La Mauvaise Qualité de la Loi : Vagueness Doctrine at the French Constitutional Council

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by PATRICIA RRAPI*

Introduction

Statutes, the United States Supreme Court asserts, should mean what they say. Yet, in reality, no one would be surprised to learn that statutes do not often say what they mean. Not only are vague laws widely found, but statutory vagueness comes in many different forms.[1]

In France, vagueness of statutes has drawn judges' and scholars' attention over the last ten years. The doctrinal literature on this issue is abundant. Sounding the alarm, this literature invites judges and politicians to find remedies for what is generally named as the "disease" of our democracy.[2] In response, the French Constitutional Council, since 1998, has been trying to generate a "quality of law" doctrine in its cases in order to improve citizens' accessibility to the law. The doctrine, however, remains under-developed compared to its counterpart in the United States.

Vagueness-of-law concerns seem to be well known in the United States, at least since the Supreme Court invoked the vagueness

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1. Keith Culver, *Varieties of Vagueness*, 54 U. TORONTO L. J. 109 (2004). *See also* TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW (Oxford Univ. Press) (2001).

2. BERTRAND MATHIEU, LA LOI (2nd ed. 2006). *See also* Pierre de Montalivet, La "Juridicisation" de la Légistique. À Propos de l'Objectif de Valeur Constitutionnelle d'Accessibilité et d'Intelligibilité de la Loi, *in* LA CONFECTION DE LA LOI, 99 (Presses Universitaries de France.) (2005); Patrick Wachsmann, *Sur la Qualité de la Loi*, *reprinted in* MÉLANGES: PAUL AMSELEK, 809 (Emile Bruylant ed., 2005).

doctrine for the first time in 1875.[3] The case law here is abundant and covers a wide variety of situations. Therefore, a comparative study of these two doctrines, French and American, may lead to new understandings of the subject, at least for French jurists. As it will be discussed, the French Constitutional Council has to learn a lot from the American vagueness doctrine. On the other hand, U.S. constitutional law will become familiar with new concepts, such as intelligibility or accessibility of statutes. The U.S. Supreme Court develops these notions in a different way. The purpose of this article is to emphasize the necessary communication between these two doctrines.

Vagueness is not an issue unique to the law; it also has political and philosophical dimensions. Without approaching these theoretical aspects of vagueness, this comparative study of French and American doctrines aspires simply to provide an overview of French and American case law. Yet, comparative analyses are problematic. It is not only that the French quality of law doctrine has yet to mature to that of its American counterpart, but dissimilarities in respective systems of judicial review complicate in-depth comparisons. Even if the purpose of these two doctrines were the same—providing constitutional rules on vagueness—American and French cases in which statutes are challenged for vagueness are materially different. Therefore, not only does the reasoning behind these two doctrines differ, but remedies provided by American and French judges to vague laws must also be considered within the confines of their respective legal systems.

The U.S. Supreme Court has ruled that "federal courts have the power to adopt narrowing constructions of federal legislation. Indeed, the federal courts have the duty to avoid constitutional difficulties by doing so if such construction is fairly possible."[4] Andrew Goldsmith calls this remedy "judicial interpretation narrow[ing the] statute."[5] After judicial narrowing, the offending provision is no longer unconstitutionally vague. In France, the jurisdiction of the Constitutional Council is invoked before a statute is signed into law, by the President of the Republic, and subsequently enforced. The Council is, in effect, a "council of revision," as the concept was described, and rejected, at the American constitutional

3. United States v. Reese, 92 U.S. 214 (1875); Andrew E. Goldsmith, *The Void for Vagueness Doctrine in the Supreme Court*, 30 AM. J. CRIM. L. 279, 280 n.1 (2003).

4. Boos v. Barry, 485 U.S. 312, 330–31 (1988) (citation omitted).

5. Goldsmith, *supra* note 3, at 295.

convention in 1787.[6] Accordingly, the Council cannot know how courts will interpret the law in application, even if in some cases the Council provides its own interpretation (*reserves d'interprétation*).

Therefore, the first part of this article provides a summary of the main distinctions between French and American judicial review. In the second part, I analyze French case law in order to bring out a comparison to the American vagueness doctrine, which is described in the third part. The last part concerns the rise of a French "quality of law" doctrine through the new procedure of "preliminary question." This procedure will give the Constitutional Council jurisdiction to review constitutional matters in actual cases.[7] It is this new feature of judicial review in France that makes comparison to American constitutional law so vital. Although the United States has known concrete judicial review since *Marbury v. Madison*,[8] this element of democratic institutions is new to France.[9] We have a lot to learn from our American cousins.

I. Judicial Review in France and the United States

A. The Constitutional Council

1. Creation, Composition, and Functions in the French Constitutional System

The Constitutional Council was created in 1958 and became the first institution under the French system vested with the power of judicial review. From 1790 to 1958, the French constitutional system not only ignored and prohibited judicial review but also criticized the

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6. Resolution 8 of the original Virginia Plan contained the proposal for the national Council of Revision. It was officially submitted to the Convention on May 29, 1787. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., Yale Univ. Press 1911) (It was proposed "that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the act of the National Legislature be again passed, or that of a particular Legislature be again negatived by [ ] of the members of each branch."); *see* James T. Barry, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 248 (1989). Therefore, the U.S. Supreme Court refers to the Framers' intent to limit courts' power by rejecting the Council of Revision. *See* United States v. Rutherford, 442 U.S. 544, 555 (1999).

7. *See* André Roux, *Le Nouveau Conseil constitutionnel? Vers la fin de l'exception française*, LA SEMAINE JURIDIQUE [JCP] 2008, I, no. 175 (Fr.).

8. 5 U.S. (1 Cranch) 137 (1803).

