decent’ level of medical care.” BRYAN HILLIARD, *THE SUPREME COURT AND MEDICAL ETHICS* 384 (2004). In fact, the Italian Constitutional Court has never concretely identified the “essential core of benefits.” See CHIARA TRIPODINA, *ART. 32, COMMENTARIO BREVE ALLA COSTITUZIONE* 327 (2008); ANDREA SIMONCINI & ERIK LONGO, *ART. 32, COMMENTARIO ALLA COSTITUZIONE* 655 (2006). (This indicates a huge gap between the legal interpretation provided by the Italian Constitutional Court and real life. Regardless of the essential core of benefits, many people do not receive satisfactory medical treatments.)

<sup>53</sup> See e.g., Massimiliano Cattapani, *I livelli essenziali delle prestazioni*, *LINEAMENTI DI DIRITTO SANITARIO* 31-42 (Giorgio Bobbio & Marilena Morino eds., *Lineamenti di diritto sanitario* 2010).

<sup>54</sup> For a detailed definition of the “basic level of benefits” deriving from an agreement between the State and the Regions, see Massimiliano Cattapani, *I livelli essenziali delle prestazioni* 31-42 (Giorgio Bobbio & Marilena Morino eds., 2010).

<sup>55</sup> Similarly, before the 2001 constitutional reform, the situation was not much different. Although the old Article 117 did not explicitly refer to basic level of benefits, the Italian Constitutional Court always entitled the State to regulate in detail the health care system. In 1984, the Court claimed that the “assistenza sanitaria ed ospedaliera” (health care) is to be considered separate from the other powers which can be exercised by the Regions. Regardless of what Article 117 stated, in this field the State has to play a more intense role. Corte Cost., Nov. 8 1984, n. 254.

opinion, reforms have finally reached a fair equilibrium between decentralization of legislative powers and the need to provide uniform health care.<sup>56</sup>

#### **D. Health care and administrative power**

At the constitutional level, Article 118 of the IC regulates the distribution of administrative powers. Similar to Article 117, Article 118 aims to attribute administrative functions to municipalities<sup>57</sup> “unless they are attributed to the provinces, metropolitan cities and Regions or to the State, pursuant to the principles of subsidiarity, differentiation and proportionality, to ensure their uniform implementation.”<sup>58</sup> Once again, the IC tries to empower the smallest urban administrative divisions as much as possible. Provinces, metropolitan cities, Regions and, last of all, the State are entitled to take over municipalities as long as the latter are not successfully able to exercise administrative functions.

This being said, health care is considered a very complex subject matter. Therefore, crucial administrative functions are delegated to the State rather than to the Regions, provinces, metropolitan cities or municipalities. The State is the only entity which can adequately make sure treatments are uniformly provided. As a consequence, the State not only has the power to set the “basic level of benefits,” but it is also allowed to substantially put into practice these rights anytime a Region is not complying with the requirements set. This analysis leads to the understanding of how important the role played by the State in the Italian health care is. Regions possess a fairly limited power in health care legislation. With regard to administrative functions, they have greater freedom, although the State still has significant influence.

#### **E. The financing of the Italian health care service. The regional revenue and expenditure autonomy**

In 2012, the U.S. health care expenditure to GDP ratio was 17.9%,<sup>59</sup> while in Italy it reached approximately 9.2% according to the World Health Organization (WHO).<sup>60</sup> The gap between these countries is significant; however, it does not mean that Italian health care service is

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<sup>56</sup> See, e.g., Beniamino Caravita, *Lineamenti di diritto costituzionale federale e regionale* 129 (2006); Paolo Cavalieri, *Diritto regionale* 121 (2009); Temistocle Martines et al., *Lineamenti di diritto regionale* (2012). See generally Renato Balduzzi, *A mo' di introduzione: su alcune vere o presunte criticità del Servizio sanitario nazionale e sulle sue possibili evoluzioni* 16 (Renato Balduzzi ed., *Trent'anni di Servizio sanitario nazionale. Un confronto interdisciplinare* 2009).

<sup>57</sup> These are the smallest urban administrative divisions. <http://www.comunivero.it/>

<sup>58</sup> Art. 118 Cost.

<sup>59</sup> In a recent report, which evaluated the overall performances of the U.S., Australia, Canada, Germany, the Netherlands, New Zealand, and the United Kingdom between 2004 and 2010, the U.S. ranks last. David Rochefort & Kevin P. Donnelly, *FOREIGN REMEDIES: WHAT THE EXPERIENCE OF OTHER NATIONS CAN TELL US ABOUT NEXT STEPS IN REFORMING U.S. HEALTH CARE 2* (2012).

<sup>60</sup> See <http://data.worldbank.org/indicator/SH.XPD.TOTL.ZS>.

either cheap or efficient. Every year, the Italian government struggled to find the billion euros required.<sup>61</sup>

Former Article 119 of the IC stated, “municipalities, provinces, metropolitan cities and Regions shall have revenue and expenditure autonomy.” However, this article was always interpreted as if the Regions only possessed expenditure autonomy. The State almost solely exercises the power to collect taxes. This led Regions to spend regardless of available resources, since the State had the duty to fully fund the health care service. The Regions, which highly benefited from this situation, spent without a worry. Irresponsibility instead of merit was rewarded.

Secondly, the State’s influence over health care financing was reinforced, once again, by Article 117, Paragraph 2, Letter M as amended in 2001. Indeed, the State has the right to intervene anytime a Region does not comply with the “basic level of benefits.” The revenue, as well as expenditure, autonomy set by former Article 119 were very often frustrated in light of Article 117. Limited resources coupled with a widespread inefficiency made the State take action over Regions several times.

