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THE REASONABLE ADJUSTMENT OF BASIC LIBERTIES.
LIBERALISM AND JUDICIAL BALANCING

Chiara Valentini

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
MAX WEBER PROGRAMME

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Abstract
This paper focuses on the "balancing" model of constitutional adjudication, conceived as a decision-making approach aimed to establish a "reasonable" equilibrium among conflicting norms of constitutional rank, so as to adjust the abstract form of the law to concrete needs.
I outline the balancing models which are dominant in practice and stress their argumentative structure: on the one hand, the model centered on proportionality analysis that has been spreading over Europe and at a transnational level; on the other hand, the model adopted in the US context, where proportionality analysis meets a strong resistance and is regarded, for historical and ideological reasons, as a threat for the priority of rights.
Focusing on this controversial aspect of the interconnection between liberal constitutionalism and judicial balancing, I draw on John Rawls' account of practical reasoning to outline a model of constitutional adjudication that brings balancing and proportionality analysis together with the priority of rights. In this perspective, I argue that the Rawlsian idea of reasonableness, along with the nested idea of reciprocity, provides the balancing approach with a theoretical foundation and serves as the unitary argumentative guideline along which the exercise of public reason unfolds - from the foundational level to the applicative level - by mutually adjusting conflicting values and goods under some rules of priority and the criterion of "proportionality as reciprocity".

Keywords
Balancing, John Rawls, proportionality, reasonableness, judicial review.

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Chiara Valentini
Max Weber Fellow, 2008-2009

Introduction

This paper focuses on the theoretical difficulties concerning the interconnection between liberal constitutionalism and the judicial use of balancing decision-making procedures in fundamental rights adjudication.

I analyse the two forms the balancing exercise of judicial review has taken in practice: on the one hand, the balancing technique centered on proportionality analysis that has been spreading over Europe and at a transnational level; on the other hand, the balancing strategies adopted in the US context, where the debate on the viability of balancing is still open, and proportionality analysis meets a strong resistance, for historical and ideological reasons, being regarded as an undisciplined decision-making procedure that undermines the normative status of fundamental rights.

In this perspective, I draw on John Rawls's account of practical reasoning over constitutional essentials and basic liberties, and argue that the Rawlsian idea of reasonableness, along with the nested idea of proportionality as reciprocity, may provide constitutional balancing with a theoretical foundation, consistent with the primacy of fundamental rights which lies at the core of american constitutionalism. I claim, then, that the reasonable plays a crucial role in shaping the exercise of public reason over basic liberties, at the foundational level as well as at the applicative level, and contend that it serves as the unitary argumentative guideline along which practical reasoning unfolds, by balancing different values and goods under some rules of priority.

Finally, I attempt to outline how this "Rawlsian" model of practical reasoning should apply to the exercise of judicial review and claim that the reasonable, here, requires: (1) the judicial assessment of reasons and arguments under the criterion of proportionality as reciprocity, and (2) a sliding-scale exercise of public reason, so as to adapt the theoretical density and ambitiousness of the judicial discourse to the different levels of abstraction which may be required, from time to time, in the forum of constitutional adjudication.

Reasonableness and Balancing in Constitutional Adjudication

Both civil-law and common-law systems, as well as international law, invoke the idea of reasonableness under a wide range of legal concepts and doctrines, both in public and private law[1]. In all these contexts, the reasonable serves as a regulative idea expressing the quest for an exercise of practical reasoning aimed to achieve an equilibrium among different normative possibilities and arguments, in relation to different, legal and factual, circumstances.

A reasonable legal discourse, thus, combines normative reasons with concrete needs, such as they emerge out of different contexts, and aims to ensure the flexibility of the law and its responsiveness to "justice and fairness"[2].

In this sense, the idea of reasonableness finds a prominent interpretative and argumentative use in constitutional adjudication, where it grounds the judicial power to review the legitimacy of laws, and indeed of all institutional actions at large.

Here, reasonableness serves as a standard of judgment and takes different forms, based on substantive criteria, such as equality, as well as on a balance of constitutional values, interests and protections: the analysis narrows to this last form of the reasonable and focuses on the "balancing" approach to constitutional adjudication, conceived as the approach to the exercise of judicial review that is intended to establish, or assess, an equilibrium among conflicting norms of constitutional rank so as to adjust the abstract form of the law to the concrete needs.

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[1] Part of this essay will be published in Giorgio Bongiovanni and Chiara Valentini, *Reciprocity, Balancing and Proportionality: Rawls and Habermas on Moral and Political Reasonableness*, in G. Bongiovanni, G. Sartor and C. Valentini (Ed. by), *Reasonableness and Law*, Springer: Dordrecht, 2009.

[2] Giorgio Bongiovanni and Chiara Valentini, *Reciprocity, Balancing and Proportionality: Rawls and Habermas on Moral and Political Reasonableness*, in G. Bongiovanni, G. Sartor and C. Valentini (Ed. by), *Reasonableness and Law*, cit., pp.xiii.

In this perspective, the reasonable regulates the exercise of judicial review and shapes the normative framework of the "balancing" decision-making processes: it places the courts under the duty of achieving, and justifying, their decisions according to a set of procedural constraints and, at the same time, provides the normative and practical requisites for the judicial assessment of norms, actions and decisions.

This set of constraints and requisites, then, is not fixed, but rather produces "multifaceted" criteria, whose content varies depending on the different areas and cases where reasonableness comes to bear[3]. The reasonable, indeed, enters the constitutional discourse as a conceptual "category", rather than a "monolithic" concept, and its fluidity explains why it is so widespread in the legal discourse, but also makes it hard to exhaust its content in comprehensive, and unitary, terms.

This aspect of the reasonable, especially when it comes to constitutional balancing, is very controversial from a theoretical standpoint as well as from the standpoint of the practice of law: the conceptual fluidity of reasonableness turns into the flexibility of the criteria framing the exercise of judicial review, and this poses a problem of objectivity, that is, the problem of making judicial decision-making, and constitutional balancing, consistent with certainty, conceived as the predictability and coherence of legal judgments.

The theoretical debate on these issues is extremely wide and embraces a broad spectrum of questions such as the nature and the normative status of constitutional norms and protections, the interpretative and the argumentative models applicable to constitutional adjudication, and the limits to the power of judicial review in constitutional democracies[4].

We will not go into the analysis of this debate but it is worth pointing out that it draws on constitutional case-law and interconnects with it: in the European context, the decisions of the German Constitutional Court have inspired, if not preceded, the theoretical assessment of a balancing model centered on the idea of proportionality[5]; in the US context, the balancing approach has entered the constitutional discourse through the Progressive movement attack on the formalist Supreme Court's jurisprudence of the *Lochner-Era* and has been evolving as "part of a revolutionary conception of the law, which changed the face of American law, and whose purpose was to undermine the existing legal philosophy"[6].

This interplay between "theory" and "practice" of balancing, then, has played a crucial role also at a transnational level, where it has been part of a broad dialogue and exchange among judges and legal scholars, involved in a "brisk international traffic" in normative ideas about rights and constitutional adjudication[7].

These ideas, from reasonableness to proportionality, define the theoretical substrate of a pervasive "balancing network" which entails a set of basic assumptions about the nature of constitutional law and constitutional systems: in this sense, it has been argued that the widespread resort to balancing relies on a "new constitutionalism"[8], endorsed by Constitutional Courts and legal scholars across different legal orders, with the exception of the United States, where the interconnection between balancing and constitutionalism is still controversial and has been following different paths.

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[3] N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon,1978.

[4] To this end, I draw on the Robert Alexy's account of constitutional rights and balancing, as the most influential and representative conceptualization of the balancing exercise in constitutional adjudication.

[5] See Robert Alexy's references to "inspiring" balancing decisions of the *Bundesverfassungsgericht* in R. Alexy, *A Theory of Constitutional Rights*, Oxford University Press, Oxford, 2002

[6] O. W. Holmes, *The Path of Law*, in "Harvard Law Review", 10, 1897. For this reading of the origins of the US balancing doctrine see M.Cohen-Eliya and I.Porat, *American Balancing and German Proportionality: The Historical Origins*, 2008, available at SSRN: http://ssrn.com/abstract=1272763 and Id., *Some Critical Thoughts on Proportionality*, in G. Bongiovanni, G. Sartor and C. Valentini (Ed. by), *Reasonableness and Law*, Springer: Dordrecht, 2009.

