"Reasonableness" as a Test for Judicial Review of Legislation in the French Constitutional Council

BY FEDERICO FABBRI

This article addresses the emergence of a "reasonableness review" in the jurisprudence of the French Constitutional Council (Conseil Constitutionnel). As will be explained in detail below, by "reasonableness" is meant a standard of judicial review of legislation whose peculiarity is to allow the interference of the judiciary in the discretionary powers of the legislature. The French Constitutional Council has repeatedly affirmed, since its 1975 Interruption volontaire de grossesse I judgment, that it is not endowed with "a general power of appreciation and decision identical to that of Parliament". It has gone on to restate the same idea in other ways, declaring, in the 1983 Loi relative à la démocratisation du secteur public decision, that "the appreciation of the general interest belongs to the legislature", and likewise, in the 1984 Loi relative à la limite d'âge dans la fonction publique et le secteur public judgment, that "a complaint that actually focuses on the opportunity of the legislative choice will not be taken into account". These formal statements by the Constitutional Council can be explained in the light of French constitutional history, which has traditionally been averse to any form of judicial review and obsessed by the fear of the gouvernement des juges.

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2 Author’s translation. In French: "un pouvoir général d’appréciation et de décision identique à celui du Parlement".
3 Décision 83-162 DC, 20 July 1983.
4 Author’s translation. In French: "l’appréciation de l’intérêt général appartient au législateur".
5 Décision 84-179 DC, 12 September 1984.
6 Author’s translation. In French: "une critique qui porte en réalité sur l’opportunité de la loi ne saurait être retenue".
The article analyzes the case law of the Constitutional Council and claims that “reasonableness” as a test for judicial review does exist in the French system of constitutional adjudication. In particular, it will be maintained that two forms of “reasonableness review” have been developed in the jurisprudence of the Council. In the 1980s the Council resorted to the “manifest error of appreciation scrutiny” (contrôle de l’erreur manifeste d’appréciation). Since the 1990s, “proportionality analysis” (test de proportionnalité) has become the customary mechanism to review legislation. With varying intensity, these techniques of “reasonableness review” drive the Constitutional Council beyond the line that distinguishes a review of the legitimacy and a review of the merit of the legislative acts. In this sense, the major effect of the appearance of “reasonableness review” in France has been that of favouring a growing “politicization” of the Constitutional Council by increasing its involvement in the law-making process. This situation is likely to be amplified by the recent constitutional reform (Loi Constitutionnelle n° 2008-724 of 23 July 2008) which has introduced in France a form of a posteriori constitutional review of legislation.

Important points of reference for this article have been studies on the political role of judicial institutions: the argument presented here differs from the claim of those French jurists who affirm that the Constitutional Council “never acted as a gouvernement des juges”. It was, however, a French scholar, René David, one of the first to underscore the importance of comparative law to better understand how national laws function in reality. Indeed, the comparative method has demonstrated that for those who operate inside a legal system it is often harder to appreciate several specific features of their own system that, on the contrary, may be easy to identify by people coming from different legal backgrounds and with different mindsets. Comparative analysis “has proven to be the most effective instrument by which it is possible to illuminate structural regularities that would otherwise pass unnoticed”. An empirical assessment of the appearance of a “reasonableness review” in the jurisprudence of the French Constitutional Council fits this paradigm: “reasonableness” is “a concept that is implicit in [the French] legal system, while being explicit” in the legislation, in legal doctrine and in the constitutional adjudication practice of other countries.

7 The works of Andrea Morrone and Alec Stone Sweet have been particularly important for the purpose of this study and will be quoted extensively throughout the article.
12 Id., p. 127.
Law is a social science, and legal phenomena are influenced by many elements, including culture, history, politics and tradition. Doing research in law therefore presents a number of complexities; reasonable people may reasonably disagree as to what interpretation to give to a specific legal phenomenon. This is why methodology matters so much and the choice of employing a specific research method directly affects the understanding of the phenomenon under review. From this point of view, the advantages of the comparative method have widely been acknowledged, given its effectiveness in illuminating “the ‘common cores’ at the international and universal levels, the convergences and divergences, the consonances and disagreements among the various legal systems and the different ‘legal families’, and their ideal and practical reasons”. Maintaining that a “reasonableness review” has emerged in the case law of the French Constitutional Council is heterodox for many of those who analyse French constitutional adjudication from a purely domestic point of view. This article exploits the comparative method to justify a different conclusion.

**LAW AND REASONABLENESS**

The modern legal concept of reasonableness originates in the wake of the constitutional revolutions of late seventeenth-century England and eighteenth-century France, with the
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birth of judicial review over administrative action.\(^{19}\) While in the ancien régime the power of the king and his officers was considered to be above the law,\(^{20}\) one founding principle of the post-revolutionary “legislative state” (Rechtsstaat; État de Droit; Stato di diritto) is that the executive branch shall abide by the rule of law and that courts are entrusted with the duty to review the activities of governmental agencies.\(^{21}\) The rise of the principle of judicial review in the field of administrative law, coupled with the doctrine of the separation of powers, generated, however, different institutional arrangements in England and in continental Europe. Whereas in the common law system the separation of powers came gradually to be identified with the idea that ordinary judges, in regular courts proceedings, could pronounce upon the lawfulness of the activities of the executive,\(^{22}\) in continental Europe the same doctrine was interpreted as requiring the establishment of a separate set of tribunals, the administrative courts (to be placed under the aegis of the administration) to review the claims addressed against the executive branch.\(^{23}\)

Despite these institutional differences, common techniques have been developed by both the common law and the continental judiciaries to scrutinize the activity of the administration. An area of significant convergence is the review of discretionary powers.\(^{24}\) While it was accepted that courts could not substitute the judgment of the administration, it was soon recognized that there should be some control over the rationality of its decisions.\(^{25}\) Since the Victorian period, English courts began utilizing a “reasonableness test” to review the exercise of administrative discretionary powers:\(^{26}\) in the Wednesbury\(^{27}\) case this test was eventually reformulated to establish the limits of the legitimate judicial intervention over “unreasonable” discretionary decisions. Two meanings of the term “unreasonable” emerged from the judgment. In the first general meaning, “unreasonable” was used as a synonym of more specific grounds of attack to the contested act (such as taking into account irrelevant considerations, acting for improper purposes etc.). In the second specific meaning, “unreasonableness” was used in a “substantive sense” to describe a decision that was so unreasonable that no reasonable public body could have made.\(^{28}\)

Similar standards of review also appeared in the legal systems of continental Europe. Notwithstanding the absence of a formalized “reasonableness” yardstick for judicial review and only the occasional use of the word by administrative courts, the “same purpose

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\(^{19}\) Charles H. McIlwain, *Constitutionalism: Ancient and Modern* (1940) has argued that the seed of the constitutional transformations in seventeenth-century England may be found in the distinction between “gubernaculum” and “iurisdictio” that step-by-step began to take place in the course of the Middle Ages.

\(^{20}\) According to Jean Bodin, the authority of the king ought to be described as “summa legibus soluta potestas” (a supreme power unbound by the law). See on this Giovanni Tarello, *Storia della cultura giuridica moderna. Volume I: Assolutismo e codificazione del diritto* (1976); Diego Quaglioni, *La sovranità* (2004), pp. 49 ff.


\(^{27}\) Associated Picture House Ltd. V. Wednesbury Corporation [1948] 1 K.B. 223.

\(^{28}\) Craig, note 25 above, p. 610.
as the review of reasonableness in English law, i.e. the limitation of the administrative discretion”,
was functionally achieved in the civil law administrative systems via the combination of other
grounds of review. Limiting our survey to France (but the same pattern may be found in Germany
and Italy), this can be seen, for example, in the fact that administrative judges have developed several
tests to scrutinize the legality of acts of the executive branch following an action for excess of power (recours pour excès du pouvoir).
Even if the administration enjoys a discretionary power, it is obliged to avoid errors of law and of facts, and courts are empowered to check that no “manifest error of assessments” (erreur manifeste d’appréciation) has been made.
Hence, the French Council of State (Conseil d’Etat) or inferior administrative courts may quash an administrative
decision “for erreur manifeste d’appréciation if it is found to be wholly unreasonable or grossly disproportionate to the facts”.
Until the first half of the twentieth century the “reasonableness test” and its functional equivalents represented a form of last resort mechanism, as courts would annul discretionary administrative decisions only in extreme situations, i.e. when those acts were patently absurd.
Nevertheless, the intensity of the “reasonableness” review began to increase with the expansion of the welfare State and the growing administrative intervention in various spheres of private and societal life. This trend is identifiable both in England and in continental Europe, as courts started exercising stricter scrutiny over the activity of the public bodies, especially when the fundamental rights of citizens were at stake. Thus in England, the reasonableness test was strengthened in order to allow judicial intervention even in cases where the stringent conditions set in Wednesbury did not apply.
In Smith, it was recognized that courts have a power “to consider whether the decision was beyond the range of responses open to a reasonable decision maker and the greater the interference with human rights the more the court would require by way of justification”.