9. LOUIS FAVOREU & LOÏC PHILIP, LE CONSEIL CONSTITUTIONNEL (7th ed. 2005).

rule that the U.S. Supreme Court announced in *Marbury*.[10] The specter of "the government of judges,"[11] as observed by French scholars in the American system, was thought to be against the principle of the separation of powers.[12] Allowing judges to review the law—an expression of general will[13]—was perceived as a violation of legislative sovereignty.[14]

Only after World War II did France, along with other European countries, conceive a special constitutional body detached from the regular and administrative judiciary.[15] Embracing uniquely European forms of review, the French system of judicial review is a compromise between a long tradition of hostility and rejection of any form of judicial review and the necessity of some mechanism to protect the supremacy of the constitution. Therefore, the Constitutional Council, as inspired by Hans Kelsen,[16] is the prototype of the European "model" of "constitutional review."[17]

The Constitutional Council is a constitutional body composed of nine members appointed by the President of the Republic and the

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10. *See* Michel Troper, *Séparation des Pouvoirs*, *in* DICTIONNAIRE DE PHILOSOPHIE POLITIQUE 708 (Phillippe Raynaud & Stephanie Rials eds., Presses Universitaires de France 2003). *See also* Michel Troper, *La Notion de Pouvoir Judiciaire au Début de la Révolution Française*, *in* 1791 LA PREMIÈRE CONSTITUTION FRANÇAISE, at 355 (1993).

11. EDOUARD LAMBERT, LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LÉGISLATION SOCIALE AUX ÉTATS-UNIS (Marcel Girard ed., 1921).

12. Alec Stone Sweet, *Why Europe Rejected American Judicial Review And Why it May Not Matter*, 101 MICH. L. REV. 2744 (2002).

13. The term "general will" is inspired by Jean-Jacques Rousseau. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT (Roger D. Masters ed., Judith R. Masters trans., St. Martin's Press 1978) (1762). His theory of the "general will" has been, since the French Revolution, at the core of French constitutional theory. Therefore, Article 6 of the Declaration of Human and Civic Rights of 26 August 1789 states, "The Law is the expression of the general will." Declaration of Human and Civic Rights of 26 August 1789, art. 6 (1789) (Fr.).

14. The French Revolution produced a separation of powers doctrine that rigidly confined judicial authority. From the perspective of French separation of powers orthodoxy, the judicial branch was not only a negligent one but the judicial review was also thought to lead to a confusion of powers. *See also* Michel Troper, LA SEPARATION DES POUVOIRS ET L'HISTOIRE CONSTITUTIONNELLE FRANÇAISE (1973).

15. FAVOREU & PHILIP, *supra* note 9.

16. The modern European constitutional court is the invention of Hans Kelsen. In his article, *La Garantie Juridictionnelle de la Constitution*, 45 REVUE DU DROIT PUBLIC [R.D.D.P.] 197 (1928) (Fr.)., he proposed a particular judicial review, different from the American one. In order to avoid arguments against the judicial review, he imagined a special constitutional body. For further explanations, see ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000).

17. *See* LOUIS FAVOREU, LES COURS CONSTITUTIONNELLES (3d ed., Presses Universitaires de France 2000) (1996).

Presidents of each House of Parliament.[18] Under Article 61 of the Constitution of 1958, the Constitutional Council exercises *a priori*, abstract review exclusively and solely upon referral by political authorities.[19] The President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators may refer Acts of Parliament to the Constitutional Council before their promulgation.[20] Until recently, there has been no other avenue for review by the Council.[21]

Under Article 62 of the Constitution, "a provision declared unconstitutional on the basis of Article 61 shall be neither promulgated nor implemented."[22] Article 61 states further: "no appeal shall lie from the decisions of the Constitutional Council.[23] They shall be binding on public authorities and on all administrative authorities and all courts."[24] This article provides Constitutional Council rulings with the authority inherent to judicial decisions.[25] Concrete review is forbidden; once promulgated, laws are immune from scrutiny by the Council or by any other jurisdiction. Thus, the Constitutional Council does not hear "cases and controversies," which is the full extent of U.S. federal jurisdiction.[26]

2. *Comparison of Judicial Review in France and the United States*

Abstract review differs from judicial review principally in that it is neither dependent on nor incidental to concrete litigation or

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18. 1958 Const. art. 56 (Fr.).

19. 1958 Const. art. 61 (Fr.) ("Acts of Parliament may be referred to the Constitutional Council, before they promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of Senate, sixty Members of the National Assembly or sixty Senators.").

20. In 1974, the French Constitution was amended and the new ruling vested standing in sixty members of the political minority in either the Senate or the National Assembly to challenge the constitutionality of an act. On the contrary the U.S. Supreme Court has always refused standing to political minorities. *See* Raines v. Byrd, 521 U.S. 811 (1997).

21. The new procedure of "question préjudicielle" is discussed later in this article.

22. 1958 CONST. art. 62 (Fr.).

23. 1958 CONST. art. 61 (Fr.).

24. *Id.*

25. Louis Favoreu, La Décision de Constitutionnalité, 38 Revue Internationale de Droit Comparé [R.I.D.C.] 611, 611–633 (1986). *See also* Jacques Robert, Louis Favoreu, Francisco Rubio Llorente & Alessandro Pizzorusso, L'Autorité de Chose Jugée des Décisions des Juridictions Constitutionnelles, 265–282 (1995).

26. U.S. CONST. art. III, § 2; *see also* Flast v. Cohen, 392 U.S. 83, 94 (1968).

controversy involving a statute.[27] The abstract review process results "in a ruling on the prima facie constitutionality of a legislative text; a concrete 'case or controversy' is not a requisite condition."[28] Alec Stone observed that the abstract review is a purely exegetical exercise since it takes place outside of the tenets of the judicial paradigm.[29]

The judicial paradigm refers to Martin Shapiro's analysis of courts on the "social logic" of triadic conflict involving two persons in conflict and a third person called to assist in achieving a solution.[30] Therefore, he emphasized that in terms of judicial paradigm, the Council's role in the French political system is much more legislative than judicial.[31]

The "judicial paradigm," even in a concrete judicial review, does not permit a sufficient analysis of constitutional law challenges since these issues miss narrowly political questions.[32] Indeed, when judges are invited to challenge the constitutionality of a statute they often participate in the law-making process itself and affront directly the legislative power. Therefore, they do not often behave as a "neutral third party."[33] But abstract constitutional review seems to be even further removed from triadic resolution than is judicial review.[34] Therefore, Constitutional Council cases and their rulings seem only to complete the law-making process. These cases, and the example of quality of law doctrine, do not always guide us by concrete and precise judicial reasoning. This does not mean that the Constitutional Council fails to give judicial answers to constitutional law challenges.[35]

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27. Louis Favoreu, *Modèle Américain et Modèle Européen de Justice Constitutionnelle* [The American Model and the European Model of Constitutional Justice], 4 ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE [A.I.J.C.] 57 (1988) (Fr.).