The vehicles through which the State tried to fix these constant problems were the so-called “*Accordi Stato-Regione*.” These *ex post* agreements<sup>62</sup> aimed to solve nearly-bankrupt regional budgets by tailoring their measures with respect to the specificity of the single case. Unfortunately, those agreements tended not to work, as the Regions had no incentives to spend efficiently. Soon after one agreement was signed, another “*Accordo*” was needed.<sup>63</sup>

### **1. The Fondo Sanitario Nazionale: the early beginning**

In 1978, the Parliament issued the Legge 23 dicembre 1978, n. 833, which also created the Fondo Sanitario Nazionale (National Health Care Fund). By passing the annual budget, the Parliament determined the sum of money allocated to the Fund, which ultimately financed the

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<sup>61</sup> Like Italy, Canada relies on a universal-access health care system. However, it is more expensive. By referring to research undertaken by the Organisation for Economic Co-Operation and Development (OECD) published in 2005, Nadeem Esmail shows that Canadians rank 2<sup>nd</sup> in health care spending. NADEEM ESMAIL, GOVERNMENT CONTROL ON ACCESS TO CARE: CANADA’S EXPERIENCE 130-31 (SCOTT W. ATLAS ed., REFORMING AMERICA’S HEALTH CARE SYSTEM. THE FLAWED VISION OF OBAMA-CARE 2010). *See also* THOMAS ROY REID III, THE HEALING OF AMERICA. A GLOBAL QUEST FOR BETTER, CHEAPER, AND FAIRER HEALTH CARE 135 (2010); Arianna Pitino, *Il Sistema sanitario canadese tra principi comuni e autonomia: una «partita aperta» tra Federazione e Province?* 339 (Renato Balduzzi ed., Sistemi costituzionali, diritto alla salute e organizzazione sanitaria 2009).

<sup>62</sup> The Italian Constitutional Court highlighted several times the importance of the collaborative relationship between the State and the Regions. More specifically, the State should not coercively impose policies over the Regions. It should be advised by the Regions, and whenever it is adopting a law without their approval, adequate justification is needed. *See, e.g.*, Corte Cost. 21 aprile 1993, n. 204.

<sup>63</sup> Interestingly, the best health care is provided by those Regions that receive the smallest amount of money.

health care service.<sup>64</sup> These resources were mostly derived from employment taxes. The general rule was that the Fondo Sanitario Nazionale had to be fully funded.

Fifteen years later, another piece of legislation was enacted. The Decreto Legislativo 30 dicembre 1992, n. 502 clearly establishes the procedure for employers to follow when paying taxes to the Istituto Nazionale della Previdenza Sociale (I.N.P.S.).<sup>65</sup> Pursuant to Article 30, every employer had to pay Contributi Assistenziali (i.e. sums eventually devoted to the Fondo Sanitario Nazionale) together with mandatory contributions set by the State.<sup>66</sup> Subsequently, those monies were transferred to each Region in accordance with the quotas set in the Fondo Sanitario Nazionale.

In addition to the above-mentioned funds, the Fondi integrativi (additional funds) were earmarked pursuant to Article 9 of the Decreto Legislativo 30 dicembre 1992, n. 502 in order to guarantee treatments beyond the threshold set in the Piano Sanitario Nazionale (National Health Care Project).

## **2. The end of the Fondo Sanitario Nazionale and the first try to implement fiscal federalism**

With the creation of the SSN, the health care funding system became extremely centralized. The State retained the right to collect taxes and allocate economic resources while the Regions merely possessed the right to spend with the purpose of providing medical treatments. This system generated large deficits, which were ultimately always paid by the State. Because of this, the Legislature decided to target new strategies to try to make Regions accountable for the resources they spent. The intention of the Legislature was to pursue fiscal federalism.

To reach this goal, the Parliament passed the Legge 13 maggio 1999, n. 133, which delegated to the government the right to increase regional revenue autonomy. One year later, the government enacted the Decreto Legislativo 18 febbraio 2000, n. 56. The National Health Care Fund was repealed, as well as all the taxes financing it. On the other hand, Article 2 granted Regions the right to share tax revenues from VAT with the State. Second, Regions could collect resources from additional taxation on personal income (IRPEF) by altering a basic rate margin in light of their particular needs.

This being said, the Legislature was also aware that greater revenue autonomy had to respect Article 117, Paragraph 2 Letter M. Basic levels of benefits had to be uniform and

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<sup>64</sup> At the constitutional level, the process through which the budget is approved every year is regulated by Article 81. The paper will also go through the recent constitutional reform, which modified Article 81.

<sup>65</sup> The I.N.P.S. can be defined as the Italian national social security organization. For more information, *see* <https://www.inps.it/portale/default.aspx>

<sup>66</sup> E.g. retirement plans' contributions

guaranteed anywhere in the country. This is why Article 7 instituted a “Fondo perequativo nazionale;” this fund aimed to redistribute national resources by taking into account that Regions with a low fiscal capacity would not be economically able to comply with the mandatory State requirements unless they were funded with money coming from wealthier Regions.

### **3. Another step toward fiscal federalism.**

#### **An overview of the Legge 5 maggio 2009, n. 42 and its ultimate failure**

As explained above, there was a substantial gap between what former Article 119 of the IC claimed and reality. The State always played a much bigger role than what was intended by the Italian constitutional framers. To some extent, it could be argued that Article 119 never truly applied. This is why the Parliament tried again to increase the Regions’ autonomy by passing the Legge 5 maggio 2009, n. 42, entitling the government to implement fiscal federalism. The principles of solidarity, social cohesion and subsidiarity pervaded the spirit of the law. In the Parliament’s view, the government possessed all the components needed to put into effect a newly developed system where responsibility and solidarity were perfectly balanced. On one hand, the law took into account territories with a low per capita taxable capacity that entitled them to additional funds, and on the other, it tried to provide Regions with greater freedom.<sup>67</sup>

Pursuant to Article 1 of the Legge 5 maggio 2009, n. 42, the executive branch was authorized to identify the “general principles for the coordination of public finances and tax system.”<sup>68</sup> In the Parliament’s view, those principles could have finally led to a decentralization of fiscal powers. All the levels of government would have finally been economically accountable for their policies’ implementation through their revenue and expenditure autonomies. The historical spending criteria<sup>69</sup> had to be replaced in order to ensure a democratic control over the elected representatives who possessed the power to allocate economic resources.