29 Bobek, note 24 above, p. 12.
31 See Giandomenico Falcon, Lezioni di diritto Amministrativo. Volume I: L’attività (2005), p. 155. Note furthermore that Italian administrative courts expressly resort to the concept of “manifest unreasonable” (manifesta irragionevolezza) to quash administrative acts where a gross error of fact or of law has been made. See also, Aldo Sandulli, La proporzionalità dell’azione amministrativa (1998); Guido Corso, “Il principio di ragionevolezza nel diritto amministrativo”, in Ars Interpretandi (2002), p. 445.
32 Bobek, note 24 above, p. 10.
34 On the organization of French administrative courts see Koopmans, note 23 above, p. 135.
35 Brown & Bell, note 33 above, p. 258 (emphasis added).
36 According to Wojciech Sadurski, “Reasonableness and Value Pluralism in Law and Politics”, EUI Working Papers no. 13 (2008), p. 3, “reasonableness plays in such circumstances a role of a ‘safety valve’, which prevents the occurrence of consequences which strongly and obviously collide with our basic sense of justice”.
40 Craig, note 25 above, p. 614, who adds that “the idea that heightened scrutiny in cases concerning rights can be seen simply as a variant of the original Wednesbury test is problematic in both linguistic and conceptual terms”.

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Similarly, in France an expansion of judicial review over discretionary powers took place: the employment of the error of appreciation test was extended to almost all fields where the administration enjoyed discretionary powers; in addition the test became more pervasive: following the decision of the Council of State in *Ville Nouvelle Est*, administrative courts began to compare the advantages that the administrative decision would produce on the general public with its costs in term of infringement of fundamental rights (*bilan coûts - avantages*). Hence, in England and continental Europe, the original weak standard of judicial review in administrative law was replaced step-by-step with a new and stronger “reasonableness test”, which is commonly known as the review of the proportionality of the administrative decisions. The proportionality test requires courts, when reviewing the activities of administrative bodies, to balance the pros and cons of the measures pursued. As such, proportionality analysis represents a more pervasive criterion of review of administrative action than the error of appreciation scrutiny or the *Wednesbury* test. With proportionality, indeed, courts can intrude more into the merits of decisions adopted by the executive agencies and reduce their discretionary room for manoeuvre.

At the end of World War II, the concept of reasonableness made headway in the field of constitutional law. As the totalitarian experience proved, restraint over executive power was not sufficient to avoid the curtailing of the fundamental rights of man by the hand of a tyrannical majority, and this lead to the incorporation of a detailed catalogue of fundamental rights and the introduction of the principle of judicial review of legislation in post-dictatorial constitutions in Italy and Germany. Following the theories of Hans Kelsen, these constitutions were conceived as the supreme law of the land: they could be modified only through a special amending procedure requiring enhanced majorities; in addition, a centralized constitutional tribunal was established with the purpose of ensuring that legislation comply with the Constitution. While under the doctrine of the

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45 According to Sadurski (note 36 above), p. 4: “this stronger meaning of reasonableness reveals a weaker presumption of legality (constitutionality) of an act, and removes the element of deference of the scrutinizer”.
48 Brown & Bell, note 33 above, p. 266; Craig, note 25 above, p. 630.
sovereignty of Parliament, the discretion of the legislature was absolute, with the creation of the “constitutional state” (Verfassungsstaat; Stato costituzionale di diritto) the Parliament is also obliged to abide by the rule of law and a special court is endowed with the power to review its acts.

According to Kelsen, the legal order was a hierarchical structure (stufenbau) with the Constitution heading it at the top as the fundamental law (grundnorm) binding all other legislative norms. When Parliament acted in violation of the Constitution, the constitutional tribunal could intervene. The legitimacy of its intervention was based on the nature of its review, which was deprived of any discretion: the constitutional tribunal operated simply as a negative legislator leaving the active power of law-making entirely in the legislature’s hands. In Kelsen’s view, however, the Constitution should have been an essentially procedural norm, establishing the rules for the adoption of legislative acts. Kelsen opposed the introduction into the Constitution of substantive principles, such as a catalogue of fundamental rights binding Parliament. In his view, this would blur the distinction between negative and positive law-making, necessarily involving the constitutional tribunal in the latter. Indeed “all rights provisions come down to reasonableness provisions. […] Empower[ing] courts to enforce rights provisions [would mean] authorize[ing] them to decide the reasonableness of the acts of other parts of government.” For Kelsen, judicial review by the constitutional tribunal in those situations would end up being the exercise of positive law-making.

Despite Kelsen’s theoretical concerns, all post-dictatorial constitutions in Europe introduced a catalogue of fundamental rights binding on the legislature and empowered ad hoc centralized courts to enforce it vis à vis Parliaments, a “reasonableness review” soon emerged in the jurisprudence of constitutional tribunals in Italy and Germany (and later in all the countries which experienced a transition from dictatorship to democracy).

52 In the revolutionary tradition the nation, as represented by the Assembly, replaces the king as the supreme authority unbound by the law. See Michel Troper, La séparation des pouvoirs et l’histoire constitutionnelle française (1980).
58 Shapiro, note 50 above, p. 376; Stone Sweet & Mathews, note 47 above, p. 93.
62 The literature on “reasonableness review” by the Italian Constitutional Court is extensive. See: Morrone, note 57 above; Massimo La Torre & Antonino Spadaro (eds.), La ragionevolezza nel diritto (2002); Gino Scaccia, Gli “strumenti” della ragionevolezza nel giudizio costituzionale (2000); Augusto Cerri, “Ragionevolezza delle leggi”, in Encyclopaedia Giuridica, XXV (1994), p. 6.
64 Giuseppe de Vergottini, Le transizioni costituzionali (1998)
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the case for Spain and the States of Central and Eastern Europe\(^\text{\textsuperscript{65}}\). In Italy, the Constitutional Court (Corte Costituzionale) began to expressly employ a “reasonableness test” (giudizio di ragionevolezza) often in conjunction with the standard of review represented by the principle of equality.\(^\text{\textsuperscript{66}}\) In Germany the constitutional tribunal (Bundesverfassungsgericht) resorted to a similar test that was already well developed in the legal doctrine, that of Verhältnisimassigkeit (usually translated as proportionality).\(^\text{\textsuperscript{67}}\) Furthermore, as had already happened in the field of administrative law, the intensity of review grew over time, with the constitutional tribunals increasingly exercising a stricter scrutiny over the exercise of power by the legislature.\(^\text{\textsuperscript{68}}\) In particular, the employment of the proportionality test has become customary in various constitutional systems in Europe\(^\text{\textsuperscript{69}}\) and world-wide,\(^\text{\textsuperscript{70}}\) prompting scholarship to conclude that “proportionality-based rights adjudication is now one of the defining features of global constitutionalism.”\(^\text{\textsuperscript{71}}\)

As this brief account highlights, the concept of reasonableness has taken on several specific connotations in different historical periods and different legal systems. Its intensity, moreover, has varied, since administrative and constitutional courts exercised in its name both a more deferential review and a high-level scrutiny in the form of proportionality analysis.\(^\text{\textsuperscript{72}}\) One common feature, however, may be identified: from its development in the field of judicial review of administrative acts to its adoption in constitutional adjudication


\(^{68}\) Morrone, note 57 above, p. 385.


\(^{70}\) Note that recent constitutional reforms in Canada and South Africa have paved the way to the appearance of a form of “reasonableness review” under the form of proportionality review. The 1982 Canadian Charter of Rights and Freedoms, Article 1 states that fundamental rights are guaranteed “subject only to such reasonable limits prescribed by law as can be reasonably justified in a free and democratic society”. See the decision of the Supreme Court of Canada, Regina v. Oakes [1986] 1 S.C.R. 103. Andrew Lokan, “Rise and Fall under Section 1 of the Charter”, Ottawa Law Review, XXIV (1992), p. 163. The 1993 Constitution of South Africa, Article 33 affirms that limits on constitutional rights must be “reasonable and justifiable in an open and democratic society”. See the decision of the South African Supreme Court in State v. Zuma and Others 1995 (2) SA 642. Claudia Lange, Unreasonableness as a Ground of Judicial Review in South Africa: Constitutional Challenges for South Africa’s Administrative Law (2002).

\(^{71}\) Stone Sweet & Mathews, note 47 above, p. 75.

\(^{72}\) Sadurski, note 36 above, pp. 3 ff.
the “reasonableness review” has been a canonical standard for judicial control over the exercise of discretionary power by hand of the executive and the legislative branches. This standard, furthermore, has allowed courts to overcome the (theoretical) line that distinguishes the review of legitimacy (legitimité) of administrative or legislative measures and the review of their opportunity (opportunité). From this point of view, the emergence of the “reasonableness review” in administrative and in constitutional law goes hand in hand with the increase of power of the judiciary vis à vis other branches of government, pulling away the veil over the myth that it is possible always to distinguish “between ‘things legal’ and ‘things political’.”

With the concept of “reasonableness” it is possible to identify, therefore, a plurality of judge-made standards of judicial review, whose leitmotif is to allow, to different degrees, the interference of the judiciary in the discretionary powers of the administration and the legislature. Either in the weaker or in the stronger sense, “reasonableness”, introduces into the review of administrative or legislative acts a reassessment of the opportunity of the choices made by the elected branches of government. Control over the merit seems to be greater in the judicial review of legislation because the generality of the constitutional dispositions, especially those concerning fundamental rights, leaves more room for manoeuvre to the adjudicators. However judicial review of administrative acts has also shown the readiness of courts “to restrict the domain of l’opportunité”. It is mostly “in the domain of rights protection [that] courts have developed highly intrusive styles of adjudication that reinforce their strategic centrality”. Indeed, as Martin Shapiro has emphasized, “policy-making is an inevitable and inescapable part of reasonableness judicial review and rights review is necessarily reasonableness review”.