28. ALEC STONE SWEET, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE (Oxford Univ. Press 1992).

29. *Id.*

30. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1–2 (Univ. of Chi. Press 1981).

31. STONE, *supra* note 28.

32. *Id.*

33. *Id.*

34. Alec Stone, *The Birth and the Development of Abstract Review in Western Europe: Constitutional Courts and Policy-Making in Western Europe*, 19 POL'Y STUD. J. 81, 81–95 (1990).

35. Louis Favoreu's writings proved that the Constitutional Council's activities are judicial and not political. *See* LOUIS FAVOREU, LA POLITIQUE SAISIE PAR LE DROIT (1988); *see also* LOUIS FAVOREU, ET AL., DROIT CONSTITUTIONNEL (2008); LOUIS FAVOREU & LOÏC PHILIP, GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL (7th

It does mean, however, that the French Constitutional Council and U.S. Supreme Court play different roles in their respective countries.

This article explores how these courts pursue similar purposes through different jurisprudential means. As a result, this comparative study of French and American vagueness doctrine seeks only to give two different approaches to the same issue, even if the purpose of the doctrines is the same in both cases.

Indeed, its role in abstract judicial review does not permit the Constitutional Council to provide a concrete meaning of its quality of law doctrine, whereas the Supreme Court is able in a concrete case to ameliorate the vagueness of a statute as it is applied to citizens.[36] This is true even in "facial" challenges before American courts, where the precise facts of a given controversy often do not factor into the analysis.[37] Facial challenges still must meet "case and controversy" requirements and the case must be ripe for adjudication. That is far different from the European "abstract review of legislation" which refers to "the review of a statute's constitutionality prior to its application or enforcement."[38] There are real and adverse litigants in facial cases, unlike the *a priori* review of the Constitutional Council. Facts in the former may not be dispositive, but can still illuminate the controversy. Facts in the latter are hypothetical at best.

Thus, while there are similarities between French and American constitutional review in facial cases, the difference between abstract review and real controversies remains important in understanding the different development of French and American vagueness doctrines. Yet, as judicial review in France moves ever more closely to its American counterpart, this comparative study may be helpful in some manner as the Constitutional Council further develops its vagueness doctrine.

3. *Quality of Law Under the French Constitution*

For the Constitutional Council, a statute is vague when it is not "intelligible" or not "accessible."[39] These two principles are two

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ed. 2005); Burt Neuborne, *In Honor of late Louis Favoreu: France Exceptionalism in Constitutional Law*, 5 INT'L J. CONST. L. 17 (2007).

36. Still, the Supreme Court accepts facial challenges in vagueness cases. Differences between "facial" challenges and "abstract review" will be discussed later in this article.

37. *See also infra* note 105.

38. *See* Stone, *supra* note 12, at 2772.

39. Still "vagueness" seems to be different from "intelligibility" and "accessibility." Vagueness is a lack of distinctness or preciseness. OXFORD ENGLISH DICTIONARY 3538 (compact ed., Oxford Univ. Press 1976). The French word "vague" has the same meaning

complimentary components of the quality of law doctrine. Constitutional grounds for this scrutiny are the individual rights provisions of Articles 4, 5, 6, and 16 of the Declaration of Human and Civic Rights, adopted during the French Revolution in 1789.[40]

Because of these several grounds, the quality of law test does not give a very precise definition of the principle of intelligibility and accessibility of law. Cases in which the Constitutional Council has been asked to review the constitutionality of the law because of its vagueness are rare. Moreover, these cases do not take a significant role in individual rights' protection as do the U.S. Supreme Court cases. Therefore the quality of law doctrine, in its current form, looks feeble compared to the vagueness doctrine under U.S. constitutional law.

Cases in which the Constitutional Council has invalidated a law because of its vagueness are also rare. Yet, there are some cases in which the constitutional judge, without challenging the constitutionality of the referred statute, more fully explicates the quality of law doctrine.

(que l'esprit a du mal à saisir a cause de son caractère mouvant et de son sens mal défini, mal établi. LE PETIT ROBERT, DICTIONNAIRES LE ROBERT 2634 (2000). "Intelligible," both in English and in French means "capable of being understood" or "comprehensible" and "accessibility" stands for the quality of "being accessible or of admitting approach." OXFORD ENGLISH DICTIONARY 1456 (compact ed., Oxford Univ. Press 1976)); LE PETIT ROBERT, DICTIONNAIRES LE ROBERT 1336 (2000). Vagueness concerns borderline cases that a statute may or not include, whereas "intelligibility" and "accessibility" refer to the meaning of the statute itself. In that sense, the Constitutional Council has not exactly dealt with vague constitutional challenges. Moreover, in an abstract review it cannot really foresee "borderline cases." But for the purposes of the comparison and since both the Constitutional Council and the Supreme Court provide similar prongs for their respective doctrines, these two constitutional requirements will be considered as analogous.

40. Declaration of Human and Civic Rights of 26 August 1789, art. 4 (1789) (Fr.) ("Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to other members of society the enjoyment of these same rights. Only Law may determine these bounds."); *id.* at art. 5 ("The Law has the right to forbid only those actions that are injurious to society. Nothing that is not forbidden by Law may be hindered; and no one may be compelled to do what the Law does not ordain."); *id.* at art. 6 ("The law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall de equally eligible to all High offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents."); *id.* at art. 16 ("Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.").

4. The Principle of Intelligibility and Accessibility of Law

The quality of law doctrine is a recent theoretical construct. The Constitutional Council distinguishes two facets that the quality of law requires: intelligibility and accessibility of law.