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<sup>67</sup> In this environment, what Ugo De Siervo wrote in 2009 should be reconsidered. He praised the Italian health care system because it finally provided to a large part of the Italian population a wide array of medical treatments. In his opinion, Italy was on the right track, which would have eventually led to further development. Ugo De Siervo, *Conclusioni* 142 (Guido Corso & Paolo Magistrelli eds., *Il diritto alla salute tra istituzioni e società civile* 2009).

<sup>68</sup> See, e.g., Corte Cost. 16 luglio 2013, n. 219; Corte Cost. 17 luglio 2013, n. 236 (dealing with the State power to coordinate public finances as a limit to Regions’ autonomy);

<sup>69</sup> The concept of “historical spending criteria” bases the allocation of resources for the year to come on the amount of money spent in the previous year. This “historical spending criteria” not only incentivizes Regions not to reduce costs, but also leads to flawed results. For example, the cost of a syringe from one Region to another can vary significantly. At this point in time, the Italian government is trying to move to a “standard cost criteria” where each Region must respect spending limits set by the State. See, e.g., Renato Balduzzi, *LA SANITÀ ITALIANA ALLA PROVA DEL FEDERALISMO FISCALE* (2012); Vittorio Mapelli, *Patto per la salute, l’errore del federalismo e il caos dei costi standard*, *Il Sole 24 Ore*, July 16, 2014, <http://www.sanita.ilsole24ore.com/art/commenti/2014-07-16/patto-salute-errore-federalismo-080236.php?uuid=AbluAe3J>.

Article 2 set detailed guidelines. The government had to direct its action in order to ensure: a greater revenue and expenditure autonomy coupled with an expanded administrative, financial and accounting liability for all levels of government; compliance with European Union (EU) regulations; a more simple tax system; involvement of all the levels of government in actions contrasting tax evasion; the attribution of autonomous resources to municipalities, provinces, metropolitan cities and regions with respect to their competence; determination of general principles of public budget harmonization in order to ensure the approval of municipal, provincial, metropolitan and regional budgets based on predefined and uniform criteria; and that rewards be granted to all those administrative bodies which efficiently exercised the taxing power, ensuring a balanced budget that complied with the State requirements.

Following Article 2, the Legge 5 maggio 2009, n. 42 became more detailed. It authorized a parliamentary and technical joint committee to implement fiscal federalism (Articles 3 and 4), and it created a permanent conference for the coordination of the public finances formed by representatives of all levels of government (Article 5).

Unfortunately, the results did not meet the expectations. Italy remained a very centralized country. Neither the 2001 constitutional reform nor the Legge 5 maggio 2009, n. 42 substantially increased the Regions' autonomy. The hopes of those scholars who strongly relied on Article 5 as a bedrock for the beginning of an Italian federalism era were frustrated. Even the Conferenza Stato-Regioni (CSR) did not function very well.<sup>70</sup> This institution left to the State the final say on the rules of public finance.<sup>71</sup>

However, it is with the 2012 constitutional reform that we can truly say that the Italian federalist process failed. Below, this article will carefully analyze the constitutional modification

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<sup>70</sup> Originally, the CSR was created by the government through the enactment of the Decreto Legislativo 28 agosto 1997, n. 281 which put into force the Legge 15 marzo 1997, n. 59 which merely set general principles. The intention of the Legislature was that the CSR would develop a more democratic decision-making process when dealing with matters affecting both the State and Regions. More recently, the CSR is very active in health care. The Regions are involved in the determination of the "basic level of benefits," the Piano Sanitario Nazionale and the financing and investment criteria. *See, e.g.*, Mariano Martini & Giorgio Bobbio, *Le principali istituzioni del sistema sanitario italiano* 53-58 (Giorgio Bobbio & Marilena Morino eds., Lineamenti di diritto sanitario 2010); Alessandro Catelani, *La sanità pubblica* 266-68 (Giuseppe Santaniello ed., Trattato di diritto amministrativo 2010). The Italian Constitutional Court clarified that both the State and the Regions have to cooperate in good faith ("leale collaborazione"). Any time the government, on the behalf of the State, executes a decision without reaching an agreement with the Regions, it has to carefully argue why it opted to do so. *See* Corte Cost., 21 aprile 1993, n. 203. More recently, it affirmed that those agreements are crucial in order to avoid policies which could eventually damage Regions. *See* Corte Cost., 21 marzo 2007, n. 121. However, the Italian Constitutional Court has almost never held the State liable for a breach of the duty to act in good faith. The only rulings in favor of Regions refer to cases where the State did not follow a mandatory procedure set by law.

<sup>71</sup> *See, e.g.*, Giulio Salerno, *Equilibrio di bilancio, coordinamento finanziario e autonomie territoriali* 153 (Vincenzo Lippolis ed., Il Filangieri. Costituzione e pareggio di bilancio 2011).

and underline the main outcomes. The principle of the balanced budget will not only lead to a more centralized allocation of the powers, but it will also indirectly affect the Italian welfare state.

## **F. The 2012 constitutional reform**

### **1. The EU directions which ultimately led to the constitutional modification**

According to the Maastricht Treaty in 1992, there are two major conditions to joining the EU. First, the debt to GDP ratio has to be lower than 60%. Second, the annual deficit needs to be lower than 3%. A failure to fulfill those requirements after joining the EU can be excused due to extraordinary reasons for a very limited period of time. These rules should have eventually ensured a stable economy among the EU members. In 1997, the Stability and Growth Pact introduced even stricter provisions. The annual deficit could not exceed 1% of the debt to GDP ratio. In addition, the EU was now entitled to issue sanctions for failure to comply.

Unfortunately, these targets were far from achieved. Therefore, on December 13, 2011, the EU passed five regulations and one directive called the Six Pack. For the first time in the history of the EU, the member states had to satisfy positive duties. Debt to GDP ratio exceeding 60% had to be reduced at an average rate of at least 5% per year of the exceeded percentage points. Also in 2011, the Euro Plus Pact required the implementation throughout domestic laws all the rules set in the Stability and Growth Pact. However, neither the Six Pack nor the Euro Plus Pact led to valuable results.