[7] M. A. Glendon, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV., 99, 100–18, 1994.

[8] A. Stone Sweet and J. Mathews, *Proportionality Balancing and Global Constitutionalism*, in "Columbia Journal of Transnational Law" 47, 2008.

Reasonableness and Balancing between "Procedural" and "Instrumental Rationality"

I will briefly analyse the balancing approach that has been spreading over Europe as well as the different approach undertaken by the US Courts: on the one hand, I will disentangle the main features of the "European" model of balancing, that is based on proportionality analysis and rests on a "procedural" conception of practical reasonableness and rationality; on the other hand, I will focus on the US balancing model, conceived as a two-fold argumentative strategy entailing the exercise of practical reasonableness in a consequentialist perspective and in terms of instrumental rationality.

The "Proportionality Analysis" paradigm: A Dominant Approach to Balancing

Starting in the 1970's, the "balancing approach" to constitutional adjudication has been spreading in judicial practice as the ordinary mechanism for the assessment of intra-constitutional conflicts. In very different contexts, from Europe to Canada, from Israel to South Africa, Constitutional Courts have turned to *balancing* as the "preferred procedure for managing disputes involving an alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest"[9].
In judicial practice, the application of this *mechanism* has been typically grounded in the standard of reasonableness and structured in three main analytical steps: balancing courts usually proceed by (1) identifying the interests conflicting in the cases under review, (2) specifying the 'weight' of these interests on the basis of the legal and factual circumstances and (3) weighing these interests one against the other, so as to strike a balance among them and assess the degree of protection they deserve in the concrete case.

This decision-making scheme has been widely assimilated and deployed by Constitutional Courts as a "*formal* structure" that explicates the reasonable"[10] in terms of procedural rationality, serving as a *procedural* template for the exercise of legal reasoning within rational argumentative boundaries, according to the standard of reasonableness.

Nonetheless, when the conceptual link between reasonableness and law concretizes in this kind of analytical process, the exercise of judicial review must cope with several difficulties: the task of identifying, weighing and commensurating very different kind of interests raises many argumentative challenges, concerning the objectivity, coherence and certainty of the resulting judgments and decisions.

In fact, the balancing "template" is not, and should not be reduced to, a procedural scheme which stands *in vacuo*: it is a model of constitutional adjudication grounded in a specific conception of constitutional norms, of the applicative dimension of these norms, and of the role the judiciary plays in the constitutional order:

(1) First, the resort to balancing in constitutional adjudication is rooted in the idea that contemporary constitutions incorporate "an objective scale of values which applies, as a matter of constitutional law, throughout the entire legal system"[11]. In this perspective, the constitutional norms protecting fundamental rights and interests are taken as "norms of principle" which give expression to the ultimate "values" of the entire constitutional system and have a special content and normative status, according to which they must be read and applied.

In particular, constitutional principles are taken as "open-ended norms" which do not provide definitive solutions to legal questions and do not specify the conditions for their application, but rather need to be specified and realized according to the legal and factual possibilities. They are not definitive commands but "optimization requirements", which can be more or less realized and whose content is indeterminate in the semantic dimension and open in the deontic dimension.

[9] Ibid., p. 2.
[10] R. Alexy, *The Reasonableness of Law*, in G. Bongiovanni, G. Sartor and C. Valentini (ed. by), *Reasonableness and Law*, Springer: Dordrecht, 2009, p. 8.
[11] BVerfGE 7 15 January 1958, BVerfGE 7,198.

In this perspective, the norms of principle, and constitutional rights, have a teleological normative status and are assimilated to values, especially for the fact that they can collide: different constitutional principles may apply to the same case and be in conflict one with the other - this meaning that a principle forbids something while another principle authorizes it - and when a conflict among them occurs, the judicial task is to evaluate the legal and factual possibilities for the "optimization" of the principles at stake and, then, strike a "balance" among them so as to find a point where the values they express may converge.

(2) Second, this perspective assigns a crucial role to legal interpretation and argumentation: the normative content of constitutional principles needs to be specified in the applicative dimension by appropriate argumentative means.

In this perspective, "the incorporation of human rights into a legal system underscores and enhances the role of balancing"[12]: the "reasonable application of constitutional rights" requires balancing as the decisional mechanism entailed by the "proper method of law's application"[13] that is identified in *proportionality analysis*. In a reasonable legal system, thus, "balancing appears not only at the object-level of the application of law but also at a meta-level, where problems concerning the proper method of law's application are to be resolved. Here, the phenomenon of meta-balancing appears".

At this meta-level, the balancing practice rests on the assumption that the "reasonable" application of conflicting constitutional norms must unfold by the means of practical reasoning, along the argumentative guidelines defined by a general principle of proportionality[14].

(3) Third, Constitutional Courts perceive themselves as entitled to balance principles/values of constitutional rank as long as they are entitled to apply constitutional principles according to their normative status: proportionality analysis, along with the nested balancing mechanisms, is conceived as the "rational" way of resolving the conflicts occurring in the constitutional dimension, among principles whose open and indeterminate content needs to be specified in light of the legal and factual possibilities, so as to "be realized to the greatest extent possible"[15].

To sum up, we can say that the "balancing-proportionality" approach is rooted in the account of reasonableness as a normative idea that prescribes the exercise of procedural rationality over constitutional rights, conceived as optimization requirements whose application implies balancing decision-making procedures revolving around proportionality analysis.

Procedural Rationality at Work: Proportionality Analysis and Balancing

As we have pointed out, the balancing template that has been spreading in Europe and in trasnational legal systems, appeals to the criterion of *proportionality*, understood as a normative idea controlling each and all of the balancing steps, so as to ensure the coherence, objectivity and certainty of the resulting judgements and decisions.

In this perspective, the whole balancing process starts and unfolds in light of a general principle of proportionality according to which the protection of constitutional rights is not absolute but relative, so that their sphere of protection can be limited when there are legitimate and compelling reasons for this, and, at the same time, the width of this sphere must be proportionate to the concrete relevance of the interests at stake, these being the interest underlying the protection of the right as well as the interest underlying the restriction under review.

[12] R. Alexy, *The Reasonableness of Law*, in G. Bongiovanni, G. Sartor and C. Valentini (ed. by), *Reasonableness and Law*, cit., p. 14.
[13] *Ibid.*
[14] According to the German Federal Constitutional Court: "the principle of proportionality emerges basically from the nature of constitutional rights themselves" (BVerfGE 19, 342; 65, 1).
[15] R. Alexy, *Constitutional Rights, Balancing, and Rationality*, in "Ratio Juris", 2, 2003, p. 135.

Accordingly, the structure of the balancing process combines different analytical levels, which are controlled by different sub-principles of proportionality: these are the criteria of "necessity" and "suitability", concerning the "factual possibilities" according to which the weight of the interests involved must be specified, and the criterion of "proportionality *stricto sensu*", concerning the "legal possibilities" according to which this weight must be specified further and commensurated to the weight of any other, colliding, interest[16]. As Alexy puts it: "the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other"[17].

This "balancing in terms of proportionality" paradigm "first arose in Germany"[18] and then spread over the rest of Europe and beyond, to become applied also by transnational judicial bodies in the context of Treaty-based systems such as the European Union (EU), the European Convention on Human Rights (ECHR), and the World Trade Organization (WTO)[19].

By the end of the 1990s, "virtually every effective system of constitutional justice in the world" has entered the "age of balancing"[20] and, "with the partial exception of the United States", has embraced "the main tenets of proportionality analysis"[21] as well as the "new constitutionalism" perspective, endorsing "a robust form of judicial review and a two stage-system of protecting rights, consisting of rights protection clauses and a standard-based doctrine for the adjudication of rights conflicts"[22].