First, the constitutional requirement for accessibility of law seems to provide the citizen with material access to the law in respect to the principle that ignorance of the law is not a defense.[41] Therefore, the principle of accessibility means that the law should be published in a sufficient way (official journal) and that its presentation should be clear. The other facet concerns the content of the law. Indeed, the principle of intelligibility seems to refer more to the clarity of law and to the ability for the citizens to reach the meaning of the law. Initially, the Constitutional Council tried to distinguish the principle of clarity of law from the principle of intelligibility and accessibility of law. The Constitutional Council for the first time in 1998 invoked the principle of clarity of law.[42] In 1999 it invoked the comparable principle of intelligibility and accessibility of law.[43]

After being criticized for having separated the clarity of law from the intelligibility of law, the Constitutional Council abandoned the principle of clarity.[44] The principle of clarity was thought to provide an objective standard of "common understanding" whereas the principle of intelligibility and accessibility furnished a subjective appreciation of the same standard.

The ground for the principle of clarity of law was different from the ground for intelligibility and accessibility of law. Indeed, between 1999 and 2004 the Constitutional Council held that the principle of clarity of law was derived from Article 34 of the Constitution of 1958, which enumerates Parliament's powers rather than the rights provisions in the 1789 Declaration.[45]

These two principles did not bind the legislature in the same way. Whereas the principle of intelligibility and accessibility of law is only "un objectif à valeur constitutionnelle" (constitutional status), which means that this principle is only a constitutional goal that the

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41. Laure Milano, *Contrôle de Constitutionnalité et Qualité de la Loi*, 3 REVUE DU DROIT PUBLIC [R.D.D.P.] 637 (2006); *see also* de Montalivet, *supra* note 2.

42. CC decision no. 98-401DC, June 10, 1998, Rec. 258.

43. CC decision no. 99-421DC, Dec. 16, 1999, Rec. 136.

44. Milano, *supra* note 41, at 645.

45. CC decision no. 98-401DC, *supra* note 42. *See also* CC decision no. 2001-455DC, Jan. 12, 2002, Rec. 49.

legislator must try to achieve (obligation of means), the second principle puts a stronger obligation on the legislature (obligation of result).[46] Many commentators found this distinction difficult to explain.[47]

The French Constitutional Council, however, tried by using these two different principles, and after 2004, by using only the principle of accessibility and intelligibility of law to set a standard (probably an objective one, as we will see later) which permits one to measure the understandability of law. The Constitutional Council held that:

> The equality before the law laid down by Article 6 of the Declaration of Human and Civic rights of 1789 ("DHCR") and the "guarantee of rights" required by Article 16 may not be effective if the citizens do not have sufficient knowledge of the statutes that apply to them, that such knowledge is also necessary for the exercise of rights and freedoms as guaranteed by Article 4 of the Declaration (Natural rights have no bounds other than those that ensure to the other members of society the enjoyment of these same rights. Only Law may determine these bounds) and by Article 5 of the same Declaration (nothing that is not forbidden by Law may be hindered, and no one may be compelled to do what the Law does not ordain).[48]

The Council usually repeats this paragraph (considérant de principe) in cases involving intelligibility and accessibility challenges. The object is to impose on the legislature a requirement that its laws be readily available and comprehensible by citizens so as to protect their rights.

B. Cases Raising the Quality of Law Doctrine

1. 1998: Future Implementation of Law

In the case *Act Reducing Working Hours*, Members of the National Assembly and Senators challenged a controversial law that reduced working hours.[49] Even though the law passed in 1998, its enforcement was deferred until 2000 and 2002. The parties making the referral to the Constitutional Council argued that by deferring its

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46. Milano, *supra* note 41, at 646.

47. Bertrand Mathieu & Michel Verpeaux, *Chronique Constitutionnelle*, 19 LES PETITES AFFICHES 16 (2002) (Fr.).

48. CC decision no. 99-421DC, *supra* note 43.

49. CC decision no. 98-401DC, *supra* note 42.

effective date until after a government report was issued, the law was unconstitutionally vague.[50] They further argued that Parliament abdicated its power (*incompetence negative*) by deferring until a future time.[51] According to this argument, if Parliament refers a law to a future report (and therefore uncertain content), the precise implementation of law is unknown when the statute is passed.[52] The Constitutional Council evaluated the argument, but held that the challenged law was sufficiently clear for constitutional purposes.[53] Parliament could defer the implementation of a law without it failing for lack of clarity.[54]

This case concerned the clarity of law doctrine, which was abandoned in later cases. The clarity of law doctrine is different from the principles of intelligibility and accessibility of law, and it is linked to the American "non-delegation" doctrine, which will be discussed later in this article. Yet, it is important to mention this case since it is the first case in which the Council expressed its concerns about the quality of law.[55]

2. 1999: Codification of Law

In the case *Act Authorizing the Government to Codify, by Ordinance, the Legislative Volume of Several Codes*,[56] Parliament delegated its power under Article 38 of the Constitution[57] in order to allow the Government to undertake the codification of the law.[58] Article 38, as interpreted by the Constitutional Council, requires that the purpose of the delegation of legislative power should be precisely defined and has to be justified by some urgency.[59] The parties making the referral to the Constitutional Council argued that Article 38 of the Constitution was violated since the legislature did not observe

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50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *See* 5 LES CAHIERS DU CONSEIL CONSTITUTIONNEL 11 (1998).

55. Milano, *supra* note 41, at 640.

56. CC decision no. 99-421DC, *supra* note 43.

57. 1958 CONST. art. 38 ("In order to implement its program, the Government may ask Parliament for authorization, for a limited period, to take measures by Ordinance that are normally the preserve of statute law.").

58. Indeed, French statutes are grouped together in Codes. Each of these codes deals with a particular subject: Criminal Code, General Tax Code, Civil Code, etc.