From this point of view, then, the onset of forms of “reasonableness review” may be regarded as the empirical evidence that courts are becoming “supplementary legislators and administrators.” In the case of constitutional tribunals in particular, the Kelsenian distinction between negative and positive law-making seems to be swept away as the adoption of “reasonableness review” “enhance[s], radically, the judiciary’s role in both

74 Morrone, note 57 above, p. 447; Stone Sweet and Mathews, note 47 above, p. 77.
77 Sadurski, note 36 above, pp. 3 ff; Morrone, note 57 above, pp. 385 ff; Giorgio Bongiovanni, Costituzionalismo e teoria del diritto (2004), pp. 40 ff.
79 Morrone, note 57 above, p. 18; Shapiro, note 49 above, p. 26.
80 Bell & Brown, note 33 above, p. 261.
81 Stone Sweet, note 76 above, p. 76.
82 Shapiro, note 49 above, p. 26.
83 Stone Sweet, note 76 above, p. 76.
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law-making and constitutional development”. 84 “Reasonableness” “bring[s] the courts into the heart of problems already settled by the political institutions”. 85 In conclusion, the concept of “reasonableness review” is intrinsically linked with the involvement of constitutional tribunals in the law-making process and its vast diffusion worldwide underscores a common trend among various constitutional systems. 86 Although other modes of rights adjudication were available and could have been chosen and developed, reasonableness, especially in the form of proportionality analysis, “has emerged as a multi-purpose, best-practice, standard”. 87 I now turn to investigate whether judicial review by the Constitutional Council in France is extraneous to these developments.

CONSTITUTIONAL REVIEW AND THE FEAR OF GOUVERNEMENT DES JUGES

Traditionally France has been averse to judicial review of legislation. 88 According to Augusto Barbera, since the Revolution of 1789, the supremacy of Parliament and the lack of judicial review have been the defining features of French “‘Jacobinian’ constitutionalism”. 89 Particularly useful in shaping the traits of French “légicentrisme” (centrality of the act of the legislative assembly) was the theorization of Jean Jacques Rousseau. 90 In his view, in fact, “only the general will (volonté générale) can direct the State according to the object for which it was instituted, i.e., the common good”. 91 Since the general will “considers only the common interest” – diverging from the will of all, which “takes private interest into account, and is no more than a sum of particular wills” – it ought be embodied in an organ representing the social compact, i.e. the legislator, and expressed through general and abstract laws. The 1789 Declaration of the Rights of Men and Citizen codified this vision, stating in Article 6, “la loi est l’expression de la volonté générale (the act of Parliament is the expression of the general will)”. 94

The consequence of Parliamentary sovereignty was to reduce the role of judges to that of “la bouche qui prononce les paroles de la loi (the mouth that pronounces the words of the law), mere passive beings, incapable of moderating either its force or rigor,” 95 as Charles de Secondat, Baron de Montesquieu, famously wrote. Not surprisingly, “the judge’s role

84 Stone Sweet & Mathews, note 47 above, p. 161. See also: Rosenfeld, note 60 above, p. 636.
85 Koopmans, note 23 above, p. 142.
86 Morrone, note 57 above, pp. 6 ff.
87 Stone Sweet & Mathews, note 47 above, p. 75.
89 See Barbera, note 21 above, p. 5, who distinguishes between an “Anglo-Saxon constitutionalism” and a “Jacobinian constitutionalism”: “the first originating in the American revolution (1776-87) and incorporating many of the ideas of the English revolution; the latter originating in the French revolution (1789). The first essentially inspired by the liberal principles; the latter by the democratic ideals”.
90 Raymond Carré de Malberg, La loi expression de la volonté générale (1931).
91 Jean Jacques Rousseau, Le contrat social (1762), Book 2, Chapter 1; Translated in Italian by Valentino Gerratana: Il contratto sociale (1965), p. 63.
92 Id., Book 2, Chapter 3; Translated in Italian by Valentino Gerratana, Il contratto sociale (1965), p. 68.
93 Id.
95 Montesquieu, L’Esprit des Lois (1748), Book 11, Chapter 6; Translated in Italian by Sergio Cotta, Il pensiero politico di Montesquieu (1995), p. 214
in this centralized system is subservient and bureaucratic. [...He] may be required to verify the existence and applicability of a command but he may not investigate the work of the legislature any further”.96 Hence, while during the ancien régime judges could contest the legitimacy of a bill passed by the legislative power,97 “no court since the Revolution has ever invalidated or otherwise refused to apply a statute on the grounds that it was unconstitutional”.98 The dogma of “l’intangibilité de la loi (the intangibility of the law)”99 together with the myth of the judge as a “syllogism machine”,100 then, consolidated during the nineteenth century and survived in the Fifth Republic notwithstanding the burial of the parliamentary regime.101

The enactment of the 1958 Constitution with the institution of a Constitutional Council, charged with the power of a priori constitutional review, did not break with this tradition. The Council mainly served, in the original intent of the Framers, the purpose of securing the rationalization of parliamentarianism:102 the Constitution of the Fifth Republic “divided powers between legislature and executive [...and] both branches were given law-making powers”,103 with Parliament competent to regulate only a limited number of fields,104 and the Government holding the residual law-making powers.105 “The function of the Council in this system was made explicit: to facilitate the centralization of executive authority and to ensure that the system would not somehow revert to traditional parliamentary orthodoxy”.106 Furthermore, “no bill of rights at all appeared in the new Constitution”,107 so the Constitutional Council was not expected to act as a constitutional tribunal, capable of engaging in fundamental rights reasonableness review. Its function was, rather, that of an “organ that regulates the activity of the public powers”.108 The choice to call the institution “Council”, and not “Court”, also symbolically highlights the original understanding that its activity was to be administrative rather than judicial.109

The Constitution of the Fifth Republic established a peculiar system of constitutional review, which confirmed the Framers’ intention to set up the Council as a check against the deviation of the parliamentary regime.110 Article 61(1) of the 1958 Constitution

98 Stone Sweet, note 96 abpve, p. 8.
103 Shapiro, note 50 above, p. 378.
105 Stefano Ceccanti, La forna di governo parlamentare in trasformazione (1997), p. 112.
107 Shapiro, note 50 above, p. 377.
grants the Constitutional Council with the mandatory power to review the institutional acts and the standing orders of the Parliamentary Assemblies before they are enacted. According to Article 61(2) – as revised in 1974 – “acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the Assemblée Nationale, the President of the Sénat, sixty deputies or sixty senators”. The Constitutional Council, hence, rules a priori “on the constitutionality of bills which have been definitively adopted by Parliament but not yet promulgated by the executive” in the absence of a concrete case and upon referral of five political authorities. “This arrangement is exceptional in Europe. The Council is the only European constitutional court whose jurisdiction is limited to abstract review; it does not receive referral of constitutional questions from the judiciary (concrete review) and individuals may not appeal to it directly (constitutional complaint).”

Despite its structural limits, however, the Constitutional Council has expanded its role over the years. With a juridical coup d’État, in the 1971 decision Liberté d’association the Council incorporated the Preamble of the Constitution of 1958 within the bloc de constitutionnalité (norms of reference for exercising constitutional review). While the Constitution of 1958 was entirely dedicated to the framework of government, the Preamble, on the contrary, recalled the 1789 Declaration (the Magna Carta of individual liberties) and the Preamble of the Constitution of 1946 (a charter dedicated to social rights). The effect of the 1971 decision was to invent a compound Bill of Rights and to transform the Council into an institution charged with the protection of fundamental rights. Even if this jurisprudence fundamentally altered the normative underpinning of the French

111 Institutional acts are norms with a supra-legislative but infra-constitutional status. According to the 1958 French Constitution, Article 46, “acts of Parliament which are defined by the Constitution as being Institutional Acts shall be enacted and amended as provided for hereinafter. A Government or Private Member’s Bill shall not be debated and put to the vote in the House before which it was first tabled until fifteen days have elapsed since the tabling thereof. The procedure set out in article 45 shall apply. Nevertheless, failing agreement between the two Houses, the text may be passed by the National Assembly on a final reading only by an absolute majority of the Members thereof. Institutional Acts relating to the Senate must be passed in identical terms by the two Houses. Institutional Acts shall not be promulgated until the Constitutional Council has declared their conformity with the Constitution”. See also Roux, note 104 above, p. 271.

112 Before the Constitutional revision law no 1974-904 only the President of the Republic, the Prime Minister and the Presidents of the two Assemblies could refer a law to the Constitutional Council. See: Jean Jacques Chevallier, Guy Carcassonne & Olivier Duhamel, La Ve République: 1958-2004 (2004), p. 231.

113 Stone Sweet, note 96 above, p. 8.

114 de Vergottini, note 14 above, p. 186.

115 Stone Sweet, note 76 above, p. 71. See also Michel Fromont, La justice constitutionnelle dans le monde (1996); Jorg Luther et al., Esperienze di giustizia costituzionale (2000)


118 Décision 71-44 DC, 16 July 1971


Constitution in ways that the founding constituent power had explicitly rejected, the new role of the Council was “partly legitimized” by the 1974 constitutional revision that extended the droit de saisine (right of referral) to the Council to sixty deputies or sixty senators. In fact, “by the mid-1970s, the politics of review [became] a central features of opposition tactics”.