Actually, it is precisely this theoretical background, and the conception of judicial review it comes with[23], that prevents the establishment of proportionality analysis in the US context: "while in many respects the United States is the birthplace of constitutionalism and the driving force behind the success of constitutionalism, its own constitutional law stands apart"[24], especially when it comes to fundamental rights and their adjudication.

The US Approach: A Twofold Balancing Strategy

The balancing devices applied by the US Courts are grounded in the conceptual dimension of reasonableness, but do not rely on "proportionality analysis": first, American courts do not appeal to the idea of proportionality overtly, even though they cope with conflicts among constitutional interests by pursuing "compromise solutions" aimed to commensurate the degree of protection granted to the conflicting interests at stake with the weight these interests carry in the concrete circumstances under review; second, the US Courts seek reasonable solutions to intra-constitutional conflicts by resorting to different balancing techniques, rather than to a "structured", proper, balancing doctrine such as the one revolving around proportionality analysis.

In this perspective, the US Courts apply different balancing *strategies* and adjust their argumentative paths to the different kinds of "intra-constitutional" conflicts – among competing institutional interests as well as among public interests and individual rights – they face in the exercise of judicial review.

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[16] Ibid .
[17] Id., *A Theory of Constitutional Rights*, p. 102.
[18] I. Porat, *Some Critical Thoughts on Proportionality*, in G. Bongiovanni, G. Sartor and C. Valentini (Ed. By), *Reasonableness and Law*, Springer. Dordrecht, 2009, p. 245.
[19] A. Stone Sweet and J. Mathews, *Proportionality Balancing and Global Constitutionalism*, in "Columbia Journal of Transnational Law" 47, 2008, 2008, pp. 73-165.
[20] T. A. Aleinikoff, *Constitutional Law in the Age of Balancing*, in "Yale Law Journal", 5, 1987, pp. 943–1005.
[21] Id., p. 76
[22] M.Cohen-Eliya and I.Porat, *American Balancing and German Proportionality: The Historical Origins*, cit., p. 2.
[23] According to R. Alexy, balancing becomes necessary in light of the "comprehensive or holistic construction" of constitutional rights embraced by the German Federal Constitutional Court and balancing courts in general. See. R. Alexy, *Constitutional Rights, Balancing, and Rationality*, cit., pp. 131-132.
[24] M.Cohen-Eliya and I.Porat, *American Balancing and German Proportionality: The Historical Origins*, cit., p. 2.

Instrumental rationality at work: means-ends scrutiny and cost-benefit analysis

Narrowing the analysis to the conflicts occurring among public interests and fundamental rights, the balancing approach of the US Courts can be described as a two-fold argumentative strategy: on the one hand, judicial bodies go into a rationality scrutiny of the institutional acts restricting fundamental rights and engage in a 'means-ends analysis' aimed to scrutinize - at different degrees of intensity - the rational connection between the interest underlying the act under review and the means adopted to pursue this interest; on the other hand, they apply a "cost-benefit analysis" to weigh the advantages deriving from the act under review against the disadvantages this act may produce in terms of impact on the right.

Both these analytical paths are characterized by a pragmatic approach to the exercise of judicial review in terms of practical reasonableness: the tension among normative reasons turns into a means-ends, cost-benefit, tension that gets evaluated by the means of instrumental rationality and in a consequentialist perspective.

This kind of strategy, then, can be applied to strike either a 'definitive' or an 'ad-hoc' balance among competing interests: according to the classification propounded by Alexander Aleinikoff we can distinguish "balancing that establishes a substantive constitutional principle of general application from balancing that itself is the constitutional principle"[25].

Depending on the kind of balancing approach, definitional or ad-hoc, the effects of the evaluative process undertaken by the Courts may differ because some interests "may count more or less when considered on a global or case-by-case basis"[26] depending on the short-term or long-term perspective by which the Courts look at these interests as well as at the consequences of their mutual adjustment. In particular, the "ad hoc balancing", which is dominant in practice, has the advantage of tailoring judicial analysis to the concrete circumstances but, at the same time, is regarded as the most dangerous, for it may undermine the continuity and coherence of the judicial action having an impact on the core of the constitutional system.

a) the first stage: the means-ends analysis

The US Courts typically engage in a means-ends analysis when they go into a 'rationality scrutiny' of the laws, or any other institutional act, affecting the sphere of protection of constitutional rights. More specifically, this kind of analysis is devoted to verifying the rationality of the "means-ends" relation underlying the institutional choices made to pursue a legitimate interest and having an impact on fundamental rights.

This kind of scrutiny typically consists of two analytical stages, aimed to evaluate the 'necessity' of the means adopted in pursuing a public interest/goal as well as the 'suitability' of those means in relation to the interest/goal pursued by the institution.

This twofold analysis entails the identification of the governmental interest underlying the institutional act as well as of the interest or value underlying the constitutional protection of the right affected by the act. The specification of these competing interests, then, is not merely abstract but develops into a 'contextual' analysis of the weight they carry in the case under review in light of the concrete circumstances characterizing the specific case.

The means-ends scrutiny can unfold at different degrees of intensity and result in three different kinds of judicial tests (the rational basis review, the strict scrutiny and the intermediate scrutiny) which serve as different, and alternative, analytical levels of a sliding-scale review, governed by a hierarchy of criteria and built upon the standard of reasonableness.

At the bottom level of this sliding-scale analysis, we find the "rational basis review" that is aimed to verify whether a governmental action is a reasonable means to an end legitimately pursued

[25] T. A. Aleinikoff, *Constitutional Law in the Age of Balancing*, cit., p. 948.
[26] Ibid.; M. B. Nimmer, *Nimmer on Freedom of Speech. A Treatise on The Theory of the First Amendment*, Bender, New York, N.Y., 1984.

by the government: here, the standard of reasonableness requires that a governmental action be "rationally related" to a "legitimate" governmental interest.

At the intermediate level, there is the "heightened scrutiny" (or "intermediate scrutiny") which is guided by a more stringent standard of reasonableness according to which the government interests must be furthered by "substantially related" means.

Next up, at the top of this sliding-scale, there is the "strict scrutiny", which is the most stringent standard of judicial review applied by American courts in the review of federal laws. According to the "strict scrutiny", the law or policy under review must satisfy three prongs: first, it must be justified by a compelling government interest, this meaning that it must be a necessary or crucial interest instead of something merely preferred; second, the law or policy must be narrowly tailored to achieve the goal or interest pursued by the government, this meaning that government action must not be over-inclusive (exceeding the public goal) neither under-inclusive (failing to address essential aspects of the compelling interest); third, the institutional act must be the least restrictive means for achieving government interest, this meaning that there cannot be a less restrictive ways to effectively achieve government interest.

b) the second stage: the cost-benefit analysis

The second argumentative path characterizing the "decisional strategy" usually applied by the American courts to intra-constitutional conflicts, focuses on the commensuration of the advantages and disadvantages deriving from all the rational, alternative, means-ends solutions applicable to the case under review.

Along this path, the Courts usually proceed by envisioning, and weighing one against the other, the benefits deriving from the act under review against the costs incurred by the infringement of the right, in order to strike a final balance among the constitutional values at stake.

In particular, according to the formula set forth by the US Supreme Court in *Mathews v. Elridge*[27] and usually applied in due process cases, "the ordinary mechanism" for the judicial balancing of "serious competing interests" must combine the means-ends analysis with an additional analytical step aimed to evaluate "the private interest that will be affected by the official action against the government's asserted interest including the function involved and the burdens the Government would face in providing greater process […] through an analysis of the risk of an erroneous deprivation of the private interest if the process were reduced and the probable value, if any, of additional or substitute safeguards […]".

The conceptual dimension of proportionality, thus, seems to play its own role at this analytical stage, resulting in a cost-benefit balancing exercise that is complementary to a means-ends rational assessment: according to the standard of reasonableness, the act under review must be (1) "rationally" related to the end pursued by the government and (2) have disadvantages which do not *outweigh* the benefits it may produce.

The judicial search for a "reasonable" solution, thus, ends with a cost-benefit assessment that completes, by the means of balancing, a judicial scrutiny which is aimed, as a whole, to verify that the restriction of a constitutional right is not un-necessary, unsuitable and too disadvantageous, all things considered.