59. CC decision no. 76-72DC, January 12, 1977, Rec. 343.

these two requirements.[60] The Constitutional Council held that the principle of intelligibility and accessibility of law which are constitutionally required and which Parliament was trying to accomplish through the challenged delegation, could justify the urgency requirement under Article 38 of the Constitution.[61]

This case provides precision for the principle of accessibility of law. The Council said that the codification of statutes could improve citizens' access to the law.[62] Since the codification improves access, the principle of accessibility of law itself includes the requirement that the statute be carefully presented.[63]

Among other quality of law problems that have been raised in France over the past ten years, the overproduction of legislation is indisputably the most alarming.[64] Yet, the Constitutional Council as a judge cannot control the quantity of statutes, since it concerns Parliament's activity as a political body. But, the Council uses the principle of accessibility as an indirect tool in order to provide relief from the huge quantity of statutes. Since Parliament cannot help but pass a large quantity of statutes, it still has to present them carefully.

3. 2003: Election of Senators

Provision 7 of the Senators Election Act (Article L. 52-3 of Election Code) reads in part:

> For each category of election, the wording and the font size of ballots must be in accordance with laws and regulations- for elections "*au scrutin majoritaire*" (election by majority vote), the ballots may not include any name other than the proper name of the candidate- for elections "*au scrutin de liste*" (list-system), the lists presented in each of the departmental or regional constituency can take a single name in order to be identified at the national level. This could be the name of a group or political party or their representatives.[65]

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60. CC decision no. 99-421DC, *supra* note 43.

61. *See* 8 LES CAHIERS DU CONSEIL CONSTITUTIONNEL 20 (2000).

62. CC decision no. 99-421DC, *supra* note 43.

63. Milano, *supra* note 41, at 643; *see also* de Montalivet, *supra* note 2.

64. Svein Eng, *Legislative Inflation and the Quality of Law*, *in* LEGISPRUDENCE : A NEW THEORETICAL APPROACH TO LEGISLATION 65, 65–79 (Luc Wintgens ed., 2003).

65. CC decision no. 2003-475DC, July 24, 2003, Rec. 397.

The parties making the referral to the Constitutional Council submitted that the changes to the Senators' elections were not "directly related" to the provision of that bill.[66]

The Constitutional Council ruled that Parliament intended to regulate Senators' election, but Article L. 52-3 is in Title I of Book I of Electoral Code, a Title that is not related to Senators' election.[67] Therefore, Provision 7 of the Senators' Election Act, was unconstitutionally inaccessible.[68] The Constitutional Council explained that this Provision could modify existing legislation only when related to Senators' elections.[69] It held that Provision 7 lacked a relationship with the Senators' Election Act.[70]

Moreover, the Constitutional Council held that words such as "proper name" and "representative of a group or political party" are ambiguous. Indeed, the last paragraph of Article L. 52-3 allows, in some cases (involving lists of candidates), the inclusion on the ballot of names of people who are not themselves candidates for election (the list sponsors). Such inclusion, however, might create confusion in the minds of voters.[71] Therefore it held that the statute was unconstitutionally unintelligible.[72]

This case provides a particular example of unintelligible statutes. The Constitutional Council seems to distinguish cases in which statutes are drafted in "ambiguous" terms. Not only citizens are unable to understand the statute, but "ambiguous" words also create confusion in the minds of voters. "Ambiguity" of a statute raises an issue different from "unintelligibility." An intelligible statute can still be ambiguous if it is written in terms susceptible to several meanings.[73] However, the Council does not provide a separate

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66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See* 15 LES CAHIERS DU CONSEIL CONSTITUTIONNEL 75 (2003).

71. *Id.*

72. *Id.*

73. ENDICOTT, *supra* note 1, at 54. Both in English and French the word "ambiguous" means that a statement is understandable but has two or more meanings. For the French word, LE PETIT ROBERT gives the following definition: "qui présente deux ou plusieurs sens possible, dont l'interprétation est incertaine." LE PETIT ROBERT, DICTIONNAIRES LE ROBERT 76 (2000). For the English word, OXFORD ENGLISH DICTIONARY gives the following definition: "admitting more than one interpretation or explanation; of double meaning, or of several possible meanings; equivocal." OXFORD ENGLISH DICTIONARY 143 (compact ed., Oxford Univ. Press 1976). Therefore, "ambiguity" and "unintelligibility" are two different problems.

ambiguity doctrine. In this case it held that the statute was unconstitutionally unintelligible since it was written in ambiguous terms.

4. Local Autonomy

Article 72-2 of the Constitution guarantees financial autonomy to French territories.[74] Article 72-2 states that the "tax revenue and other own revenue of territorial communities shall, for each category of territorial community, represent a decisive share of their revenue."[75] In 2004, the Institutional Act that was to determine the conditions for implementation of this rule was referred to the Constitutional Council. Provision 4 of the Act repeated Article 72-2 of the Constitution, but without providing further details.[76] It stated that the "decisive share" should respect two conditions: first it must guarantee local autonomy, and second it must observe a minimal threshold that the Parliament provided by referring to the level recorded during 2003.[77]

The Constitutional Council held that:

> 13. Parliament must exercise to the full the powers vested in it by the Constitution and in particular by Article 34 thereof. The full exercise of such powers, together with the principle of clarity of law, which derives from the same Article and object of constitutional status that the law be intelligible and accessible, which derives from Article 4, 5, 6 and 16 of the Declaration of 1789, place it under a duty to enact provisions, which are sufficiently precise and unequivocal. Protection must be afforded to all from interpretations which run counter to the Constitution or from the risk of arbitrary decisions, without leaving it to courts of law or administrative authorities to determine rules which the Constitution provides should be the sole preserve of statutory law.[78]

The Constitutional Council often uses similar paragraphs to introduce its quality of law doctrine in order to respond to the referral. It then continues to discuss the case: "15. Two conditions set by Provision 4 of the Act referred are tautological and violate both

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74. CC decision no. 2004-500DC, July 29, 2004, Rec. 116.
75. 1958 CONST. art. 72-2 (Fr.).
76. CC decision no. 2004-500DC, *supra* note 74.
77. *Id.*
78. *Id.*

the principle of clarity of the law and the requirement of precision that Article 72-2 of the Constitution compels[.]"[79]

The Constitutional Council invalidated "tautological" provisions in this case . More than correcting statute drafting, it seems to watch over Parliament's absentmindedness. The statute, the Council asserts, must consist of a useful scope. When the Constitution requires more precision, the statute has to provide them. Parliament cannot merely repeat what Articles of the Constitution have already said.[80]