One year later, in March 2012, 25 out of 27 EU member States approved the Fiscal Compact. Pursuant to Article 3 Paragraph 2, the Fiscal Compact recommended contracting parties to domestically implement all the requirements set “through provisions of binding force and permanent character, preferably constitutional.”<sup>72</sup> Under strong pressure exerted by financial markets, the Monti government promptly responded to this request. A few months later, the Italian Parliament ratified the Fiscal Compact with the Legge 23 luglio 2012, n. 116 and, on April 20, 2012, passed the Legge costituzionale 20 aprile 2012, n. 1 which amended the Articles 81, 97, 117 and 119 of the IC.<sup>73</sup>

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<sup>72</sup> Nicola Lupo highlights how the word “preferably” was chosen as a few EU member states, like Denmark, possess a very complex procedure to amend the Constitution. A provision required to modify the Constitution would have been an unreasonable burden on these countries. Nicola Lupo, *La revisione costituzionale della disciplina di bilancio e il sistema delle fonti* 95 (Vincenzo Lippolis ed., Il Filangieri. Costituzione e pareggio di bilancio 2011).

<sup>73</sup> Pursuant to Article 138, the Parliament is entitled to amend the Constitution by adopting the following procedure: “Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting. Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes. A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members.”

## **2. A brief overview of the constitutional modification**

In 1948, when the IC was enacted, most of the Italian scholars and politicians agreed that the principle of the balanced budget should not be implemented, otherwise the Legislature would have been excessively constrained.<sup>74</sup> Therefore, former Article 81 of the IC stated: “The budget may not introduce new taxes and new expenditures. Any other law involving new or increased spending shall detail the means therefor.”<sup>75</sup> This passage was never interpreted<sup>76</sup> as a limit to the Legislature to pursue deficit spending policies.<sup>77</sup> In Corte Cost 7 gennaio 1966, n. 1, the Italian Constitutional Court<sup>78</sup> clearly affirmed this principle. In its view, a balanced budget<sup>79</sup> should not be considered a value worthy of the same attention granted to the rights set in the Constitution.<sup>80</sup>

On the contrary, the 2012 constitutional reform tried to implement a balanced budget at all levels of government. The definition of balanced budget, however, should not be taken as literally meaning revenues equal to expenditures.<sup>81</sup> As of the Fiscal Compact, it could be described as a general budget deficit lower than 3.0% of the GDP and a structural deficit lower than 1.0% of GDP if the debt-to-GDP ratio is significantly below 60%, or else it shall be below 0.5% of GDP. The constitutional modification addresses not only the State but also municipalities, provinces, metropolitan cities, Regions (as amended in Article 119) and the public administration (as amended in Article 97). In addition to the principle of the balanced budget, local urban divisions “shall contribute to ensure the fulfillment of the economic and financial

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<sup>74</sup> Antonio Bennati, *MANUALE DI CONTABILITÀ DI STATO* 210-11 (1977).

<sup>75</sup> For further details regarding former Article 81, see Sergio Bartole, Art. 81 (Giuseppe Branca ed., *Commentario della Costituzione* 1979); Costantino Mortati, *ISTITUZIONI DI DIRITTO PUBBLICO* 677 (1976); Antonio Bennati, *MANUALE DI CONTABILITÀ DI STATO* 301 (1977); Dimitri Giroto, Art. 81 744 (Sergio Bartole & Roberto Bin eds., *Commentario breve alla Costituzione* 2008).

<sup>76</sup> Arturo Carlo Jemolo underlines the importance of legal interpretation. He rightfully points out that politicians and scholars often refer to the spirit of the law in order to justify their own views. This behavior leads to misleading ideas. Arturo Carlo Jemolo, *QUESTA REPUBBLICA* 13 (1981).

<sup>77</sup> Giovanni Bognetti, when referring to the ideas proposed by Valerio Onida, clearly points out how in the understanding of the former President of the Italian Constitutional Court, former Article 81 did not include neither the principle of the balanced budget nor a restriction against unsustainable budgets. It merely called for the government, under the consent of the Parliament, to set uniform and well-organized policies. Giovanni Bognetti, *Costituzione e bilancio dello Stato. Il problema delle spese in deficit* (Note ispirate dalla lettura di un libro di G. Rivosecchi), 3 *Nomos*, (2008). See also Valerio Onida, *LE LEGGI DI SPESA NELLA COSTITUZIONE* (1969); Salvatore Buscema, *Il bilancio* 193 (1971).

<sup>78</sup> For an overview of the Italian Constitutional Court’s jurisprudence regarding social rights, see Carlo Colapietro, *LA GIURISPRUDENZA COSTITUZIONALE NELLA CRISI DELLO STATO SOCIALE* (1996). See generally Carmela Salazar, *DAL RICONOSCIMENTO ALLA GARANZIA DEI DIRITTI SOCIALI* (2000); Le sentenze della Corte costituzionale e l’art. 81 (1993) (gathering reports from a seminar held in Rome in Palazzo della Consulta on November 8-9, 1991).

<sup>79</sup> See, e.g., Corte Cost. 6 luglio 1994, n. 304; 14 luglio 1999, n. 339 (discussing the importance of economic resources in the delivery of rights).

<sup>80</sup> See, e.g., Corte Cost. 2 gennaio 1990, n. 1. Gaetano Silvestri, former President of the Constitutional Court, confirmed this view in the 2013 annual reunion held by the Associazione Italiana Costituzionalisti on October 17-19, 2013. Several years before, he already held this opinion. Michele Ainis, *I soggetti deboli nella giurisprudenza costituzionale*, 30 *Pol. Dir.* 25, 44 (1999).

<sup>81</sup> For further details, see Article 1 of the Fiscal Compact.



imposed by the EU” (Article 119). This element couples with the fact that, pursuant to the amended Article 81, the local urban divisions do not possess the same fiscal maneuverability granted to the State. Although in theory, municipalities, provinces, metropolitan cities and Regions should exercise revenue and expenditure autonomy, the truth is that, in light of such strict constraints, their decision-making power is extremely limited.

Article 81 as amended represents the main core of the constitutional reform, as it is the only article of the IC dealing with the national budget and the financial statement. First of all, it is worth noting that the new Article 81 is more detailed compared to its older version. However, regardless of the effort, it is not much clearer than before. Previously, the Legislature was free to pursue deficit spending policies, but now taking on debt is considered constitutional only as long as the Legislature takes into account the effects of the economic cycle, or under the occurrence of exceptional circumstances. These two possibilities, however, present legal issues that have not been solved yet.