In this sense, we argue that this balancing strategy relies on the exercise of practical reasonableness in terms of instrumental rationality and unfolds in a consequentialist perspective: there is a cost-benefit balance, and a compensatory logic underlying it, which follows the rational means-ends assessment through and reveals the pragmatic approach that lies at the core of this twofold decisional strategy.

c) the judicial call for proportionality analysis

Although the conceptual dimension of proportionality plays its role in the final assessment of a proper relation between conflicting interests of constitutional rank, no 'proportionality doctrine' has ever

[27] *Mathews v. Eldridge*, 424 U.S. 319 (1976).

been developed by the US Courts, and no explicit reference to proportionality *stricto sensu* can be found in their vocabulary and arguments.

Nonetheless, we should point out that an open call for the introduction of a transparent, and structured, proportionality analysis in constitutional adjudication, has been made in a very recent US Supreme Court decision[28]: in his dissenting opinion, Justice Breyer has overtly invoked the application of a "proportionality approach" to balancing cases, stressing that this is the kind of approach that has been applied by the US Supreme Court in the past, in many crucial fields, even though not explicitly.

For Breyer, "where a law significantly implicates competing constitutionally protected interests in complex ways, the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests. Any answer would take account both of the statute's effects upon the competing interests and the existence of any clearly superior less restrictive alternative. Contrary to the majority's unsupported suggestion that this sort of "proportionality" approach is unprecedented, the Court has applied it in various constitutional contexts".

This shift towards proportionality analysis may be a turning point for the establishment of a balancing doctrine in the American context, as well as for the US Courts' involvement in the transnational judicial dialogue on proportionality.

As for the first point, the explicit reference to a "not unprecedented" proportionality approach seems to us the signal that there is a judicial awareness of a hidden role played by the idea of proportionality in the balancing strategies adopted in the past; overall, it reveals the judicial awareness of the pivotal role this approach may play in the future refinement, and improvement, of the analytical structure which supports the balancing mechanisms.

As for the second point, the judicial call for the proportionality approach discloses the possibility of a more active involvement of the US Courts in the judicial and scholarly exchange that has been setting forth on a global scale a new paradigm for judicial review revolving around proportionality as "the ultimate rule of law"[29].

In this perspective, the idea of proportionality could be the driving force of a future convergence between the European and the American models of fundamental rights adjudication and serve as a breach through which the migration of normative ideas may reach the US Courts and bring to an end their isolation.

d) the reticence towards balancing and proportionality analysis

However, there are many obstacles on this path: in the US context, "balancing is still a controversial and suspect concept, retaining some of its anti-formalist image and it has not acquired the status of a central, formal doctrine of American constitutional law"[30].

There are several reasons for this reticence.

First of all, there are historical reasons: in the US context, the balancing approach first arose in private law and entered the constitutional discourse later, as a reaction to the formalistic approach to the protection of individual rights against different kinds of interests[31]. In time, balancing has "gained some acceptance as a method that can protect rights", by ensuring that rights are not un-necessarily restricted, even though the awareness is still strong that it was introduced to ensure that rights were not too protected against other interests.

There are, then, "ideological" reasons for the resistance towards constitutional balancing: due to its ductility, it is regarded as a decision-making procedure which may undermine the normative content of rights and turn the constitution into a transitive order of values and goods left at the disposal of the Courts.

In this perspective, the ongoing exchange among judges and scholars must cope with many controversial issues and a substantial theoretical effort is still needed to provide judicial practice with

[28] *District of Columbia v. Heller*, 554 U.S. ___ (2008)
[29] D.Beatty, *The Ultimate Rule of Law*. Oxford University Press, Oxford, NY, 2004.
[30] M.Cohen-Eliya and I.Porat, *American Balancing and German Proportionality: The Historical Origins*, cit., p. 34.
[31] Ibid., pp. 5 e ss.

normative models, and conceptual tools, which may reconcile the balancing approach with the "narrow and strict construction" of constitutional rights characterizing the US legal tradition and constitutional culture.

In this perspective, the theoretical debate is still open and wide, and deals with several questions:

1) First, there is a question of the foundation and legitimacy of the balancing-proportionality approach *per se*: the idea of a mutual, proportional, adjustment among constitutional rights implies a reduction of their sphere of protection which must rest on theoretical assumptions, and normative reasons, fitting the liberal attachment to the priority of rights lying at the core of the US constitutional order and also grounding the judicial "rights-based" approach to the exercise of judicial review undertaken by the American Courts in recent decades.

2) Second, there is a question concerning the sphere of application of the balancing-proportionality approach, and the kind of interests which can be balanced: here, the matter is which constitutional values can be balanced one against the other and to what extent they can be balanced "away" by the courts. As for the first aspect, the main question is whether constitutional rights can be balanced by the judiciary and whether they can be balanced against different sorts of interests or goods; as for the second aspect, the question is to what extent constitutional rights can be balanced without depriving their core of the due protection.

3) Third, there is a question of method and criteria concerning: the scale of values to be used by judicial bodies in assigning, and commensurating, the weight of different interests of constitutional rank; and the specification of the criteria governing the several stages of the balancing review so as to encompass judicial argumentation within a rational framework.

On these issues, the US legal theorists and constitutional lawyers are divided: on the one hand, the opponents of balancing appeal to deontological ideas in moral theory or liberal foundations in political philosophy; on the other hand, the proponents of balancing argue from the same premises, mainly grounded in utilitarianism (in its different versions) or welfarism, which define the theoretical background of the means-ends, cost-benefit, analysis characterizing the balancing strategies adopted by the Courts and expounded above.

Nonetheless, the contention here is that there is a third perspective, according to which the liberal conception of fundamental rights and the proportionality-balancing approach to constitutional adjudication are not mutually exclusive: I draw on the account of reasonableness and constitutional adjudication propounded by John Rawls and argue that his idea of *reciprocity* provides constitutional balancing with a theoretical foundation consistent with liberal constitutionalism, by drawing a line of normative continuity among the different dimensions (from the foundational level down to the applicative level) in which the reasonable brings together the prioritization of rights and their mutual adjustment into an "adequate scheme".

Reframing Constitutional Balancing and Proportionality in a Liberal Perspective: Reasonableness and the Legacy of John Rawls

In the account offered here, the Rawlsian idea of reasonableness lies in the domain of practical reason, where it serves as a constraint on the rational and stands as a regulative idea whose normative core is centered on the concept of "proportionality as reciprocity". This conception of the reasonable has a twofold foundation: on the one hand, it rests on the Rawlsian intersubjective reading of the Kantian account of rational autonomy[32]; on the other hand, it is influenced by the Sibley's account[33] of the

[32] a. J. Rawls, *Kantian Constructivism in Moral Theory*, in Id., *Collected Papers*, Harvard University Press, Cambridge, Mass., 1999.

[33] W.M. Sibley, *The Rational Versus The Reasonable*, in "Philosophical Review", 4, 1953.

reasonable as implying "a willingness to consider our actions from a common standpoint and in light of the interests of the others"[34].

Reasonableness, thus, is a distinctive disposition of the rational agents, conceived as liberal persons, who "are not moved by the general good as such, but desire for its own sake a social world in which they, as free and equal, can cooperate with others in terms that all can accept. They insist that *reciprocity* should hold within that world so that each benefits along with others"[35].

On this account, the reasonable is inclusive of, but not reducible to, correctness of reasoning or instrumental rationality. Rather, it draws on moral considerations, among others, and asks us to take into account some fundamental criteria of moral judgment, such as universalizability and impartiality, in determining whether a behaviour, argument or decision is correct.

In this sense, the reasonable shapes a set of procedural constraints which prevent the rational agents from making partial judgements and enable a discursive achievement of agreements constructed as the outcomes of impartial deliberative procedures. The point, thus, is that this conception of reasonableness is based on a unitary system of criteria and admits, at least indirectly, of procedures for balancing goods and principles[36]: Rawls's theory proceeds on the basic assumption under which, for all the foundational difficulties involved in developing a moral or political conception, the conception finally worked out invokes substantially unitary spheres and criteria of reasonableness, thereby suggesting, however indirectly, that we need to balance different goods against one another, on the basis of rules establishing priorities among such goods.