“The incorporation of rights into the Constitution increased the Council’s capacity to make law”. Nevertheless, the perception of the role of the Council in academic circles was still influenced by the founding myths of the French Republic. Constitutional scholars were engaged at that time in an effort to secure the recognition of the Council as a judicial body and to strengthen its legitimacy, as it was a newcomer to the institutional scenario of France. Hence, they consistently denied that constitutional review by the Constitutional Council intruded into the area of discretion belonging to the law-making branches. The idea that the Constitutional Council could co-participate in the policy-making process was evaded as the spectrum of the gouvernement des juges. According to the leading constitutional lawyer, Louis Favoreu, “constitutional review of legislation, far from hooking the Council into the field of the political opportunity, preserves the legislature’s freedom of decision and discretionary power.” “For Favoreu and many of his followers, two ideal, polarized positions appear to be the only one possible: either

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121 Stone Sweet, note 117 above, p. 922.
122 Stone Sweet, note 76 above, p. 80.
123 See note 112 above.
126 The jurisprudence of the council on the contrary has often been attacked by politicians who lamented the fact that a non-democratically elected institution had thwarted the decisions of bodies representing the sovereign will of the people. Louis Favoreu, “Le Conseil Constitutionnel et l’alternance”, in O. Duhamel, et al. (eds.), La Constitution de la Vème République (1985), pp. 422, 428 analyzes the confrontation that took place between the socialist majority and the Gaullist opposition in 1981 while Parliament was approving the Loi de Nationalisation (which was eventually referred by 60 members of Parliament to the Constitutional Council for review) and recalls the well not phrase that the socialist deputy André Laignel pronounced vis à vis the political opposition: “You are legally in the wrong, because you are politically in the minority”, which meant that from the moment that a majority is created, that majority can do what it wants, without any juridical limit.” For an overview of the most aggressive attacks to the legitimacy of the Council see: Rousseau, note 116 above, p. 86.
127 One of these myths is the idea that judges simply apply the law. See: Donnarumma, note 99 above. It should be noted that legal positivism plays an important role in the education of constitutional scholars still today, see: M. Troper (ed.), L’enseignement de la philosophie du droit (1997).
129 Rousseau, note 116 above, p. 506. The concept of “gouvernement des juges” entered French discourse through the work of Edouard Lambert, Le gouvernement de juges et la lutte contre la législation sociale aux Etats-Unis (1921), who analyzed the role of the United States Supreme Court in contrasting the new social legislation enacted by Congress on the basis of a “substantive due process” jurisprudence (inspired by the so called “freedom of contract liberalism”). See note 202 below. According to Stone Sweet, note 76 above, p. 84: “in its most generic form the phrase refers to a situation in which an authority external to, and independent of, the legislature exercise the power to block or to alter the substance of decisions made in Parliament”. See also Michel Davis, “A Government of Judges: An Historical Re-View”, American Journal of Comparative Law, XXXV (1987), p. 559; Michel Troper, Le gouvernement des juges, mode d’emploi (2007).
“Reasonableness” as a Test for Judicial Review of Legislation

the Council legislates exactly as does Parliament, or it does not legislate at all”. As the analysis of the emergence of a “reasonableness review” in the case law of the Council will show, however, this position does not describe the reality of the facts.

THE CASE LAW OF THE FRENCH CONSTITUTIONAL COUNCIL

The Constitutional Council has developed two “reasonableness” tests for constitutional review of legislation. I first analyze the “manifest error of appreciation scrutiny”. Then I turn to “proportionality analysis”. Next, some recent trends will be taken into account. The techniques employed by the Constitutional Council have been significantly influenced by those adopted by the Council of State, which (as noted above) has developed them to scrutinize the exercise of the discretionary power of the administration. Because of its long-established tradition as a defender of the public liberties of French citizens, the Council of State has often also been regarded as a model by the Constitutional Council. Nonetheless, the employment of these techniques in constitutional adjudication has proved to be more pervasive than in administrative law. “Constitutional rights reasonableness decisions, particularly where statutes are involved, are usually more sui generis and more abstract and global in character. [...] Ultimately, a reviewing court must go through the exactly the same calculations the legislature did”. From this point of view, the major effect of the emergence of a “reasonableness review” in the French system of constitutional adjudication has been to lead the Council “to the heart of the political system, to the heart of power”.

Le contrôle de l’erreur manifeste d’appréciation

From the early 1980s, the Constitutional Council began employing in the review of the constitutionality of legislation a technique that the Council of State had elaborated to verify that the executive power did not act ultra vires. In the Council’s hands, the review of the erreur manifeste d’appréciation became a powerful instrument to scrutinize the reasonableness of the policy choices made by Parliament and to quash the abuses of the legislative power (excès de pouvoir legislatif). The first, implicit, appearance of the standard of the “manifest error of appreciation” in the Council judgments dates to the 1981 Sécurité et liberté decision: in that case, the Council upheld a bill that tightened the punishments provided in the Criminal Code, affirming that it “is not for the Constitutional Council to

131 Stone Sweet, note 76 above, p. 74.
132 Andrea Patroni Griffi, “Il Conseil Constitutionnel e il controllo di ‘ragionevolezza’”, Rivista Italiana di Diritto Pubblico Comunitario, no. 1 (1998), pp. 39, 73. From this point of view Jean Rivero, “Note C.C. 16 juillet 1971”, Actualité Juridique Droit Administratif (1971), p. 537, remarks that the decision of the Constitutional Council to incorporate fundamental rights in the norms of references for constitutional review represented “a step for the protection of the citizen against the arbitrariness of the legislature no less decisive than those by which the Council of State has progressively organized the defence of the citizen against the arbitrariness of the government”.
133 Shapiro, note 49 above, p. 27.
replace the appreciation of the Parliament with its personal one in what concerns the most appropriate and needed punishment for a criminal offence as far as no disposition of the act of Parliament under review is manifestly contrasting with the principle set by Article 8 of the 1789 Declaration”. 137

In the 1982 Loi de nationalisation judgment, however, the Council refers explicitly for the first time to the criterion of the “manifest error of appreciation”. The decision, perhaps one of the most contested in the history of the Constitutional Council, 139 concerned the legitimacy of the nationalization undertaken by the newly-elected Socialist Government. The Council ruled that the majority had the right to go ahead in the policy of nationalizing enterprises but also clearly recognized for itself the power to control the discretionary power of Parliament. “The legislative choice to proceed in the policy of nationalizing enterprises, taken in the act of Parliament under review, will not, in the absence of a manifest error of appreciation, be challenged as long as it will not be settled that the transfer of good and enterprises restrict the right to enjoy private property to the point of denying the principle set in Article 17 of the 1789 Declaration”. 140 Following the approach developed by Laurent Habib, 141 the Constitutional Council has so far used the technique of the erreur manifeste d’appréciation mainly in two situations. First, the Council has resorted to it when the legislature acted under a compelling need (exigence de nécessité); second, when the principle of equality (principe d’égalité) was at stake.

Erreur manifeste d’appréciation et exigence de nécessité

The “manifest error of appreciation scrutiny” has been used by the Constitutional Council to verify that legislation complied with specific compelling needs. Under certain circumstances the Constitution requires Parliament to respect certain compelling needs while pursuing some collective good: i.e. punishments may be established only when it is strictly and obviously necessary (Article 8, 1789 Declaration) or private property may be deprived only when public necessity obviously requires it (Article 17, 1789 Declaration). This was the case, indeed, with the two above-mentioned judgments. In other circumstances, on the contrary, the Council sets down certain limits to the exercise

137 Author’s translation. In French: “il n’appartient pas au conseil constitutionnel de substituer sa propre appréciation à celle du législateur en ce qui concerne la nécessité des peines attachées aux infractions définies par celui-ci, alors qu’aucune disposition du titre Ier de la loi n’est manifestement contraire au principe posé par l’article 8 de la Déclaration de 1789” (emphasis added). Note that Article 8 of the 1789 Declaration states (see note 94 above): “The Law must prescribe only the punishments that are strictly and evidently necessary; and no one may be punished except by virtue of a Law drawn up and promulgated before the offense is committed, and legally applied”.


139 Favoreu & Philip, note 120 above, p. 432.

140 Author’s translation. In French: “l’appréciation portée par le législateur sur la nécessité des nationalisations décidées par la loi soumise à l’examen du Conseil constitutionnel ne saurait, en l’absence d’erreur manifeste, être récusée par celui-ci dès lors qu’il n’est pas établi que les transferts de biens et d’entreprises présentement opérés restreindraient le champ de la propriété privée et de la liberté d’entreprendre au point de méconnaître les dispositions précitées de la Déclaration de 1789” (emphasis added). Note that Article 17 of the 1789 Declaration states (see note 94 above): “Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid”.

of legislative discretion. In its 1985 decision Loi portant diverses dispositions d’ordre social, the Council upheld a statute by which Parliament reiterated an administrative provision (declared unlawful by the Council of State) related to the procedure of nomination of the members of the Conseil Supérieur de l’Université. Since the effect of the provision was limited to one year, the Council affirmed that “in this circumstance, the legislature, in reiterating for a provisional time an executive disposition, did neither mean to rebuke the judgment of the Council of State nor to infringe over the principle of the separation of power, but rather to resolve a situation that [...] shall be regulated in conformity with the needs of the public service and the general interest.” Consequently, the Council acknowledged that the legislature “did not incur in a manifest error of appreciation”.