With respect to the first option, it is clear that the implied goal is to put the Legislature in the position to contrast economic contractions or expansions by passing expansionary or contractionary monetary policies. However, the definition of “economic cycle” remains unclear. Secondly, the so-called “exceptional events” present relevant problems as well. The Legge Costituzionale 20 aprile 2012, n. 1 Paragraph 1 Letter D defines “exceptional events” as severe economic recessions, financial crises or natural disasters. In order to provide more details, pursuant to Article 81 Paragraph 6, the Parliament adopted the Legge 24 dicembre 2012, n. 243. However, the information given is still limited. Although further time could be spent dealing with the 2012 constitutional reform, these are the main points that are worth pointing out in this article. The intention of the Legislature to bring equilibrium to the Italian budget might be frustrated by the fact that those rules might not be either judiciable<sup>82</sup> or enforceable.<sup>83</sup>

### **3. The impact on the Italian welfare state**

The economic crisis is jeopardizing the Italian welfare state. The Fiscal Compact led to the enactment of the amended Article 81, which seems to strongly conflict with socialist ideas. The IC guarantees positive rights such as the right to health care, which is considered

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<sup>82</sup> See Gino Scaccia, *La giustiziabilità della regola del pareggio di bilancio 212* (Vincenzo Lippolis ed., *Il Filangieri. Costituzione e pareggio di bilancio 2011*). It is still unclear which entities are legally entitled to file before the Italian Constitutional Court a breach of the principle of balanced budget pursuant to Articles 81, 97, 117 and 119. However, it is true that the Italian Constitutional Court seems to have started paying more attention to these issues. In a recent ruling, it declared a law passed by the Region Friuli Venezia Giulia unconstitutional, as it did not adequately identify the resources needed to economically ensure palliative treatments and pain medications. *Corte Cost.*, 10 maggio 2012, n. 115.

<sup>83</sup> For further information regarding the 2012 constitutional reform, see Vincenzo Satta, *PROFILI EVOLUTIVI DELLO STATO SOCIALE E PROCESSO AUTONOMISTICO NELL'ORDINAMENTO ITALIANO* 164 (2012).

fundamental. Costantino Mortati proudly sustained that the IC is the only contemporary constitution that gives great importance to health care.<sup>84</sup> The Legislature is bound to do whatever it takes to protect individuals from illnesses.<sup>85</sup> What at first sight seems to be a legal issue, however, is to be considered a practical problem. As of now, the Italian Legislature has to ensure a balanced budget, meaning that it has to offer treatments compatible with the available economic resources. Indeed, the resources are limited and, at some point, the State can even go bankrupt.<sup>86</sup>

As mentioned at the end of the previous paragraph, the amended Article 81 does not currently look judiciable. However, it is exerting some pressure over the Legislature. Experts, as well as politicians, started referring to it in order to stop policies that do not clearly identify the resources needed for their implementation. On August 5, 2014, the Commissioner for the Spending Review highly criticized an amendment passed by the Chamber of Deputies. It increased expenditures and pretended to specify the means by referring to predicted cuts that have not come yet.<sup>87</sup> The debate is still going on whether this interpretation complies with the new Article 81. In this matter, sooner or later the Constitutional Court will probably end the dispute.

At the moment, the legal impact of the 2012 constitutional reform over the welfare state is barely relevant. Italy is not yet aware of the “Cost of Rights,”<sup>88</sup> which is the reason it still consistently finances the welfare state by taking on debt. Although more recently the Legislature is paying more attention to this problem, the remedies adopted do not seem to be enough to successfully reach an equilibrium.<sup>89</sup>

## **II. The U.S.**

### **A. A crucial health care reform**

The path that led to the enactment of Social Security Act, Medicare, Medicaid and, last of all, the Affordable Care Act<sup>90</sup> (ACA) was difficult.<sup>91</sup> Several entities, such as the American

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<sup>84</sup> See Roberto Nania, *Il diritto alla salute tra attuazione e sostenibilità* 29 (Michele Sesta ed, L'erogazione della prestazione medica tra diritto alla salute, principio di autodeterminazione e gestione ottimale delle risorse sanitarie 2014).

<sup>85</sup> In 2010, the Constitutional Court stated that extraordinary economic crises (i.e. the one which began in 2008) empower the Legislature to take action and enforce insuppressible rights regardless of economic constraints. Corte Cost. 15 gennaio 2010, n.10.

<sup>86</sup> As a matter of fact, Argentina went bankrupt, once again, on July 31, 2014.

<sup>87</sup> Subsequently, this amendment was repealed. See Nicoletta Cottone, Decreto Pa, sì alla fiducia. Il testo torna alla Camera. Per i «quota 96» intervento più ampio, Aug. 5, 2014 <http://www.ilsole24ore.com/art/notizie/2014-08-04/maia-4-emendamenti-decreto-pa-via-quota-96-che-sbloccava-4mila-pensionamenti-scuola-103616.shtml>.

<sup>88</sup> Stephen Holmes & Cass Robert Sunstein, THE COST OF RIGHTS. WHY LIBERTY DEPENDS ON TAXES 24 (2000).

<sup>89</sup> See, e.g., Luciano Hinna & Mauro Marcantoni, Spending Review. *È possibile tagliare la spesa pubblica italiana senza farsi male?* (2012).