In this perspective, the reasonable comes to play its role in *Political Liberalism*[37], where Rawls focuses on the possibility of social cooperation and identifies in the "reasonable" use of public reason the tool for the construction of the agreements supporting this cooperation: public reason, here, is *the way* of reasoning about political values, shared by free and equal citizens, and unfolds within the procedural framework that is defined by reasonableness and enables social cooperation by way of "reciprocity". And reciprocity, here, means that citizens are treated as free and equal, which is the basic understanding of liberal citizenship on which a fair cooperation is founded.

In this sense, "reasonableness as reciprocity", is the basic criterion of public reason as a decision-making scheme: it is the criterion that acts as a constraint on argumentation and limits the spectrum of reasons and claims which can be advanced, and assessed, in the forum of public reason.

This criterion, indeed, requires that the rational agents involved in the exercise of public reason proceed by "changing roles" with their counterparts in deliberative processes, and accept the consequences that the final decision will entail. In this sense, the reasonable requires the exercise of practical rationality so as to produce judgments and decisions by *mutually* adjusting different normative reasons and arguments: an argument offered as most reasonable to us, must at least be reasonable to others, so as to narrow down the gap between what we think is justified and what others think can be justified.

To specify, at this point, the conceptual link between this conception of reasonableness as reciprocity and the ideas of proportionality and balancing: here, the point is to see how the claims and arguments, which have been reasonably advanced in impartial decision-making processes, should be worked out, especially when it comes to constitutional essentials and basic liberties.

These processes, as we will see, unfold at different stages and in different forums, and are intended to assess the different reasons that the rational agents reasonably give one another when they discuss fundamental political questions. In this perspective, "public justification is not simply valid reasoning, but argument addressed to others: it proceeds correctly from premises we accept, and think

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[34] J.W. Boettcher, *What Is Reasonableness?, in "* Philosophy & Social Criticism", 5–6, 2004, pp. 597–621.

[35] J. Rawls, *Political Liberalism*, New York: Columbia University Press, 1993, p. 50.

[36] Giorgio Bongiovanni and Chiara Valentini, *Reciprocity, Balancing and Proportionality: Rawls and Habermas on Moral and Political Reasonableness*, in G. Bongiovanni, G. Sartor and C. Valentini (Ed. by), *Reasonableness and Law*, p. 82. *Contra*, Habermas reduces the criteria of reasonableness to the consideration of whether moral judgments are amenable to post-metaphysical justification and, accordingly, denies the possibility of any balancing procedure (See J. Habermas, *Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism*, and Id., *"Reasonable" versus "True," or the Morality of Worldviews*, in Id., *The Inclusion of Other*, The Mit Press, Cambridge, Mass. 2000

[37] J. Rawls, *Political Liberalism*, New York: Columbia University Press, 1993.

others could reasonably accept, to conclusions we think they could also reasonably accept."[38] The same basic idea, then, applies to political values such as liberty, equality, and opportunity: we are called on to balance these values against one another, and work out their meaning, and the appropriate place for this is the forum of public reason, where rational agents are bound to provide what, from their own perspective, is the most reasonable argument and what, from the perspective of the others, may be considered at least reasonable.

In this sense, the exercise of public reason turns into the assessesment of different political conceptions, to be worked out by balancing the political values which these conceptions are based on: a conception of justice entails a combination and balance of political values, and it is the criterion of reciprocity that we must rely on in order to work out this balance in the public forum.
This idea of people balancing values as equals is also exemplified by Rawls with respect to the issue of abortion: "the only comprehensive doctrines that run afoul of public reason are those that cannot support a reasonable balance [or ordering] of political values".

In this sense, I argue that claims and arguments can be judged reasonable only if they appropriately balance goods and values: we are working out a way to place goods and values on a scale that ranks them from *most* to *least* reasonable, which involves an effort to achieve, among such goods and values, a proportionality, to be construed by working from the perspective of what can be presented as reasonable to others, under the criterion of reciprocity among equals. In this sense, reciprocity serves as the theoretical foundation of decision-making procedures which balance goods and values in order to make them proportional to one another.

The reasonable, thereby, prescribes the exercise of "procedural rationality" and identifies in *proportionality as reciprocity* a unitary argumentative guideline, along which deliberative processes must unfold in all the forums where "public reason" is involved, in the political as well as in the legal domain.

The Priority and Foundation of the Basic Liberties

In *Political Liberalism*, the Rawlsian idea of the reasonable expounded above, comes to play a central role in providing a foundation for the basic liberties and in governing their application.

In the initial account offered in *A Theory of Justice*[39], the basic liberties were set on a foundation that fell short in one important respect as discussed by H.L.A. Hart[40]: the theory failed to convincingly explain why the "parties to the agreement" (the parties in the original position) should choose the basic liberties as primary goods and should agree to make these liberties prior to all other goods.

To fill this gap, Rawls proceeded in the first place by rephrasing his first principle of justice, describing the whole system of the basic liberties no longer as "the most extensive total system," but as "a fully adequate scheme"[41].

We find two closely bound-up ideas at the core of such a revision: the first, is the idea of the list of basic liberties understood as having priority over all other sorts of goods; the second, is the idea that the liberties in this list are tied by a relation of *mutual adjustment* which makes it possible to establish among them a reasonable equilibrium so as to fit them into a "fully adequate scheme," as the revised formulation reads.

The Rawlsian list of liberties comprises "freedom of thought and liberty of conscience, the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law"[42].

These liberties are now understood as forming a "family", and it is this family we have to give priority in a liberal perspective, rather than liberty as such or any single liberty in the list.

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[38] J. Rawls, *The Idea of Public Reason Revisited*, in Id., *Collected Papers*, Cambridge, Mass., 1999, p. 594.
[39] J. Rawls, *A Theory of Justice*, Cambridge, Mass.: Harvard University Press, 1971.
[40] H.L.A. Hart,. *Rawls on Liberty and its Priority*, in University of Chicago Law Review, 3, 1973, pp. 534-555.
[41] J. Rawls, *Political Liberalism*, cit., p. 291.
[42] Id., pag. 290.

In fact, the foundation on which Rawls rests this priority is a liberal conception of the person: "The basic liberties and the grounds for their priority can be founded on the conception of citizens as free and equal persons in conjunction with an improved account of primary goods"[43].

Rawls, thus, uses this conception to establish a connection between the basic liberties (with their priority as a family) and the fair terms of cooperation among equals: the liberties are made to fit into a conception setting out fair terms of cooperation among equal persons, and the problem of justifying the priority of the basic liberties is therefore recast as the problem of setting out the reasonable conditions making it possible, for such equals, to agree on the terms of their cooperation.

The weight of this justification falls on the liberal conception of the person, which proves essential in two important respects: in framing the conditions subject to which the parties in the original position are to reach an agreement (understood as offering a provisional justification), as well as in showing the possibility of an overlapping consensus (understood as offering a final justification).

The liberal conception of the person in the original position describes not the parties but the people they represent (namely, the free and equal citizens of a well-ordered society) and this conception enters the original position through the constraints modelling the reasonable. These constraints, indeed, ensure an impartial deliberation among rational parties, so they express a conception of persons as both rational and reasonable, that is, as persons exercising their full moral powers: their rational autonomy in deliberation and their full autonomy as representatives of citizens in a liberal society.

The parties decide on principles of justice and choose primary goods on the basis of what the people they represent would want as free and equal citizens: the goods someone will want depend on the kind of person he or she is. For a person conceived as Rawls does, the primary goods are not "all-purpose means" but the basic liberties, which enable people to exercise their two moral powers as free and equal citizens.

It is, therefore, this conception of the person, along with its companion conception of society, which explains the basic liberties—freedom of speech, thought, association, and so on—and which accounts for their absolute priority over all other primary goods.

It is the liberal conception of the person, and of a person's rational interests, which explains why someone should not want to trade off the basic liberties with other kinds of primary goods. This answers Hart's objection, and also allows us to ground the mutual adjustment of basic liberties in liberal premises: the reason why no tradeoffs are possible is that a citizen, in a well-ordered liberal society, has a higher-order interest in exercising his or her two moral powers (which is what the basic liberties and their priority are for).