In the early opinions employing the “manifest error of appreciation” technique, the Constitutional Council always endorsed the legislative provision under scrutiny, arguing that Parliament had never incurred in a manifestly wrong appreciation of the compelling needs at stake. This is why several scholars described the erreur manifeste d’appréciation as a “minimum test” of constitutional review (contrôle minimum), which leaves the discretion of the legislative power intact. However, the analysis of the 1984 judgment Loi visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse excludes a similar reading. The case concerned the constitutionality of an act of Parliament that limited the concentration of press enterprises. The right-wing opposition claimed that the purpose of the law was not that of favouring the pluralism of the press but, rather, that of dismantling the corporation of Mr. Hersant, a tycoon and financer of the Gaullist party. In its ruling, the Council accepted the arguments of the claimants and quashed the act of Parliament. What matters from our point of view, however, is the fact that the Council engaged in a scrutiny of the legislative “manifest error of appreciation” that is anything but minimal. Indeed, the Council affirmed that “if the legislature may [...] adopt for the future, if it deems necessary, stricter regulations [concerning the ownership of press enterprises] it may not change ex post facto these regulations, except in two situations: if the ownership of the press enterprise has been acquired illegally or if the renovation of the regulation is really necessary to assure the realization of a constitutional interest”. It then concluded that “as far as national press is concerned, it may not be valuably argued that the variety of visions and tendencies, the diffusion of these newspapers actually contrasts with the need of pluralism to the point of requiring a reconsideration of the existing situation”.

143 Author’s translation. In French: “dans ces circonstances, le législateur, en reprenant à son compte à titre provisoire les désignations résultant de ces élections, a tendu, non à censurer la décision du conseil d’Etat ou à enfreindre le principe de séparation des pouvoirs, mais à pourvoir, comme lui seul pouvait le faire, à une situation qui [...] doit être réglée conformément aux exigences du service public et de l’intérêt général” (emphasis added).
144 Author’s translation. In French: “ne procède pas d’une erreur manifeste” (emphasis added).
145 Favoreau & Philip, note 120 above, pp. 442, 630.
146 Décision 84-181 DC, 10-11 October 1984.
147 Author’s translation. In French: “s’il est loisible au législateur [...] d’adopter pour l’avenir, s’il l’estime nécessaire, des règles plus rigoureuses que celles qui étaient auparavant en vigueur, il ne peut, s’agissant de situations existantes intéressant une liberté publique, les remettre en cause que dans deux hypothèses: celle où ces situations auraient été illicITEMENT acquises; celle où leur remise en cause serait réellement nécessaire pour assurer la réalisation de l’objectif constitutionnel poursuivi” (emphasis added).
148 Author’s translation. In French: “en ce qui concerne les quotidiens nationaux, [...] il ne peut être valablement soutenu que le nombre, la variété de caractères et de tendances, les conditions de diffusion de ces quotidiens
It becomes apparent that the “manifest error of appreciation” technique is not simply a “minimal” review of the activity of the legislature: “the scrutiny tends to be rather ‘normal’, that is ‘maximal’. What is generally called a ‘minimum’ scrutiny […] is minimal only in words: this review should rather be considered in constitutional adjudication as a form of reasonableness review (contrôle du raisonnable)”.

Erreurs manifestes d’appréciation et principe d’égalité

The principle of equality is the second arena in which the Council has widely used the “manifest error of appreciation” technique to scrutinize the activity of the legislature and to become involved in the law-making function. The Council, in fact, soon interpreted the principle of equality as a founding principle of the French constitutional order imposing the general obligation over Parliament to treat similar cases similarly and different ones differently, over and above the provision engraved in Article 1 of the 1958 Constitution that ensures the equality of citizens before the law (only) “without distinction of origin, race or religion”. Applying the erreur manifeste d’appréciation doctrine to the principle of equality mainly meant for the Council to verify that the discrimination produced by the law was not based on a manifestly wrong appreciation of the facts. Thus, in the 1983 Troisième voie de l’ENA decision, the Council upheld a statute that positively discriminated a group of public officials in the admission exam to the École Normale de l’Administration. The Council argued that “the legislature decided to limit the number of public officials admitted to the exam and to give preference to those who could be presumed to be more highly trained and prepared, under the understanding that opening the exam to a wider range of participants would have made the organization of the exam and its functioning practically impossible”. Consequently, the Council found that the discriminatory provision “was not a product of a manifest error of appreciation of the circumstances”.

Even if in its first judgments concerning the principle of equality the Constitutional Council apparently used the “manifest error of appreciation” scrutiny as a form of “minimal” review, there are other rulings where the Council controlled the choices of the legislative power more strictly. As such, the Council’s decisions concerning the redistricting of electoral colleges are particularly relevant, not only because the principle of equality in electoral matters is a conditio sine qua non for the legitimacy of a democratic society (“one head, one vote”), but also because the definition of those electoral points is a highly politicized issue. The 1985 Évolution de la Nouvelle-Caledonie case concerned the electoral law for the Regional Assembly of New Caledonia: this statute, with the

149 Habib, note 141 above, p. 708 (emphasis added).
151 Décision 82-153 DC, 14 January 1983.
152 Author’s translation. In French: “sous peine d’ouvrir le concours qu’il a institué à un nombre très élevé de participants, ce qui en aurait rendu l’organisation et le fonctionnement pratiquement impossibles, le législateur était conduit à limiter le nombre des postulants éventuels et à donner la préférence à ceux qui pouvaient être présumés les plus expérimentés et les plus compétents”.
153 Author’s translation. In French: “ne procèdent pas d’une appréciation manifestement erronée” (emphasis added).
purpose of over-representing the aborigine population in the Assembly, established that in the white-populated Noumea province each representative would be elected by about 4,700 inhabitants whereas in all the other aborigine-populated provinces a member of the Assembly would be elected by only 2,400 inhabitants. The Constitutional Council quashed the law affirming that “the Regional Assembly […] shall […] be essentially elected on a demographic basis: […] this does not mean that such representation shall necessarily be proportional to the population of each province and certainly other general interests may be taken into account; however, these considerations shall interfere only to a limited extent, that has been manifestly exceeded in the case”.155

A few days later, Parliament approved a new electoral law for Caledonia where the representatives of the white-populated province of Noumea would this time be elected by only 4,000 people. Nevertheless, asked again for a ruling, the Constitutional Council, in its Evolution de la Nouvelle-Caledonie II156 decision, affirmed that the principle of electoral equality and the principle of the demographic equilibrium in drawing the electoral colleges “had not been manifestly exceeded.”157 “The ratio of the ‘manifest error of appreciation’ review is not that of a ‘minimal’ assessment of the activity of the legislature, but a comprehensive and attentive examination of the legislative choices: the results, however, are always uncertain, as long as the threshold beside which an appreciation becomes manifestly wrong is not clear-cut.”158 The Council benefits from a wide margin of appreciation: it has the power to decide whether the principle of equality has been excessively and unjustifiably abridged. As a consequence, it has been argued, the employment of the erreur manifeste d’appréciation doctrine to the field of the principle of equality “nolens volens transforms the Council into the supreme judge of what equality in the legal order should be.”159

The analysis of the ‘manifest error of appreciation’ technique in the case law of the Constitutional Council may enable us to draw some preliminary conclusions. To begin with, the erreur manifeste d’appréciation review in constitutional adjudication should be understood not as a ultima ratio scrutiny of the activity of the legislature, but rather as a “reasonableness review”160 that allows for consistent control over the merit of legislative choices. Secondly, the “manifest error of appreciation test” bears in itself already the potential for evolving into a “proportionality test”: indeed, the concept of compelling need evokes directly the idea of degree and proportion. Moreover, in the field of equality, a proportionality review is virtually mandated by the requirement to balance the pursuit of the general interest without jeopardizing the principe d’égalité. The next step will therefore be that of evaluating the “proportionality test”.