In the same line of cases the Council held that the statute should consist of "normative" dispositions. If Parliament drafts statutes that are only declaratory and do not consist of a useful scope, the Council is sometimes willing to strike down these provisions. In 2005, provision 7 of the Programming Act for the Future of the School was found unconstitutionally unintelligible and inaccessible since it did not set "normative" disposition.[81] Provision 7 reads:

> [T]he aim of the school is the success of all students. The school must recognize and promote all forms of intelligence in order to enable students to develop their talents, depending on their diversity. The school, under the authority of teachers and with the support of parents, must permit each student to complete the work required for the development of his intellectual and manual abilities.[82]

The Council held that provision 7 described only the aim of the school without setting any legal obligation.[83] Therefore, it violated the principle of accessibility and intelligibility of the law. Still, this provision is neither unintelligible nor inaccessible.[84] The Council once again includes within the principle of accessibility and intelligibility of law different aspects of poorly drafted statutes. Statutes lacking in a useful scope are far different from unintelligible provisions. Moreover the Council did not explain how a "declaratory" provision could obstruct citizens' accessibility to the law. One can easily realize

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79. *Id.*

80. *See* 17 LES CAHIERS DU CONSEIL CONSTITUTIONNEL 62 (2004).

81. CC decision no. 2005-512DC, April 21, 2005, Rec. 72.

82. *Id.*

83. *Id.*

84. *See, e.g.*, Veronique Champeil-Desplats, *N'est pas Normative qui peut. L'Exigence de Normativité dans la Jurisprudence du Conseil Constitutionnel*, 21 LES CAHIERS DU CONSEIL CONSTITUTIONNEL 93 (2006).

that the Council is not only trying to provide a constitutional requirement in order to improve citizens' accessibility to the law but it also regulates Parliament's statutory activity.

5. 2005: Finance Act

The Finance Act for 2006[85] was challenged for being unintelligible and inaccessible. Members of the National Assembly and Senators argued that Provision 78 (Article 200-00 A of General Tax Code) of the statute reached a level of such complexity that it became unintelligible to the citizen.[86] This Provision introduced some tax benefits under the income tax law and enumerated different amounts of the benefits cap according to the composition of different households.

The Constitutional Council held that the mechanism proposed by Article 200-00 A of General Tax Code did not respect the principle of equality since it could treat taxpayers differently in situations that were objectively identical.[87] This followed directly from the criterion for the selection of households subject to the cap. Neither the statute nor Parliament's debate gave the definition for such distinction. Moreover, this provision was drafted in such a complicated way, by referring to other Articles of the General Tax Code and by providing an intricate calculation of the tax benefits, that the Constitutional Council found it unintelligible and inaccessible to the taxpayers.[88] Therefore, it held that this provision was vague and imprecise. Indeed, the Constitutional Council held that

> 77. The equality before the law laid down by Article 6 of the Declaration [of Rights] and the "guarantee of rights" protected by Article 16 would not be effective if people do not have sufficient knowledge of rules that are applicable to them and if those rules were too complex in terms of the ability of citizens to measure the useful scope. In particular the right to effective redress before a court will be infringed. Also, this complexity would restrict the exercise of rights and freedoms guaranteed by Article 4 of the Declaration. These rights have no bounds other than those that ensure to the other members of society the enjoyment of these same rights. Only Law may determine these bounds. This complexity would also restrict the exercise

85. CC decision no. 2005-530DC, Dec. 29, 2005, Rec. 168.

86. *Id.*

87. *Id.*

88. *See* 20 LES CAHIERS DU CONSEIL CONSTITUTIONNEL 32 (2005).

> of rights guaranteed by Article 5, under which nothing that is not forbidden by Law may be hindered, and no one may be compelled to do what the Law does not ordain.[89]

Here again the Constitutional Council introduces its reasoning by first providing constitutional grounds for the quality of law doctrine. Then, the Council discuses the case:

> 79. In this case, the tax law demands taxpayers to make choices and determine the final amount of the tax according to different options provided by the statute. The principle of equality requires, however, that the citizen should be able to foresee to a reasonable degree the amount of tax according to different options that the statute opens to him;
> 80. *However the complexity of the law can be justified on the grounds of sufficient general interest.*[90]

This decision is reminiscent of due process principles underlying much of the U.S.'s vagueness doctrine.[91] Every person may be "presumed to know the law," but unless the law is known and knowable, the presumption fails. Still, some legal matters are unavoidably complex or imprecise. That alone does not create vagueness. Recognizing such limits on the fullness of language, the Constitutional Council noted in this case that there are statutes in which unintelligibility is permissible since they deal with complex problems. The example of the tax law is consonant with the Council's idea of a complex law.

This excuse also shows the limits of the subjective standard of "common understanding" behind the quality of law doctrine. One can easily conclude that this excuse maintains the objective standard of common understanding. In this case, however, the Constitutional Council held the law to be unconstitutional since the complexity of provision 78 was excessive. It suggested that it will examine whether the complexity of a statute can be justified by a sufficient general interest. Moreover the requirement of intelligibility is dependent upon the sensitivity of whom the law is directed.[92] Therefore, the Council held that:

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89. CC decision no. 2005-530DC, ***supra*** note 85.
90. *Id.* (emphasis added).
91. *See* discussion ***infra*** Part II.C.
92. 20 LES CAHIERS DU CONSEIL CONSTITUTIONNEL 32, 35 (2005).

> 82. Yet, in this case, Provision 28 is directed not only to the tax administration, but also to taxpayers, who are required to calculate in advance the amount of the tax;
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> . . .
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> 84. Therefore the complexity of these rules results in the length of provision 78 and in its imbricate drafting that it becomes unintelligible for the taxpayer, and sometimes ambiguous for the professional. This provision, as it referees to other Articles of General Tax Code, would not insure the legal stability and would lead to future misunderstandings, complaints and litigations.[93]

The U.S. Supreme Court seems to accept the same argument when it says "there are areas of human conduct where, by the nature of the problems presented, legislatures cannot establish standards with great precision."[94] In *Smith v. Goguen*, the Court wrote that a statute, such as one barring disorderly conduct, might require imprecise language, "requiring as it does an on-the-spot assessment of the need to keep the order."[95]

Even if both French and American judges admit the same excuse for vagueness, their arguments are slightly different. First, these cases relate to different statutes (tax law for the Council and criminal law for the Court).