There is, also, the question of stability: the basic liberties and their priority will become stable, and we can come up with their final justification, once the conception of the person in which they are grounded—a conception now understood as a normative and political ideal—becomes the focus of an "overlapping consensus".

In Rawls's view, the overlapping consensus is the result of agreements which should not be mistaken for mere compromises among rational people who seek to maximize their personal utility; it is rather something that citizens achieve if they can agree on basic matters of justice, despite the different conceptions of the good which shape the other areas of their lives.

It is, therefore, an agreement among people in a liberal society, and in the result it will make stable the choice made in the original position with respect to the primary goods, understood as goods necessary for the citizens' exercise of their two moral powers. "Citizens are thought to have and want to exercise these (moral) powers whatever their more comprehensive religious, philosophical, or moral

[43] J. Rawls, *The Basic Liberties and Their Priority*. In The Tanner Lectures on Human Values III. Ed. Sterling M. McMurrin. Salt Lake City: University of Utah Press, 1982, pag. 4.

doctrine"[44]: we have different conceptions of the good held by people who, as citizens, regard one another as free and equal, and who—despite their diversity—are willing to agree on the terms of their future cooperation[45].

The Rawlsian idea of overlapping consensus, thus, is helpful in two respects: on the one hand, we have a way to enable people to realize their two moral powers as free and equal, rational and reasonable, members of a liberal society conceived as a fair scheme of cooperation among citizens commited to *reciprocal* respect; on the other hand, it makes this scheme, with its embedded priorities, the subject of an agreement by which the citizens bring *stability* to their cooperation.

At this point, the priority of the basic liberties (a priority understood as an enabling condition) makes full sense and gets its final justification in light of the need to bring stability to a social arrangement so construed.

The Status and Application of the Basic Liberties: Prioritization of Liberties and Constitutional Balancing

In this, and in the following sections, we will focus on the special status of the basic liberties and their applicative dimension, in the attempt to disentangle the Rawlsian model of constitutional balancing.
According to the Rawls account of the basic liberties, their special status[46] implies that: (1) they take priority as a *family* of liberties, and as such they carry absolute weight over the public good and over perfectionist values; (2) none of these liberties can be limited except for the sake of other basic liberties; which brings in the third feature, namely (3) none of the basic liberties can be said to carry absolute weight with respect to any of the others, in the sense that if they should come into conflict, we should adjust them to one another until we achieve a coherent, adequate, scheme secured as such for all citizens equally.

Let us clarify this point further, in connection with the Rawlsian distinction between *restricting* the basic liberties and *regulating* them: in the applicative dimension, only their restriction is ruled out; their regulation, by contrast, is permitted and indeed may even prove necessary in order to combine them into a coherent scheme or to make them practicable.

The only sort of regulation that is disallowed is the kind that would undermine what Rawls refers to as the "central range of application"[47], understood as that core part of the liberties which enables citizens to adequately develop and fully exercise the two moral powers.

In this perspective, we can regulate the basic liberties by adjusting them one to the other, until they form a fully adequate scheme to be specified by degrees: in the original position at first, and then at the constitutional, legislative, and judicial stages.

Yet this process of specification is not left to happenstance, but must be guided by clarifying, in the original position and at a foundational level, the special role of the basic liberties and their central range of application[48].

Let us consider, now, this process of specification, and address three matters with regard to the adjustment of basic liberties: (a) first, I outline the Rawlsian criteria guiding the specification of the basic liberties into a fully adequate scheme: these criteria will prove to be substantive enough to guide the specification, yet not so stringent as to compromise the absolute priority the basic liberties have as a whole; (b) second, I consider the proper attitude by which rational agents, and Courts, should go about blocking out the basic liberties and their interrelation at the different stages of specification,

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[44] J. Rawls, *Kantian Constructivism in Moral Theory*, in *Collected Papers*, Cambridge, Mass.: Harvard University Press, 1999, p. 517.

[45] They are willing to do so precisely because they are acting on a conception of themselves as liberal citizens bound by a sense of mutual respect, and the consensus they will attempt to reach will cover the basic liberties: these are viewed as indispensable to citizens exercising their capacity for a sense of justice and their capacity for a conception of the good under reasonable conditions of fair social cooperation.

[46] J. Rawls, *Political Liberalism*, cit., pp. 294-99.

[47] J. Rawls, *Political Liberalism*, cit., p. 297.

[48] Id., pp. 334-40.

gauging as well, for each of these stages, the admissible degree of specification; (c) and third, I consider the resulting role played by the courts as well as the viability of balancing in constitutional adjudication.

(a) The Criteria of Specification

In *A Theory of Justice*, there are two criteria by which to specify the basic liberties: first, we should seek to achieve the most extensive scheme of these liberties; and second, the basic liberties should satisfy the rational interest of the representative equal citizen[49]. Both of these criteria became a focus of Hart's criticism: the first criterion is merely quantitative and does not apply to the most significant cases of conflict among the basic liberties; the second criterion is simply too vague for application, since it is unclear what the representative equal citizens' rational interest should consist in.

This twofold applicative gap is one that Rawls, in response to Hart, has filled, in the first place, by acknowledging that it would indeed be absurd to think of the specification criteria as quantitative, for that would entail that we should maximize something, and yet there is nothing in the system of basic liberties that could conceivably be maximized: certainly, we cannot maximize the liberties themselves, nor can we maximize the moral powers, since we lack a notion of their "maximum development."

In the second place, Rawls has pointed out that, as much as there may be the focus of a higher-order interest in exercising the two moral powers, these powers do not fully account for the person, since the person is also assumed to have put these powers to use in developing a conception of the good and to have an interest in pursuing such a conception. Stated otherwise, our interest in exercising the two moral powers may be primary, but this exercise is certainly not our only form of good or even its highest form: it is rather a condition of that highest good.

It thus makes more sense to think of the two moral powers as goods to be secured to a minimum indispensable degree rather than as goods to be maximized: in this way, we recognize that each person has a higher interest in fulfilling a conception of the good or plan of life by using those two powers.

This suggests a criterion for specifying the basic liberties: these should be adjusted to one another so as to enable not the maximum development of the two moral powers, but rather an adequate development of them. And there are "two fundamental cases" to which the liberties apply, corresponding to the two moral powers, that is, a capacity for a sense of justice and a capacity for a conception of the good.

The Rawlsian idea, thus, is that we have to guarantee for all citizens the essential conditions for the adequate development of these two powers (in the two fundamental cases) and, in this sense, the test of adequacy splits into two criteria, one for each of the two moral powers, which are closely bound up: we have a sense of justice, and the liberties that go along with it; and we have a capacity for a conception of the good, with another set of liberties suited to serving our rational interest in developing such a conception.

The two criteria are thus made to cohere, "for it is clear from the grounds on which the parties in the original position adopt the two principles of justice that these interests, as seen from the appropriate stage, are best served by a fully adequate scheme"[50].

In this perspective, we can now set up an ordering for the basic liberties, on the basis of their connection with the two moral powers and the two corresponding fundamental cases. The freedom of thought and the political liberties make possible the full and effective exercise of our sense of justice, securing the application of the principles of justice to the basic structure of society; liberty of conscience and freedom of association make it possible to form, revise, and pursue a conception of the good over a complete life, making sure that citizens can make a full, informed, and effective use of their powers of deliberative reason; the remaining basic liberties—relating to the integrity of the

[49] J. Rawls, *A Theory of Justice*, cit., p. 250

[50] J. Rawls, *Political Liberalism*, cit., p. 333.

person and the rule of law—serve as a necessary support in guaranteeing the preceding basic liberties, and in this way they connect with the two fundamental cases.

At this point, I turn to a further criterion that can help us make sense of the basic liberties so arranged. This consists in the Rawlsian notion of the *significance* that each liberty has in the arrangement: "A liberty is more or less significant depending on whether it is more or less essentially involved in [...] the full and informed and effective exercise of the moral powers in one (or both) of the two fundamental cases"[51].