155 Author’s translation. In French: “le congrès, […] doit […] être élu sur des bases essentiellement démographiques; […] s’il ne s’ensuit pas que cette représentation doive être nécessairement proportionnelle à la population de chaque région ni qu’il ne puisse être tenu compte d’autres impératifs d’intérêt général, ces considérations ne peuvent cependant intervenir que dans une mesure limitée qui, en l’espèce, a été manifestement dépassée” (emphasis added).
156 Décision 85-197 DC, 23 August 1985.
157 Author’s translation. In French: “n’a pas été manifestement dépassée” (emphasis added).
158 Rousseau, note 116 above, p. 369.
159 Leben, note 150 above, pp. 331-332.
160 Habib, note 141 above, p. 708.
Le test de proportionnalité

Since the beginning of the 1990s the “manifest error of appreciation review” has gradually evolved into a review of the “manifest disproportion” of the law. This transformation has been favoured by the appearance in the jurisprudence of the Council of State of the “cost-benefit analysis” as well as by the consolidation of the principle of proportionality in the case law of the European Court of Justice. The “proportionality test” reshapes the “reasonableness” jurisprudence of the Constitutional Council: however, the difference between the test de proportionnalité and the contrôle de l’erreur manifeste d’appréciation is not a matter of nature (quality) but rather of intensity (quantity).\footnote{I am grateful to Professor Michel Verpeaux, Université Paris I Panthéon-Sorbonne, for having made this point clear to me in the course of a friendly conversation at the Centre Malher, in October 2007.} It is therefore possible to notice a continuity between the two jurisprudences. After all, proportionality analysis was deeply embedded in the “manifest error of appreciation” scrutiny, and, indeed, to see how short the step from one form of review to the other was, it suffices to read again the already cited Loi de nationalisation I\footnote{See note 161 above.} decision. “The legislative choice to proceed in the policy of nationalizing enterprises, taken in the act of Parliament under review, will not, in the absence of a manifest error of appreciation, be challenged as long as it will not be settled that the transfer of good and enterprises restrict the right to enjoy private property to the point of denying the principle set in Article 17 of the 1789 Declaration.”\footnote{Author’s translation. In French: “l’appréciation portée par le législateur sur la nécessité des nationalisations décidées par la loi soumise à l’examen du Conseil constitutionnel ne saurait, en l’absence d’erreur manifeste, être récusée par celui-ci dès lors qu’il n’est pas établi que les transferts de biens et d’entreprises présentaient opérés restreindraient le champ de la propriété privée et de la liberté d’entreprendre au point de méconnaître les dispositions précitées de la Déclaration de 1789” (emphasis added).} Since then, “proportionality analysis” has become the tool that the Council customarily employs in adjudicating constitutional issues, both when the Government acts under the limitations of compelling needs and when the principle of equality is at stake.\footnote{Mathieu & Verpeaux, note 119 above, p. 101.}

Test de proportionnalité et exigence de nécessité

Whereas under the “manifest error of appreciation” doctrine the Council mainly reviewed whether Parliament had acted in compliance with a compelling need enshrined in the Constitution, with the “proportionality test” the Council also verifies whether the pursuit
of such a compelling need is disproportionate because of an excessive infringement over other constitutional principles. In criminal law, for example, the review moves from the need for punishments to the proportionality of the sanctions, which allows the Council to balance the general interest pursued by the legislature with other conflicting constitutional rights. Thus, in the 1993 Loi réformant le code de la nationalité judgment, the Council declared unconstitutional a provision of the immigration code that denied the obtainment of citizenship to all individuals born in France but having a foreign nationality who were expelled from the country. As the Council argued, “the loss of the right to obtain the French citizenship for people born in France as a consequence of the expulsion [...] seems to be a manifestly disproportionate sanction with regard to the events that may lead to the adoption of such a measure, in violation of Article 8 of the 1789 Declaration.” Conversely, in the field of property law, the Council does not review only the necessity of the limitations of property rights, but also their proportionality. In the 1993 Loi relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques decision, the Council quashed a statute that authorized, with the purpose of preventing corruption, the Anti-Corruption Committee to request from enterprises all private documents with no limitation concerning their date or nature. According to the Council, indeed, such disposition “jeopardizes personal liberty and infringes disproportionately the right to property”. Usually, the Council makes no reference to the three-step “analytical structure” that other courts worldwide adopt in proportionality analysis, where a “suitability test” is followed by a “necessity test” and finally by “ad hoc balancing”. A case study, however, highlights that the French Constitutional Council also resorts to a kind of “necessity test” in order to ensure that a legislative measure has not curtailed a constitutional right any more than is necessary to achieve the public goal. To illustrate, in the 1995 Loi d’orientation et de programmation relative à la sécurité, the Council declared constitutional a statute that allowed prefects to forbid the carrying, during demonstrations, of objects that could be used as arms, since this was a police measure “proportionate to the necessity that appears from the circumstances.” Similarly, in the Loi relative à l’archéologie préventive case, the Council acknowledged that the institution of a public body holding the monopoly of archaeological research did not violate the freedom of establishment since “it was not a disproportionate infringement” given the need to protect the archaeological patrimony. Furthermore, the “proportionality test” becomes a true “balancing test” when conflicting constitutional

168 Author’s translation. In French: “la perte du droit à l’acquisition de la nationalité française par l’effet de la naissance sur le sol français qui résulterait soit d’un arrêté de reconduite à la frontière […] apparaît comme une sanction manifestement disproportionnée par rapport aux faits susceptibles de motiver de telles mesures en méconnaissance de l’article 8 de la Déclaration de 1789” (emphasis added).
170 Author’s translation. In French: “sont de nature à méconnaître le respect de la liberté personnelle et à porter des atteintes excessives au droit de propriété” (emphasis added).
172 Sadurski, note 36 above, p. 5.
174 Author’s translation. In French: “proportionnée aux nécessités que font apparaître les circonstances” (emphasis added).
176 Author’s translation. In French: “n’en résulte pas d’atteintes disproportionnées” (emphasis added).
rights are at stake. For example, in the recent *Loi relative à la protection des données à caractère personnel* ruling, the Council upheld a statute on the protection of personal data which authorized the companies that manage copyrights to verify data concerning previous criminal offences, before granting a licence. The Council acknowledged, in fact, that such measure pursued the goal of protecting copyright and the moral right of cultural creation and at the same time “was able to assure that no manifest disproportion existed between the right to privacy and the respect for other rights and liberties”.

In balancing constitutional rights (*conciliation des normes constitutionnelles*), the Council does not follow a static hierarchy of values, but rather takes into account what right should prevail on a case-by-case basis. Therefore, “the review of the Council points towards a constant target: finding an equilibrium between the conflicting liberties”. In the 1998 *Loi d’orientation relative à la lutte contre les exclusions*, the Council affirmed that taxing non-rented houses was constitutional, because the right of human dignity included the right to decent accommodation: “the legislature can limit the right of property, when it deems it necessary, [...] as far as these limitations do not denature the meaning and the extent of this right”. Recently, in 2004, the Council ruled in *Loi relative à l’assurance maladie* that the creation of a medical record with the patient’s data does not violate the constitutional right to privacy and health, as long as the record is written with respect to the medical-professional secret. According to the Council, “Parliament has operated among the conflicting constitutional interests, a balancing that does not seem to be manifestly disproportionate”. From this point of view, the “proportionality test” grants the Constitutional Council all the advantages of the “manifest error of appreciation” technique with a surplus: the Council can directly explain to the legislature what the exact degree of limitation is of a constitutional right that may be considered legitimate in the pursuit of an *exigence de nécessité*. And, of course, it is the Council itself that sets this degree.

**Test de proportionnalité et principe d’égalité**

The “proportionality” test has become for the Constitutional Council (as it has for most other constitutional tribunals) the customary way of adjudicating cases where the principle of equality is at stake. While under the “manifest error of appreciation” doctrine a discrimination was admitted whenever it was founded on a relevant factual difference, with the *test de proportionnalité* the Council can adopt a stricter scrutiny. A violation of the principle of equality is admitted only when the discrimination is justified by the pursuit

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178 Author’s translation. In French: “est de nature à assurer, entre le respect de la vie privée et les autres droits et libertés, une conciliation qui n’est pas *manifestement déséquilibrée*” (emphasis added).
179 Mathieu & Verpeaux, note 119 above, p. 96.
182 Author’s translation. In French: “s’il lui est loisible, à cette fin, d’apporter au droit de propriété les *limitations qu’il estime nécessaires* [...] à la condition que celles-ci n’aient pas un caractère de gravité tel que le sens et la portée de ce droit en soient dénaturées” (emphasis added).
184 Author’s translation. In French: “le législateur a opéré, entre les exigences constitutionnelles en cause, une conciliation qui n’apparaît pas *manifestement déséquilibrée*” (emphasis added).
185 Rousseau, note 116 above, p. 151.
186 Cheli, note 78 above, p. 117; Morrone, note 57 above, p. 37.
of another constitutional interest and is necessary for the achievement of this interest. The 1988 
Loi relative à la mutualisation de la Caisse nationale de crédit agricole decision illustrates well the 
evolution in the Council’s jurisprudence in regard to the principle of equality: “The principle of equality 
does not enjoy the legislature from regulating different situations differently; furthermore it does not prevent the legislature from derogating to 
equality for reasons of general interest if the discrimination that follows is connected with 
object pursued by the law”. If the first part of the sentence repeats the ratio in force under 
the “manifest error of appreciation” doctrine, the second part makes it clear that with 
the “proportionality test” a discrimination may take place only when there is a logical 
connection between the discrimination itself and the general interest pursued by the law. Thus, the duty of the Constitutional Council becomes that of reviewing the proportionality 
between means (violation of the principle of equality) and ends (general interest).

In scrutinizing the policy choices of Parliament with respect to the principle of equality, the Constitutional Council adopts a test that partially resembles the one used for “proportionality analysis” Europe-wide. First, the Council verifies that the legislature 
has pursued an adequate objective of general interest (objectif d’intérêt général adéquat) – a 
sort of “suitability test”: the discrimination shall take place in the pursuit of some collective 
good. Second, the Council ensures that the objective of general interest pursued is sufficient 
(objectif d’intérêt général suffisant) – a sort of “least restrictive means test”: the discrimination 
must be the necessary consequence of the achievement of a collective good, given that 
no other least restrictive paths could be followed. In the Loi de finances pour 1992 case, 
the constitutionality of a disposition of the budgetary law was disputed. Such provision 
granted a particular fiscal privilege to the donations made via act of notary public, with the 
 exclusion of those simply drawn up by an individual, for the purpose of fighting against 
tax evasion. The Council, however, declared the bill unconstitutional, arguing that for the 
purpose of fighting fraud the legislature should have better distinguished between hidden 
 donatons and public donatons (the participation of the notary public being irrelevant). 
Therefore the act of Parliament is quashed because no “adequate” interest justifies the 
discrimination: “the discrimination produced is not justified by reasons of general interest 
connected with the purely fiscal objective pursued by the statute”.