<sup>90</sup> On 23 March 2010, the ACA was signed into law by President Barack Obama. In light of this historical result, he subsequently said: “We are a nation that does what is hard. What is necessary. What is right. Here, in this country, we

Medical Association (AMA) and the Pharmaceutical Research and Manufacturers of America, were never in favor of these programs.<sup>92</sup>

Following 2010, the ACA faced further resistance at both the political and legal levels.<sup>93</sup> With respect to the first point, the Republican Party always declared that one of their very first targets was to repeal the bill. However, the reelection of Barack Obama in November 2012 seemed to have greatly lowered their aspirations. More importantly, in 2014, although there are still several politicians, journalists and scholars criticizing the ACA, the reformed health care hit the enrollment goal with 7.1 millions sign-ups.<sup>94</sup>

The targets pursued are extremely ambitious. Indeed, the ACA aims to provide more health care at a lower cost. Those who support ObamaCare believe this is possible because the current U.S. health care allocates resources inefficiently as there is no preventive medicine for millions of uninsured citizens. The new system shifts costs more efficiently and effectively. Mitt Romney shared this view while he was the governor of the state of Massachusetts. According to the Congressional Budget Office, the ACA should save approximately 70 billion dollars over 10 years,<sup>95</sup> and “the bottom line for the vast majority of Americans is more benefits, greater security, less cost.”<sup>96</sup>

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shape our own destiny. That is what we do. That is who we are. That is what makes us the United States of America. And we have now just enshrined (...) the core principle that everybody should have some basic security when it comes to their health care. And is an extraordinary achievement.” The Staff of the Washington Post, *Landmark: The Inside Story of America’s New Health-Care Law and What It Means for Us All* 1 (2010). See also David Rochefort & Kevin P. Donnelly, FOREIGN REMEDIES. WHAT THE EXPERIENCE OF OTHER NATIONS CAN TELL US ABOUT NEXT STEPS IN REFORMING U.S. HEALTH CARE, 16 (2012).

<sup>91</sup> See, e.g., Paul Starr, *Remedy and reaction. THE PECULIAR AMERICAN STRUGGLE OVER HEALTH CARE REFORM* (2011); Thomas Roy Reid III, *THE HEALING OF AMERICA. A GLOBAL QUEST FOR BETTER, CHEAPER, AND FAIRER HEALTH CARE* (2010); Rosemary Gibson et al., *THE BATTLE OVER HEALTH CARE. WHAT OBAMA’S REFORM MEANS FOR AMERICA’S FUTURE* (2012); Beatrix Hoffman, *HEALTH CARE FOR SOME. RIGHTS AND RATIONING IN THE UNITED STATES SINCE 1930* (2012).

<sup>92</sup> See, e.g., Harry A. Sultz & Kristina M. Young, *HEALTH CARE USA: UNDERSTANDING ITS ORGANIZATION AND DELIVERY* (1997); Jill Quadagno, *ONE NATION UNINSURED. WHY THE U.S. HAS NO NATIONAL HEALTH INSURANCE* (2005).

<sup>93</sup> See, e.g., Peter Ferrara, *THE OBAMACARE DISASTER. AN APPRAISAL OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT* (2010); David Gratzner, *WHY OBAMA’S GOVERNMENT TAKE OVER OF HEALTH CARE WILL BE A DISASTER*, 1 *Encounter Broadside*, (2009); Phillip Longman, *BEST CARE ANYWHERE: WHY VA HEALTH CARE WOULD WORK BETTER FOR EVERYONE* (2012); Betsy McCaughey, *OBAMA HEALTH LAW: WHAT IT SAYS AND HOW TO OVERTURN IT*, 13 *Encounter Broadside*, (2010); Dick Morris & Eileen McGann, *REVOLT. HOW TO DEFEAT OBAMA AND REPEAL HIS SOCIALIST PROGRAMS. A PATRIOT’S GUIDE* (2011); Sally C. Pipes, *THE TRUTH ABOUT OBAMACARE* (2010); Grace-Marie Turner et al., *WHY OBAMACARE IS WRONG FOR AMERICA. HOW THE HEALTH CARE LAW DRIVES UP COSTS, PUTS GOVERNMENT IN CHARGE OF YOUR DECISIONS, AND THREATENS YOUR CONSTITUTIONAL RIGHTS* (2011).

<sup>94</sup> Jim Acosta et al., CNN (Apr. 1, 2014), available at <http://edition.cnn.com/2014/04/01/politics/obamacare-signups-target/>. For a comparative analysis, see Nadeem Esmail, *Government Control on Access to Care: Canada’s Experience* (Scott W. Atlas ed., *REFORMING AMERICA’S HEALTH CARE SYSTEM. THE FLAWED VISION OF OBAMACARE* (2010)); Arianna Pitino, *Il Sistema sanitario canadese tra principi comuni e autonomia: una «partita aperta» tra Federazione e Province?* (Renato Balduzzi ed., *Sistemi costituzionali, diritto alla salute e organizzazione sanitaria* 2009).

<sup>95</sup> See The Staff of the Washington Post, *Landmark: The Inside Story of America’s New Health-Care Law and What It Means for Us All* 173 (2010). For a different view, see Douglas Holtz-Eakin, *The Real Math Of Congressional*

## B. The legal complaints

On May 28, 2012, the U.S. Supreme Court ultimately ruled that the individual mandate may be upheld within Congress's power to "lay and collect taxes."<sup>97</sup> The judgment issued by the Supreme Court was extremely technical;<sup>98</sup> the justices pointed out several times how they did not intend to interfere with the legislative power. Chief Justice Roberts clearly affirmed:

Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.<sup>99</sup>

However, they were still well aware of the crucial importance of this decision. In the near future, the U.S. constitutional setting might turn to be greatly affected by *National Federation of Independent Business v. Sebelius*.

## C. Different constitutional settings

From a constitutional perspective, Italy and the U.S. propose two different approaches. While the IC guarantees positive rights,<sup>100</sup> the U.S. Constitution does not present any legally enforceable claim<sup>101</sup> that requires the Legislature to take action. The interpretation given by the U.S. Supreme Court did not change much over time. *In San Antonio Independent School Dist. v.*

Budget Office Estimates (Scott W. Atlas ed., REFORMING AMERICA'S HEALTH CARE SYSTEM. THE FLAWED VISION OF OBAMA-CARE (2010)).

<sup>96</sup> Lawrence R. Jacobs & Theda Skocpol, HEALTH CARE REFORM AND AMERICAN POLITICS. WHAT EVERYONE NEEDS TO KNOW 123 (2010).

<sup>97</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012). Edward Rubin supported this thesis before the Supreme Court issued its decision. Edward Rubin, *The Affordable Care Act, The Constitutional Meaning Of Statutes, And The Emerging Doctrine Of Positive Constitutional Right*, 53 WM. & MARY L. REV. 1639, 1713 (2012).