Second, the Constitutional Council accepts the inability of the legislator to draft intelligible laws in complex areas whereas the Supreme Court points out the limits of the language to precisely define the meaning of the term that describes a human conduct. The Council accepts that sometimes statutes can be drafted in sufficiently precise terms but cannot help but be somewhat complicated. For the Supreme Court the "open texture" of some statutes cannot be sharpened to an unequivocal statement of what they require.[96]

C. 2008: Private Finance Initiative Act

The Constitutional Council invalidated *proprio motu* (on its own motion) provision 16 of The Private Finance Initiative Act ("PFI") on

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93. CC decision no. 2005-530DC, *supra* note 85.

94. Smith v. Goguen, 415 U.S. 566, 581 (1974).

95. *Id.*

96. Culver, *supra* note 1. "Open texture" of a statute means that the statute is susceptible of two or more interpretations. *Id.* Therefore, judges often have to interpret statutes. That does not necessarily mean that the statute is broad or vague.

the grounds that it was unconstitutionally intelligible (despite the fact that the Member of National Assembly and Senators in their referral did not challenge the Act on such ground).[97] The Council found that this article had mentioned twice a superior threshold for PFI contracts, even though it had to set an inferior and a superior threshold.[98] The Council held that the legislature intended to define two procedures, supposed alternatives, below and above a threshold, however. The article referred in both cases to the contracts whose amounts are "above the threshold."[99] Since the legislator failed to draft the right words, it violated the principle of intelligibility and accessibility of the law. Therefore, the last two paragraphs of Article 16 of the PFI Act were invalidated.[100]

This case suggests that the Council will in the future strike down drafting errors. Moreover, the Constitutional Council challenges the provision of this statute *proprio motu* as it usually does in matters of public policies (*ordre public*).

For the Supreme Court, a statute is vague "if it fails to provide a reasonable opportunity for people of ordinary intelligence to understand what conduct it prohibits" or "if it authorizes or even encourages arbitrary and discriminatory enforcement."[101] The Constitutional Council seems to provide similar prongs for its quality of law doctrine.

II. The Supreme Court's Vagueness Cases

A. The First Amendment

Vagueness challenges can involve either a "facial" challenge to a law or an "as applied" challenge. The "facial" challenge concerns a claim that a law is facially unconstitutional and should be struck down in its entirety.[102] The "facial" challenge is controversial because the claimant before the court may not be arguing that a particular law is vague as to him, but may ask the court to strike down the law because

97. CC decision no. 2008-567DC, July 24, 2008, Rec. 341.

98. *Id.*

99. *Id.*

100. *Id.*

101. Chicago v. Morales, 527 U.S. 41, 56–57 (1998).

102. RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT 87–90 (2d ed. 2006).

it is vague as applied to others.[103] Therefore the Court has to consider speculation about possible vagueness in hypothetical situations not before the court.

One may see in "facial" challenges a review similar to the French constitutional review. Indeed, both the Constitutional Council and the Supreme Court in facial challenges deal with hypothetical cases, and both strike down statutes in their entirety. Nevertheless, the French Council does not exactly resolve hypothetical cases. It confronts statutes with the Constitution and it is cut off from any concrete case. Therefore, its reasoning remains abstract. In dealing with a facial challenge, the Supreme Court hears a concrete case and has to give a precise reasoning even if at the same time it "resolves" hypothetical cases.[104] Yet, courts are generally reluctant to let individuals assert the rights of others, and the Supreme Court has a very strict interpretation of standing rules.[105] Vagueness doctrine under the First Amendment is among these rare cases when the Supreme Court is willing to consider facial challenges.[106]

The Supreme Court is inclined to apply the vagueness doctrine particularly when free speech is implicated. Cases in which statutes targeting Communists and establishing loyalty oaths were challenged

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103. Vagueness challenges are often combined with overbreadth claims. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1972). Laws restricting speech are overbroad when they suppress more speech than necessary to accomplish the state's legitimate goals. Laws suffering from overbreadth, just as vague laws, are often considered « on their face. *See* Gooding v. Wilson, 405 U.S. 518 (1971).

104. Stone, *supra* note 12, at 2744. He argues that traditional differences of judicial review in U.S. and Europe are in deep crises. Not only has European constitutional review become more concrete but also American judicial review has become increasingly abstract. In order to illustrate his point of view he explains two situations: the procedure of declaratory or injunctive relief and facial constitutional challenges. He further argues that these two situations are examples of an "abstract review" by the U.S. Supreme Court, even if American constitutional law does not use the term "abstract review." For our purposes, it still remains an important difference between facial challenges and abstract review. Abstract review is cut off from any concrete litigation. In declaratory or injunctive relief and in facial challenges judges have an idea of how the statute is being applied, which is never the case for the French Council. Moreover, invalidating a statute on its face does not necessarily mean that the review is abstract. For example, the new procedure of "question préjudicielle" grounds the Constitutional Council in concrete review activities but the Council still deals, in this case, with facial constitutional challenges. When the Council invalidates a statute, it is always on its face, even after this new procedure. Therefore, American facial constitutional challenges will look more like Constitutional Council cases' raised on the grounds of the preliminary question procedure.

105. *See, e.g.*, Warth v. Seldin, 422 U.S. 419 (1975) (rejecting *jus tertii* standing for injured parties).