In its judgment Loi relative à la maîtrise de l’immigration et aux conditions d'entrée, 
d'accueil et de séjour des étrangers en France in 1993, contrariwise, the Council declared 
unconstitutional a bill that discriminated between French citizens and non-citizens in the 
 enjoyment of fundamental rights since the second step of the “proportionality test” was 
failed by the government. According to the Council, the interest pursued by the legislature,
mainly the safeguarding of the public order, is not “sufficient” in this case to discriminate between nationals and non-nationals: “if Parliament may take certain measures with regard to foreigners, it shall respect the fundamental rights and liberties having a constitutional value that belong to all those residing in the territory of France”. The foundation of a Bill of Rights for aliens shows the success of the application of the “proportionality test” together with the principle of equality, but also highlights how pervasive the review of the Constitutional Council can be: “the Council signals to the legislature that from now on the purpose of general interest shall be particularly important in order for an infringement over a right or liberty to be constitutional. And it is the Council that will evaluate discretionary whether the objective of general interest pursued is sufficient”.

Having analyzed the use of the “proportionality test” by the Constitutional Council, it is possible to underline some provisional conclusions: the test de proportionnalité replaces the contrôle de l’erreur manifeste d’appréciation, changing an “external review” into a stricter and more efficient “internal review”. When the legislature now pursues a compelling need, the Council may review the extent to which such general interest should be achieved. When the principle of equality is at stake, the Council can verify that an adequate and sufficient public interest justifies the discrimination. “The legislator is ordered to become a good manager, a reasonable producer of rationalized and standardized norms”. However, the only institution that has the power to decide whether the law is reasonable is, ultimately, the Constitutional Council.

What Next?

What characterizes both the “manifest error of appreciation” and the “proportionality” doctrines is the fact that the Constitutional Council exercises a review over the general interest pursued by the legislature. With the contrôle de l’erreur manifeste d’appréciation, the Council verifies that a statute does not pursue an interest that is manifestly wrong given the exigence de nécessité and the principe d’égalité. With the test de proportionnalité, the Council makes sure that the reaching of a general interest is not disproportionate with regard to the compelling needs or to the principle of equality. There are, of course, differences between these two techniques, but in both cases the Council takes the general interest pursued by Parliament at face value: the general interest is simply given as an objective fact (out of discussion), and the Council never scrutinizes the general interest per se. If this be the case, it is easy to understand the bewilderment with which certain scholars have analyzed the opinion of the Constitutional Council in a recent judgment, Loi de finance 2006. The case concerned the constitutionality of a provision of the budgetary law establishing (in violation of the duty of fairness) an excessively complicated method for identifying the tax-free zone. Instead of quashing the bill by using the customary “proportionality” technique,
the Council scrutinized the purpose of the law and concluded that “the complexities imposed on the tax payers by the statute do not find a basis in a true general interest”.

The ratio decidendi employed by the Council “is astonishing, not to say explosive”. The Council engages in a substantive evaluation of the objective pursued by the legislator. As such, the departure from the “proportionality” doctrine is remarkable, because it is one thing is to say that the general interest is “inadequate” or “insufficient”, and quite another to say that the general interest is “untrue” (read “unworthy”). “In the first case the Council pragmatically balances interests, in the second case, it expresses its ideological view”. The question whether the Council is walking the path of a “substantive due process jurisprudence” is thereby unavoidably raised.

There are no other rulings where the Council referred again to the concept of “true general interest”. Nonetheless, the same ratio seems to be hidden in at least two other judgments. In the case Loi de financement de la sécurité sociale pour 2002, the Council quashed a financial provision that retroactively erased the debts of the Fonds pour la réduction des cotisations sociales. In its opinion the Council argued that “the purpose of providing relief to the financial situation of the body does not represent a sufficient general interest to jeopardize retroactively the results thereof”. Even though the language is that traditionally used for the proportionality test, the unconstitutionality of the statute seems to be based on the conviction that the interest pursued by the legislature is not “worthy” (“true”) enough. Likewise, in the 2005 Loi d’orientation et de programme pour l’avenir de l’école, the Council declared unconstitutional a provision of the law favouring accession to public school that stated: “The objective of the public school system is the success of all students. Taking into account the diversity among the students, the school shall recognize and promote all form of cleverness – School education enables, with the expertise of the teachers and the support of the parents, every student to obtain the preparation that is necessary to valorise and develop his or her practical and intellectual, sport and artistic proficiency – The school contributes to the preparation of a personal and professional curricula”. According to the Council, in fact, such provision was “manifestly lacking a normative meaning”.

199 Author’s translation. In French: “la complexité nouvelle imposée aux contribuables ne trouve sa contrepartie dans aucun motif d’intérêt général véritable” (emphasis added).
200 Merland, note 189 above, p. 41.
201 Id.
202 American constitutional scholars identify with the term “substantive due process jurisprudence” a specific period in the history of the United States Supreme Court inaugurated by the decision in the case Lochner v. New York 198 US 45 (1905). The decision codified the principles of “freedom of contract liberalism” on the basis of which all social legislation enacted by Congress was for about 25 years declared unconstitutional, until West Coast Hotel Co. v. Parish 300 US 379 (1937) when a shift in jurisprudence finally took place. On this see among others, John Orth, Due Process of Law (2003); Richard Polenberg, The Era of FDR 1933-1945 (2000); Lawrence Friedman, Law in America (2nd ed., 2004); David Bernstein, “Lochner Era Revisionism Revised: Lochner and the Origins of Fundamental Rights Constitutionalism”, Georgetown Law Journal (2003); Cass Sunstein, “Lochner’s Legacy”, Columbia Law Review, LXXXVII (1987), p. 873. The analysis of these events done by Lambert (note 129 above), is at the origin of the discourse on the “gouvernement de juges” in France. See also the literature cited note 129 above.
204 Author’s translation. In French: “le souci de remédier aux difficultés financières du fonds créé par l’article L. 131-8 du code de la sécurité sociale ne constitue pas un motif d’intérêt général suffisant pour remettre en cause rétroactivement les résultats d’un exercice clos” (emphasis added).
206 Author’s translation. In French: “manifestement dépourvue de toute portée normative”.

62 JCL 4:1
the contrary, the normative meaning of the provision is quite evident, it may be argued that the Council has rejected the pursuit of a general interest because it considered that interest as “untrue”. In conclusion, even though it is still unclear whether these opinion represents mere obiter dicta and it is too early to evaluate the impact of this limited number of judgments, there is some evidence that could perhaps show that the Council is moving towards an era of substantive judicial activism, which substantiates the hypothesis of a co-participation of the Council in the policy-making process.

CONSTITUTIONAL REFORM AND THE EXCEPTION D’INCONSTITUTIONNALITÉ

On 23 July 2008, the President of the French Republic promulgated – two days after the final vote of the two chambers of Parliament sitting jointly in Congress (Congrès) – the constitutional revision bill of modernization of the institutions of the Fifth Republic (Loi Constitutionnelle “de modernisation des institutions de la Vème République”) n° 2008-724. The constitutional bill n° 2008-724 “is a coherent ensemble, that proposes a global and ambitious institutional change;” and since roughly 33 articles out of the 89 forming the 1958 French Constitution are changed, “it is the most important revision to which the Fundamental Law has been submitted”. Together with manifold innovations concerning the framework of the government of the Fifth Republic, the reform introduces a new Article 61-1 in the text of the French Constitution, which reads as follows. “(1) If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Council of State or by the Court of Cassation to the Constitutional Council which shall rule within a determined period. (2) An Institutional act shall determine the conditions for the application of the present article”.