<sup>98</sup> See, e.g., Einer Elhauge, OBAMACARE ON TRIAL (2012).

<sup>99</sup> *Sebelius*, 132 S. Ct. at 2579. Similarly in the Italian legal system, Article 28 of the Legge 11 marzo 1953, n. 87 limits the Italian Constitutional Court from making political decisions leading to a conflict with the legislative power. See, e.g., Michele Ainis, *I soggetti deboli nella giurisprudenza costituzionale*, 30 Pol. Dir. 25, 52 (1999); Carlo Amirante, *Diritti fondamentali e diritti sociali nella giurisprudenza costituzionale* 260 (Diritti di libertà e diritti sociali tra giudice costituzionale e giudice comune 1999).

<sup>100</sup> See, e.g., BARBARA PEZZINI, LA DECISIONE SUI DIRITTI SOCIALI. INDAGINE SULLA STRUTTURA COSTITUZIONALE DEI DIRITTI SOCIALI 9-10 (2001); RITA PILIA, I DIRITTI SOCIALI (2005); MARIO NAPOLI, IL CONTRATTO DI LAVORO 136 (2008). CARMELA SALAZAR, DAL RICONOSCIMENTO ALLA GARANZIA DEI DIRITTI SOCIALI 49 (2000). However, there are a few scholars who disagree with this idea. For example, Guido Corso is convinced that the IC does not include positive rights. He bases his opinion on the fact that those articles protecting health care or labor are too vague to impose a duty on the Legislature. Carlo Amirante, *Diritti fondamentali e diritti sociali nella giurisprudenza costituzionale* in DIRITTI DI LIBERTÀ E DIRITTI SOCIALI TRA GIUDICE COSTITUZIONALE E GIUDICE COMUNE 262 (1999); VEZIO CRISAFULLI, LEZIONI DI DIRITTO COSTITUZIONALE 363 (1976); LIVIO PALADIN, DIRITTO COSTITUZIONALE 787 (1998).

<sup>101</sup> With respect to Italy, Enzo Balboni believes that a key role might be played by the judicial power. When a constitutional positive right is being breached, a judge is empowered to order bureaucracy to fulfill the constitutional duty. More specifically he cites the ordinanza 5 maggio 2000 issued by the Tribunale di Firenze. Enzo Balboni, *Livelli essenziali: il nuovo nome dell'eguaglianza? Evoluzione dei diritti sociali, sussidiarietà e società del benessere*, LA GARANZIA DEI DIRITTI SOCIALI NEL DIALOGO TRA LEGISLATORI E CORTE COSTITUZIONALE, 231 (Paolo Bianchi ed. 2006).

*Rodriguez*,<sup>102</sup> Justice Powell stated that: “Since the Court now suggests that only interests guaranteed by the Constitution are fundamental for purposes of equal protection analysis, and since it rejects the contention that public education is fundamental, it follows that the Court concludes that public education is not constitutionally guaranteed.”<sup>103</sup> Although the Chief Justice did not openly sustain the general non-existence of positive rights in the U.S. Constitution, he clarified that a state has no duty to provide a minimum essential education.

Similarly, in *DeShaney v. Winnebago County Department of Social Services*,<sup>104</sup> Chief Justice Rehnquist went even further. He declared that “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.”<sup>105</sup> The Chief Justice seemed to bring the debate of whether the U.S. Constitution guarantees positive rights or not to a conclusion.

However, more recently there are scholars who beg to disagree with the Supreme Court’s jurisprudence. For example, Edward Rubin claims that the U.S. Constitution is “in essence an intentional or purposive document, and that the meaning of those purposes is only revealed over time.”<sup>106</sup> By referring to the Fourteenth Amendment, the pursuit of happiness (Declaration of Independence) and justice, general welfare and blessing of liberty (Preamble), he believes that the enactment of the ACA can lead to a reinterpretation of the U.S. Constitution. Indeed, relating the above-mentioned provisions to the recent health care reform, the justices could conclude that the text of the Constitution can include positive rights.

#### **D. A few words about American cooperative federalism**

The ACA was not declared entirely constitutional. In fact, the Supreme Court decided to invalidate part of the Medicaid expansion provision.<sup>107</sup> For the first time in the history of the United States, the Supreme Court invalidated a federal statute as unconstitutionally coercive. This ruling could have a relevant impact on the American cooperative federalism.<sup>108</sup> Unfortunately, the

<sup>102</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 93 S. Ct. 1278 (1973).

<sup>103</sup> *San Antonio Indep. Sch. Dist.*, 93 S. Ct. at 1336.

<sup>104</sup> *DeShaney v. Winnebago County Dep't of Social Services*, 109 S. Ct. 998 (1989).

<sup>105</sup> *DeShaney*, 109 S. Ct. at 1003.

<sup>106</sup> Edward Rubin, *The Affordable Care Act: The Constitutional Statutes and the Emerging Doctrine of Positive Constitutional Right*, 53 WM. & MARY L. REV. 1639, 1689 (2012).

<sup>107</sup> *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601-08.

<sup>108</sup> *See, e.g.*, Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83 (2012); Nicole Huberfeld et al., *Plunging Into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Businesses v. Sebelius*, 93 B.U. L. REV. 1 (2013); Charlton C. Copeland, *Beyond Separation in Federalism Enforcement: Medicaid Expansion, Coercion, and the Norm of Engagement*, U. PA. J. CONST. L. 91 (2012); Robert F. Rich et al., *The Patient Protection And Affordable Care Act Of 2010: Implementation Challenges In The Context Of Federalism*, 16 J. HEALTH CARE L. & POL'Y 77 (2013).

justices did not provide a clear definition of coercion. This unanswered question is likely to lead to a lot of litigation between the states and the federal government.<sup>109</sup>

By contrast, the Italian Parliament, in light of the economic crisis, chose to centralize the powers. By passing the Legge costituzionale 20 aprile 2012, n.1, the legislative power of “harmonization of the public account” has become an exclusive State power where previously concurring legislation between the Regions and the State applied. The 2001 constitutional reform, which aimed to provide Regions with a broader revenue and expenditure autonomy,<sup>110</sup> seems to have suffered an important setback.<sup>111</sup>