This notion of significance, thus, plays an essential role when it comes to applying the basic liberties, because it guides us in assessing the weight of the claims asserted on the basis of this or that basic liberty— and therefore helps us figure out how each of these liberties are best protected.

We can see, at this point, that the mutual adjustment of the basic liberties and their specification proceed on the basis of a set of criteria, all of them closely connected: (1) the fulfilment of the interest in developing the moral powers, without thereby sacrificing the interest in pursuing a conception of the good; (2) an interest in securing the liberties' central range of application, the indispensable core needed to secure the two preceding interests; (3) the significance of the basic liberties in assessing the claims made on the basis of these liberties in exercising the two moral powers, in the two fundamental cases; (4) and the adequacy of the scheme of liberties with respect to the rational interests of the equal representative citizens.

This system of criteria, and the scheme of basic liberties, thus, responds to a unitary logic, by which the liberties are specified and applied in accordance with the reasons for their priority and the meaning ascribed to such a priority.

It can be said, therefore, that all the specification and application criteria descend from the conception of the liberal person as a free and equal citizen and from the companion conception of a reasonable and fair scheme of social cooperation—which conceptions also help to establish a line of continuity between the foundation and the application of the basic liberties in a liberal perspective.

The overarching idea, in short, is that we have to keep specifying the basic liberties and adjusting them to one another until we achieve the reasonable equilibrium in which the arrangement or scheme they compose is *fully adequate*, in such a way that the scheme so modelled will secure, with its priority, a reasonable system of social cooperation, namely, a system central to which is the idea of reciprocity, and which offers a public space where our interest in exercising the two moral powers can thrive in conjunction with our interest in pursuing a conception of the good.

(b) Stages of Specification: From the Foundation to the Adjudication of Basic Liberties

According to the criteria identified above, the basic liberties get specified at three consecutive stages, these being the constitutional convention, where the liberties are modelled as constitutional rights, followed by the legislative and the judicial stage.

At each of these stages, "the reasonable frames and subordinates the rational"[52]. What change are the tasks assigned to the "rational agents" (delegates, legislators, and judges as rational representatives of the free and equal citizens) and the constraints to which they are subject.

These constraints are all based on the subordinating idea of the reasonable, and become increasingly strong with each successive stage as the veil of ignorance becomes thinner and thinner: at the first stage, in the original position, the reasonable is weakest and the veil of ignorance thickest, whereas at the last stage of judicial decision-making the inverse is true, with the reasonable carrying the greatest weight and the veil of ignorance almost entirely lifted.

In the account offered here, this sequential process is designed to shape the basic liberties through a fair and effective procedure in which the reasonable plays a stronger and stronger role. Nonetheless, the transition from one stage to the next is not described exhaustively by Rawls: as Alexy

[51] Id., p. 335.
[52] J. Rawls, *Political Liberalism*, cit., p. 340.

points out[53], for instance, we have to look at the kind of considerations made in the original position before we can specify the leeway afforded to the delegates to the constitutional convention, whose job is to fashion the family of the basic liberties into an adequate scheme of constitutional rights.

On this aspect I focus later, to point out that the transition from the legislative to the judicial stage is not described exhaustively, so the consequences of this transition on the reasonable exercise of public reason in the forum of constitutional adjudication have to be disentangled.

However, at this second stage, the point of a liberal constitution is to frame a just political procedure, in such a way as to incorporate the basic liberties and ensure their priority: the parties in the original position, thus, are tasked with selecting the principles of justice and the liberties on which rests the basic structure of society, whereas the delegates have to apply these liberties through the constitution, in keeping with the constraints imposed by the reasonable and in view of the equal citizens' rational interest in an adequate scheme of basic liberties.

The main focus, here, must be on the first principle of justice, and the delegates must be concerned in the first place with securing freedom of thought and the equal political liberties: this is what we may define as the essential task in the process of framing a just political procedure, and it should proceed by providing a rough sketch, to be specified in full only later, at the legislative and judicial stage, in the continuing effort to secure and protect constitutional rights.

On the sequential rationale, built upon the Rawlsian idea of reasonableness, the constitution is entrusted with the task of framing a just political procedure, by incorporating the constraints designed to protect the basic liberties, with the rest, and the main part, of the job being left to the legislative and judicial stages.

It should be pointed out that the constraints of the reasonable, here, are stronger than they were in the original position, since the scheme of the liberties worked out at that earlier stage must now be recast as a scheme of constitutional rights; then, at the subsequent stages, we will see the constraints becoming stronger still, with the legislators having less leeway and the judges the least: the latter have to proceed under the constraints placed by the veil of ignorance and the constitution, and the former under those two constraints plus those that come by way of legislation.

In this sense, we can qualify this four-stage sequence as incremental, for it keeps piling on "layers of reasonableness" in the process of shaping and interpreting the basic liberties: on the reading offered here, *the stronger the reasonable, the greater the protection of the basic liberties,* which in a constitutional democracy function as the condition enabling free and equal citizens to cooperate, and reach an overlapping consensus, on the basis of the idea of reciprocity.

In fact, as the constraints of the reasonable become stronger, so does the specification and application of the basic liberties come to depend more and more on the use of public reason which is essentially defined by the idea of proportionality-as-reciprocity.

We can appreciate, now, how pervasive the Rawlsian idea of reciprocity is: it guides the process of specifying and mutually adjusting the basic liberties, understood as political values, and it also guides, in a broader way, the activity of evaluating principles and values in the forum of public reason.

(c) The Judicial Stage and the Role of the Courts

In the account offered so far, the Rawlsian idea of reciprocity plays a crucial role in relation to the comprehensive conceptions, as well as to the arguments, claims and solutions, which can be used by the rational agents (the delegates, the legislators, and the judges) in order to assess and decide the questions concerning constitutional essentials and matters of basic justice: the reasonable arguments and decisions are those which balance different interpretations and attempt to establish a proportionate relationship among different values and goods.

[53] R. Alexy, La teoria delle libertà fondamentali di John Rawls, in F. Sciacca (Ed. by), *Libertà fondamentali in John Rawls*, Milan: Giuffrè, 2002, p. 7.

In this sense, the argument is that the idea of reasonableness provides constitutional balancing with a theoretical foundation, at each of the different stages where it guides the exercise of public reason.

Thus, when it comes to the last stage, and to the exercise of judicial review, constitutional balancing will ensure the priority of rights and liberties as long as the Courts use the tool of public reason in reasonable terms. Public reason, here, defines at the deepest level the basic moral and political values of democratic constitutional systems: it does so by providing a forum for discussions and decisions that develop and get justified in light of the criterion of reciprocity.

In this sense, judicial argumentation is to be seen as aimed at producing judgments and decisions which balance different interpretations and arguments, so as to establish a proportionate relationship among different reasons, and among values and goods, under the rule of the priority of rights over collective goods.

Indeed, in a dualist constitutional democracy—distinguishing constitutional power from legislative and executive power, the supreme law of the land from ordinary laws—the Supreme Court, along with all constitutional courts generally, stands as the principal institutional tool for upholding the constitution, and this consequently involves the task of protecting the system of constitutionally guaranteed basic rights through the constraints based on the principles of justice.

And in addition to serving in this protective capacity, the Supreme Court must also uphold public reason, by giving it a lasting and adequate form and substance, indeed acting as its "institutional exemplar"[54].

Thus, the idea of public reason is being applied here in different ways, depending on who is using it: where the judges are concerned, the decisions they make, and the justifications they provide for these decisions, are framed by public reason alone, that is, on the sole basis of political values which, in their judgment, offer the most reasonable understanding of the public conception of justice and its constituent ideas.

In this perspective, then, constitutional justice plays a key role in specifying the constitutional essentials as well as the basic liberties, and the idea of public reason applies in the strictest way to the judges, who, along with the executive, the legislature, and those running for public office, are part of the public forum, where political discussions are held on matters of basic importance

The Courts, therefore, stand as a product and a tool of public reason and, in this sense, I contend that a liberal perspective should identify the court as the emblem of a constitutional democratic system, which depends on *reasonable* choices for all the questions of political justice.