207 Champeil-Desplats, note 197 above, p. 278.
208 On the judicial implementation of a political agenda see: Jed Rubenfeld, Revolution by Judiciary (2005).
212 Official translation available in the web site of the French Constitutional Council (see note 110 above). In
This provision grants the Constitutional Council the power to exercise *a posteriori* constitutional review, i.e. to check the compatibility with the Constitution of an act of Parliament which has already been enacted by Parliament and is enforced by the public administration.213 The technical means by which this goal is achieved is the *exception d’inconstitutionnalité* (plea of unconstitutionality), an instrument shared by all the juridical systems that have attributed the power of constitutional review to *ad hoc*, centralized courts, following the doctrine of Hans Kelsen. In these systems, ordinary and administrative judges cannot review the constitutionality of legislation on their own: however, when it is claimed in the course of a legal dispute that the statute that has to be applied in the case is contrary to the Constitution, the judge may suspend the decision of the case in front of him and send a preliminary question of constitutionality to the constitutional tribunal, asking for a ruling on the matter.214 If the Constitutional tribunal does not declare the statute unconstitutional, the judge may proceed in the decision of the controversy applying the statute in its ruling. If, otherwise, the constitutional tribunal does declare the statute unconstitutional, the judge should decide the case without taking into consideration the voided statute.215

The introduction of a form of *a posteriori* constitutional review of legislation represents a milestone in the juridical history of a country that has traditionally been hostile to judicial review and the “limitation of parliamentary sovereignty”.216 Eventually, also in France, individuals will be allowed to contest, in the course of a concrete controversy, by recurring to the Constitutional Council, the legitimacy of a statute that unjustly abridges the rights and liberties recognized by the Constitution: as such, this novelty may be appreciated as an “important step of the development of the *Etat de droit* (rule of law)”.217 Besides terminating the anomalies of the French model of constitutional justice, this constitutional innovation may also affect the application of the “reasonableness review” in the jurisprudence of the Constitutional Council. In the comparative perspective, indeed, “reasonableness” as a test of constitutional adjudication commonly emerged and developed in those legal systems where constitutional tribunals or supreme courts were able to scrutinize a legislative measure *a posteriori*, either directly or upon referral by independent judges. In this way, courts reconciled in a concrete case both the abstract provisions of the law and the factual elements at stake, with the aim of striking the right balance among the conflicting values.218

French: “Lorsque, à l’occasion d’une instance en cours devant une juridiction, il est soutenu qu’une disposition législative porte atteinte aux droits et libertés que la Constitution garantit, le Conseil Constitutionnel peut être saisi de cette question sur renvoi du Conseil d’État ou de la Cour de Cassation qui se prononce dans un délai déterminé. Une loi organique détermine les conditions d’application du présent article”.


214 Cappelletti, note 19 above, p. 98.

215 Zagrebelsky, note 61 above, p. 666.

216 Barbera, note 21 above, p. 13; See also: Stone Sweet, note 213 above.

217 *Une Véne République*, note 210 above, p. 90.

218 Morrone, note 57 above, p. 393; Shapiro, note 49 above, p. 26.
As a matter of fact, one of the main avenues followed by administrative and constitutional courts to reassess, via the “reasonableness review”, the merit of the decisions made by the administration or the legislature is by reconsidering the factual conditions that gave rise to the dispute under review.219 Especially in cases dealing with the protection of fundamental rights, courts engage in a practical balancing, by concretely weighing *hic et nunc* the importance of the general interest pursued by the public body with the limitation over the individual liberty at stake.220 It is worth highlighting, furthermore, that in the countries where the “reasonableness review” has been adopted, constitutional adjudication is independent from the will of the political institutions. Constitutional courts are requested to deliver their judgments by independent tribunals or even directly by individuals, where an express action to the constitutional court, such as the German *Verfassungsbeschwerde*, is institutionally set up.221 As noted above, these characteristics were missing in the French system of constitutional review because the Council could decide only *in abstracto* and upon referral by five political authorities. The reform has the potential, therefore, to strengthen the “reasonableness review” of the Council, “fully expos[ing it] as law-maker.”222 Nevertheless, some *caveats* are necessary. Indeed, a peculiarity of the *exception d’inconstitutionnalité* mechanism introduced into the French Constitution is that not all judges are allowed to send a preliminary question directly to the Constitutional Council to ask whether a statutory disposition infringes over the rights and liberties that the Constitution safeguards. Only the top ordinary and administrative tribunals, i.e. the Council of State and the Court of Cassation, may send a matter to the Constitutional Council. When lower judges face a constitutional question, they must, on the contrary, submit the matter to their supreme ordinary or administrative court: the high court has the duty to verify the seriousness of the matter in a timely manner. Only when the seriousness test is passed may the Constitutional Council then be called upon to review the allegedly unconstitutional statute. The choice not to allow lower judges to send preliminary references directly to the Constitutional Council is known as “double-filter mechanism” and has led to much criticism because of the shortcomings that it generates.223

To begin, the implementation of this technical solution neutralizes the virtuous effects of a direct dialogue between the lower judges and the Constitutional Council.224 Furthermore, the “double filter mechanism” risks jeopardizing the achievements introduced by the reform. On one hand, since the task of deciding whether the constitutional question submitted by lower judges is “serious in nature” lies entirely in the autonomous power of the supreme administrative and ordinary courts, there is a possibility that only a

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221  de Vergottini, note 14 above, p. 186; Cheli, note 78 above, p. 94; Bongiovanni, note 77 above, p. 40.

222  Stone Sweet & Mathews, note 47 above, p. 77.


small number of cases will reach the Constitutional Council. On the other hand, such a complicated mechanism may discourage lower ordinary or administrative judges, dealing with an allegedly unconstitutional statute, from raising constitutional questions tout court. In the French legal order treaties have a supra-legislative status, so lower judges already have the power to review whether a statute complies with international treaties on their own (contrôle de conventionnalité). And, since there are international conventions that have catalogues of rights that are comparable to a constitutional Bill of Rights, this review tends to strongly resemble a form of decentralized judicial review. When assessing the effectiveness of the current constitutional reform and its potential impact on the “reasonableness review” exercised by the Constitutional Council, these factors need to be taken into account.

CONCLUSION

The purpose of this article was to address the emergence of a “reasonableness review” in the jurisprudence of the French Constitutional Council. In comparative perspective, “reasonableness” as a test for judicial review of legislation identifies a plurality of judge-made techniques of constitutional adjudication through which constitutional tribunals widen their review to the point of reassessing the political merit of the activity of Parliament. The emergence of a form of “reasonableness review” testifies to the growing “politicization” of constitutional tribunals and their consistent involvement in the law-making process. The French Constitutional Council has ostensibly denied any interference with the exercise of the legislative discretion that belongs to Parliament. Constitutional scholars have supported this claim: in the French “Jacobinian” tradition, any involvement of the judiciary in policy-making would give rise to a gouvernement de juges. The analysis of case law of the French Constitutional Council, however, discloses the identification of two techniques of “reasonableness review” that have been employed by the Council approximately one after the other in the course of the last thirty years. These tools, powerful and sophisticated, allow the Council to intervene deeply in the law-making process.

In the 1980s, with the “manifest error of appreciation review”, the Council began participating in policy-making, acknowledging for itself the power to verify that the legislature did not pursue a compelling need or violate the principle of equality in a manifestly wrong way. To the Council, however, fell the task of establishing whether and when a statute passed the threshold of the “manifest error”. In the 1990s, with the “proportionality test”, the Council strengthened its participation in policy-making by ensuring that the legislature did not follow a general interest to the point of abridging disproportionately other constitutional rights or infringe the principle of equality unless this was proportionately connected with the pursuit of an adequate and sufficient public interest. To the Council again, however, fell the task of establishing whether and when a statute had exceeded the “principle of proportionality”. Some recent decisions must then

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be mentioned: by evaluating the “true general interest”, the Council has shown signs of its intention to take the lead in the policy-making process. Even though only a few cases have been decided using this technique, in at least two circumstances the Council has affirmed to be de facto the only institution endowed with the power to say what the “true general interest” is.

In the end, “it does not really matter that the word ‘reasonableness’ is not expressly employed in its decisions by the Constitutional Council”.228 Given the incisiveness of the techniques of review used by the Council and their suitability in favouring a growing involvement of the Council in the policy-making process, it is possible to affirm that “also in France the Constitutional Council reviews the constitutionality of legislation in the light of the principle of reasonableness”.229 The jurisprudence of the Constitutional Council here highlights a pattern of convergence with the other European systems of constitutional review,230 with “a gradual reduction of the exceptional, anomalous features of French constitutionalism vis à vis the other European democracies”.231 In particular, the consolidation in the case law of the Constitutional Council of “proportionality analysis” as a technique of “reasonableness review” brings the French experience of constitutional adjudication into conformity with recent global trends, since, as it has been argued: “proportionality-based rights adjudication now constitutes one of the defining features of global constitutionalism”.232 Furthermore, save for the caveats mentioned above, this convergence could be increased by the recent constitutional reform introducing a form of a posteriori constitutional review of legislation.

The employment of reasonableness review in constitutional adjudication raises, of course, several relevant issues, such as the legitimacy of un-elected courts to engage in policy-making,233 the dilemma of who guards the guardians234 and the like: these questions, however, are beyond the scope of this article and have been addressed elsewhere by experienced authors.235 The aim here was simply to demonstrate that the Council may

228 Patroni Griffi, note 132 above, p. 83.
229 Donnarumma, note 99 above, p. 579.
230 Morrone, note 57 above, p. 3.
232 Stone Sweet & Mathews, note 47 above, p. 75.
235 To use the categories of Norberto Bobbio, Teoria della Norma Giuridica (1958), p. 86, this article is about the “sein” not about the “sollen”, since it analyzes whether the French Constitutional Council does employ a
be depicted as a Guardian of Reasonableness (Gardien du raisonnable). Otherwise, if “reasonableness” is the metaphor of the typical legal experience of constitutional democracies, if characterized by the principle of pluralism of values and by the protection of fundamental rights, it is not surprising to find the appearance and the consolidation of a “reasonableness review” in the French system of constitutional adjudication. Revolutionizing softly the “Jacobinian” tradition over the course of the years, the Constitutional Council has increasingly begun to wear the robe of a reasonableness’ court, charged with the duty “to unify the different elements of the law, so that vi rationis hominem conciliat homini”.240


236 Morrone, note 57 above, p. 3; Stone Sweet and Mathews, note 47 above, p. 75.
239 Barbera, note 21 above, p. 13; Shapiro, note 50 above, p. 378.