### Conclusion

On several points, Italy and the U.S. are far away from each other. It is hard to disagree with Daniel Hannan when he says: “the U.S. Constitution is mainly about the liberty of individual. The EU Constitution is mainly about the power of the state.”<sup>112</sup> However, it seems that the ACA caused the Italian and U.S. models to converge. Italy is reducing health care while the U.S. is expanding coverage; through different strategies, Italy and the U.S. should chase a common goal to leave a decent future to the present and next generations.<sup>113</sup> The “pursuit of happiness” as laid down in the United States Declaration of Independence (1776) is still very much connected to the availability of state’s resources;<sup>114</sup> whenever the welfare state is reduced because of a lack of economic resources, citizens’ quality of life will be consequently reduced.<sup>115</sup>

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<sup>109</sup> In this environment, we should bear in mind that a relevant role is played by federal and state bureaucracy in implementing federal policies. See Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011).

<sup>110</sup> For more discussion, see Corte Cost. 10 marzo 2010, n. 100; Corte Cost. 17 ottobre 2011, n. 272 (dealing with the principle of the balanced budget and regional autonomy); Corte Cost. 24 aprile 2013, n. 79 (dealing with regional autonomy and EU requirements).

<sup>111</sup> See, e.g., Alessandro Catelani, *La sanità pubblica*, TRATTATO DI DIRITTO AMMINISTRATIVO 53-62 (Giuseppe Santaniello ed. 2010).

<sup>112</sup> Daniel Hannan, *Why America Must Not Follow Europe*, 19 ENCOUNTER BROADSIDE 6 (2011). However, it is worth mentioning that there are more and more European economists like Professor Luigi Zingales who would rather see little involvement of the State in the economy. LUIGI ZINGALES, MANIFESTO CAPITALISTA. UNA RIVOLUZIONE LIBERALE CONTRO UN'ECONOMIA CORROTTA (2012).

<sup>113</sup> On January 6, 1941, Franklin Delano Roosevelt illustrated to Congress four fundamental freedoms. It is worth citing one of them: “The third is freedom from want - which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants - everywhere in the world.” President Franklin D. Roosevelt, Annual Message to Congress (Jan. 6, 1941), in 87 CONG. REC. 44, 46 (1941).

<sup>114</sup> In this environment, Erik Longo believes that the economic crisis is highlighting the importance of social rights. Those rights are essential to overcome such a difficult period. Erik Longo, *Le relazioni giuridiche nel sistema dei diritti sociali*. PROFILI TEORICI E PRASSI COSTITUZIONALI 438 (2012).

<sup>115</sup> Benedict XVI has often underlined the importance of pursuing the common good. Benedetto XVI, *Caritas in Veritate* 9 (2009). Similarly, Filippo Pizzolato shares these values. See FILIPPO PIZZOLATO, IL PRINCIPIO COSTITUZIONALE DI FRATERNITÀ – ITINERARIO DI RICERCA A PARTIRE DALLA COSTITUZIONE ITALIANA (2012).

As of now, both Italy and the U.S. are reorganizing their economies. A balanced budget should be ensured<sup>116</sup> and the principle of responsibility toward future generations<sup>117</sup> has to be carefully taken into account.<sup>118</sup> In this environment, the thoughts of Aristotle ring true: “A golden mean must be found: moderation.”<sup>119</sup>

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<sup>116</sup> In the long run, Giovanni Bognetti believes that deficit policies can lead to a breach of the Constitution. At some point, a socialist country might not have enough money to provide the rights guaranteed by its constitution. GIOVANNI BOGNETTI, *COSTITUZIONE E BILANCIO DELLO STATO. IL PROBLEMA DELLE SPESE IN DEFICIT* 42, (Fulco Lanchester ed., 2008);

<sup>117</sup> At the beginning of the legislative session no. 554 held on November 29, 2011, the Chamber of Deputies illustrated a report recommended to implement the principle of the balanced budget in Article 53 of the IC, which deals with the duty to pay taxes. This idea was based on intergenerational equity. On a long-term perspective, budgetary policies have to be economically sustainable. Unfortunately, the Chamber of Deputies believed this modification was not worthy of consideration. Claudia Golino, *I vincoli al bilancio tra dimensione europea e ordinamento nazionale: le possibili ricardute sul welfare* 679 (Michele Sesta ed, *L'erogazione della prestazione medica tra diritto alla salute, principio di autodeterminazione e gestione ottimale delle risorse sanitarie* 2014). See GIOVANNI BOGNETTI, *COSTITUZIONE E BILANCIO DELLO STATO. IL PROBLEMA DELLE SPESE IN DEFICIT* (2008); Massimo Luciani, *Generazioni future, distribuzione temporale della spesa pubblica e vincoli costituzionali*, *UN DIRITTO PER IL FUTURO. TEORIE E MODELLI DELLO SVILUPPO SOSTENIBILE E DELLA RESPONSABILITÀ INTERGENERAZIONALE* (Raffaele Bifulco & Alessandro D'Aloia eds. 2008). Contrary, Article 20a of the German Constitution [Protection of the natural bases of life] claims that: “Mindful also of its responsibility toward future generations, the state shall protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.”

<sup>118</sup> In 2011, a report pointed out how young people are strongly affected by the economic crisis. *RAPPORTO SULLO STATO SOCIALE 2011. QUESTIONE GIOVANILE, CRISI E WELFARE STATE* (2011) Three years later, the situation is even worse. Thousands of Italians are leaving the country.

<sup>119</sup> Lidiana De Grassi favors a review of the welfare state. As of now, resources are not spent efficiently. LIDIANA DE GRASSI, *LA RAZIONALIZZAZIONE dello Stato sociale nell'ORDINAMENTO DEI SERVIZI ALLA PERSONA E ALLA COMUNITÀ* 369 (2004); see also FILIPPO PIZZOLATO, *UNIVERSALISMO E SELETTIVITÀ* 60 (2009).