In the forum of constitutional adjudication, indeed, these questions are debated in terms of principles, because principles make up the subject of the court's reason and serve at the same time as its only tool of judgment and justification. The constraints the reasonable places on constitutional justice, then, account for the whole of judicial decision-making, exhausting all of the conditions subject to which this activity unfolds: the courts invoke no other values than political values, and make no other decisions than political decisions—political by virtue of their connection with constitutional principles, expressing basic political values.

Which means that the courts use no other reason than public reason, and so that they proceed solely within the bounds of the reasonable and its nested criterion of reciprocity.

In the judicial forum, therefore, the exercise of public reason turns into the exercise of legal reasoning within argumentative boundaries which are less flexible than in the other forums: the reasonable, here, plays its strongest role and grounds an exercise of judicial review that is aimed at achieving the "overlapping" of conflicting normative reasons, under a strict criterion of reciprocity as well as under the rules of priority we have discussed above.

This perspective, thus, entails a view of judicial balancing as a qualified, and legitimate, way of dealing with argumentative conflicts concerning the protection of conflicting rights: the exercise of

[54]J. Rawls, *Political Liberalism*, cit. p. 235.

public reason by the means of balancing is constrained at the source, and the courts will develop their argumentative paths within the argumentative scheme sketched above, drawing on the ideas of reasonableness, reciprocity and proportionality; this procedural scheme encompasses legal reasoning so as to guide it towards impartial decisions and mantains the judicial action within the limits required by the same reasons which justify this action: the strongest become the constraints of the reasonable, the more impartial, and legitimate, becomes the judicial adjustment of rights.

In this sense, the Courts produce reasonable, balanced, solutions "simply beacuse they are in the position to do so"[55]: in the forum of constitutional adjudication, the judicial action unfolds under criteria, constraints, and rules of priority, which are strongly binding, and leave a "minimal" margin of discretion.

The Courts, here, are called on to complete and perfect the constitutional enterprise of liberal democracies, one that begins with the prioritization of rights at the foundational level and then proceeds at the different stages of their application, so as to end up in the judicial implementation of the "balanced" scheme of values and goods, gradually refined by the exercise of public reason in the political as well as in the legal domain.

Judicial Balancing: a Sliding-scale Review from the Abstract to the Concrete

The idea of reasonableness as a normative link between the foundational and the applicative dimension of practical reasoning on constitutional rights, stands as Rawls's most valuable contribution to the foundation of an adequate model of judicial balancing in a liberal perspective, for it brings together the reasons for the priority of rights with the criteria guiding their mutual adjustment in the applicative dimension.

Nonetheless, it should be pointed out that the "continuity" of the public discourse on constitutional essentials, along the procedural spectrum that goes from the original position to the stage of constitutional adjudication, comes with the attraction of the legal discourse into the orbit of the political discourse, in spite of the different levels of abstraction required by the legal and the political dimensions of the public reason.

As Cass Sunstein has pointed out[56], the level of abstraction required by legal reasoning is often lower than the one required by political reasoning on constitutional essentials: in the forum of constitutional adjudication, practical reasoning is concerned with particular cases, and deals with the "concretization" of normative conflicts, whereas the exercise of public reason in the political domain copes with conflicts involving "deep" disagreements. Rawls's use of the "overlapping consensus", indeed, aims to make liberal people, who endorse different political views, converge on "political abstractions"[57], as Sunstein underscores. Rawls conceives abstraction as the "way of continuing public discussion when shared understandings of lesser generality have broken down. We should be prepared to find that the deeper the conflict, the higher the level of abstraction to which we must ascend to get a clear and uncluttered view of its roots".

When it comes to the legal discourse, however, rational agents deal with individual cases, and must "reasonably" agree on "particulars": accordingly, they should exercise public reason at a low level of abstraction and use the "constructive" force of silence "as a device for producing convergence despite disagreement, uncertainty, limits of time and capacity, and heterogeneity"[58].

In this sense, I contend that the adjustment of basic liberties under the criterion of reciprocity should be calibrated and adapted to the theoretical density of the public discourse in each of the different stages at which this discourse unfolds, along a spectrum that goes from the most abstract (constitutional level) to the least abstract (judicial stage).

[55] J.W. Boettcher, *What Is Reasonableness?,* p. 602.
[56] C. R. Sunstein, *Legal Reasoning and Political Conflict*, Oxford University Press, New York, 1996, pp. 46 e ss.
[57] *Ibid.*, p. 47.
[58] C. R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv. L. Rev. 1733, 1995, p. 1735

The argument is that the use of the overlapping consensus does not exclude such a "conceptual descent": it is a "format" for agreements which must be reached at the level of abstraction that is needed, time to time, to reach *reasonable* solutions of the conflicts at stake.

Actually, Rawls does not specify the level of abstraction needed in the forum of judicial reasoning, since he aims to offer a perspective by which constitutional lawyers can work out normative conflicts: the point, here, is that this perspective entails a judicial discourse unfolding at different levels of abstraction because this is what reasonableness requires when it prescribes that the legal discourse comes close to experience and concrete needs. The high level of abstraction which Rawls refers to with regard to the political discourse, must be narrowed down when it comes to constitutional adjudication: the veil of ignorance, here, is almost completely lifted, and the constraints of the reasonable are far stronger, this meaning that the argumentative path followed by judicial reasoning is encompassed within the boundaries prescribed by the normative idea that, in the applicative dimension, the abstract form of the law should be adapted to the concrete needs.

In this perspective, I claim that there is no need to withdraw the Rawlsian idea of overlapping consensus: we have to apply this idea, again, in light of the reasonable, namely by adjusting the level of abstraction at which this consensus must be achieved to the concreteness of the conflicting reasons we have to work out and balance, until we reach their mutual adjustment into an adequate scheme.
In this sense, we can imagine a sliding-scale exercise of public reason, encompassing an exchange of arguments and reasons whose theoretical density decreases, in the different stages at which the adjustment of liberties, and constitutional rights, takes place, so as to decrease the level of abstraction at which the exercise of judicial review should achieve a reasonable "overlapping" of the claims at stake.

Going back to the conceptual link between reasonableness and law, we can see, now, the form that this link takes when it comes to the exercise of judicial review: in the transition from the political to the legal dimension of the public discourse, the constraints of the reasonable, conceived in Rawlsian terms, become the strongest, while the degree of abstraction in the exercise of practical reasoning becomes the weakest, so as to make legal reasoning the closest-to-experience exercise of public reason.

In this account, the exercise of judicial review by the means of balancing unfolds towards "overlapping" solutions of legal conflicts, by building a convergence among the different perspectives on the *concrete significance* of the rights at stake, rather than among the "deep" conceptions of their significance.

Conclusions

This paper has outlined the main features of the different balancing approaches to constitutional adjudication which have been spreading over Europe and the USA, and underlied the different role played by the normative ideas of reasonableness and proportionality in the theoretical backgrounds of these approaches.

The focus has been on the resistance posed by the US Courts and legal scholars to balancing and proportionality analysis, and we have pointed out the theoretical effort which is still needed to reconcile the liberal idea of the priority of rights with the judicial practice of their adjustment by the means of balancing procedures.

In this perspective, it is claimed that the Rawlsian idea of reasonableness, combined with his conception of proportionality-as-reciprocity, can be helpful in two respects: first, it justifies the balancing approach to fundamental rights adjudication in a liberal perspective, for it provides this approach with a theoretical foundation that is consistent with the primacy of fundamental rights and does not imply a consequentialist or means-ends perspective in the exercise of judicial review; second, the reasonable, conceived as Rawls does, provides constitutional balancing with a rational argumentative structure, that encompasses the exercise of practical reasoning over fundamental rights within boundaries and limits deriving from a unitary package of criteria, which apply in the political domain as well as in the forum of constitutional adjudication, and which revolves around the criterion of proportionality as reciprocity.

Finally, the paper has focused on the model of judicial review that can be drawn on this account of "public" reasoning on fundamental rights, and contends that when we leave the sphere of political reasoning on constitutional essentials and enter the forum of constitutional adjudication, we have to calibrate the "theoretical ambitiousness" of practical reasoning to the level of abstraction required by a legal discourse that is concerned with "individual cases" and "concrete" needs.