106. RUSSELL L. WEAVER & DONALD E. LIVELY, *supra* note 102.

on the grounds of vagueness are revealing of the Supreme Court's position.[107]

In *Baggett v. Bullit*[108] the Supreme Court asserted that "[t]he vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution. We are dealing with indefinite statutes whose terms, even narrowly constructed, abut upon sensitive areas of basic First Amendment freedoms."[109] In *Baggett,* the plaintiffs challenged the constitutionality of a 1931 Washington statute requiring teachers, as a condition of employment, to take a loyalty oath.[110] The Supreme Court held that the statute was unconstitutionally vague.[111] It ruled that the oath was lacking in "terms susceptible of objective measurement and failed to inform as to what the State commanded or forbade."[112] The Supreme Court wrote, "Persons required to swear they understand this oath may quite reasonably conclude that any person who aids the Communist Party or teaches or advises known members of the Party is a subversive person because such teaching or advice may at some future date aid the activities of the Party."[113] Therefore, the statute did not provide an "ascertainable standard of conduct."[114] The Supreme Court added, "the challenged oath is not open to one or a few interpretations, but to an indefinite number."[115]

Another case illustrates the risk of "arbitrary enforcement." It is usually affirmed that criminal statutes are subject to stricter vagueness analysis than civil statutes. Subject to an even stricter standard are criminal statutes that reach expression protected by the First Amendment. In *Kolender v. Lawson*,[116] the Supreme Court invalidated a California statute requiring persons who loiter or wander on the streets to provide a "credible and reliable" identification. The Supreme Court held that:

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107. *Id.*

108. Baggett v. Bullit, 377 U.S. 360 (1964).

109. *Id.* at 372.

110. *Id.* at 371.

111. *Id.* at 372.

112. *Id.* at 367 (quoting Cramp v. Bd. of Pub. Instruction, 368 U.S. 278 (1961)).

113. *Id.* at 368.

114. *Id.* at 372.

115. *Id.* at 378.

116. Kolender v. Lawson, 461 U.S. 352 (1982). For the free assembly and association, see Coates v. City of Cincinnati, 402 U.S. 611 (1970).

> As presently drafted and construed by the state courts, the statute contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest.[117]

Therefore the statute was unconstitutionally vague because it "encouraged arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute."[118]

In some other cases the Supreme Court found that a statute violated both prongs of the vagueness test. In *City of Chicago v. Morales,*[119] Justice Stevens wrote for the Court that an ordinance which required a police officer, "on observing a person whom he reasonably believed to be a criminal street gang member loitering in any public place with one or more other persons, to order all such persons to disperse, and made failure to obey such an order a violation," was unconstitutionally vague in falling to provide fair notice of prohibited conduct.[120] The ordinance was also impermissibly vague in failing to establish "*minimum guidelines for enforcement.*"[121]

B. Prior Restraints

Another line of cases that concern the danger of arbitrary decision in U.S. constitutional law is found in the prior restraint doctrine. The Supreme Court has held that a statute that gives "unfettered discretion" to government officials to grant or withhold permits for speech in public places is tantamount to a "prior restraint." Prior restraints are generally forbidden under the First Amendment.

In *City of Lakewood v. Plain Dealer Publishing*,[122] the Supreme Court held that a licensing statute that:

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117. *Kolender*, 461 U.S. at 358.
118. *Id.* at 361.
119. City of Chicago v. Morales, 527 U.S. at 60.
120. *Id.*
121. *Id.* (quoting *Kolender*, 461 U.S. at 358 (emphasis added).
122. City of Lakewood v. Plain Dealer Publishing, 486 U.S. 750 (1988).

> [V]ests unbridled discretion in a government official over whether to permit or deny expressive activity ... constitutes a prior restraint and may result in censorship, engendering risks to free expression ... The mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused.[123]

In *Lakewood*, a newspaper company challenged the constitutionality of a city ordinance that regulated news racks on public sidewalks. That ordinance gave the mayor the authority to grant or deny applications for annual news rack permits.[124] The Supreme Court held that "giving the mayor *unfettered discretion* to deny a permit application and to condition the permit on any additional terms he deems 'necessary and reasonable,' to be unconstitutional."[125]

The ordinance was drafted in vague terms and failed to provide precise standards of conduct for authorities that had to enforce it. The Supreme Court said that the unfettered discretion given to the mayor could lead to arbitrary enforcement of the ordinance since one could not presume that the mayor would act in good faith and adhere to standards that are not explicitly stated on the face of the ordinance.[126] Therefore, the Court explained that the risk of arbitrary enforcement followed from the "unfettered discretion" given to the mayor, which itself resulted from the statute's vagueness.[127]

Unlike the U.S. Supreme Court, the French Constitutional Council is rarely asked to resolve cases involving individual rights and quality of law issues. As the above First Amendment cases demonstrate, the U.S. Supreme Court is more concerned about the broadness of the law. The French Constitutional Council, by contrast, focuses on the complexity of the law. This is probably the

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123. *Id.* at 755–56.

124. If the mayor denied an application, he was required to "state the reasons for such denial." *Id.* at 793 n.18. In the event the mayor grants an application, the city was asked to issue an annual permit subject to several terms and conditions. Among them were: (1) approval of the news rack design by the city's Architectural Board of Review; (2) an agreement by the news rack owner to indemnify the city against any liability arising from the news rack, guaranteed by a $100,000 insurance policy to that effect; and (3) any "other terms and conditions deemed necessary and reasonable by the Mayor." *Id.* at 753–54.

125. *Id.* at 772 (emphasis added).

126. *Id.* at 770.

127. *Id.* at 772.

result of its abstract judicial review. The Constitutional Council cannot, in an abstract case, appreciate the broadness of the law and has to limit itself to challenges based on poorly drafted or intricate statutory requirements. Therefore, Constitutional Council cases do not deal with statutory vagueness challenges in the way that the American Supreme Court does. Nonetheless, the French quality of law doctrine provides an outcome that is similar to the American vagueness doctrine. The Council has explained, as will be discussed later, the constitutional requirements of intelligibility and accessibility as preventing citizens from arbitrary enforcement of statutes. Thus, even if statutory vagueness comes in different forms, it always affects citizens in the same way. Both the Constitutional Council and the Supreme Court consider in their respective doctrines different sources of statutory vagueness, but they seem to reconcile them with similar constitutional requirements.

C. Due Process

The American vagueness doctrine finds its root in the Due Process Clauses of the Fifth and Fourteenth Amendments.[128] The Supreme Court has held that due process implies that legislation must meet constitutional standards for definiteness and clarity.

In *Kolender*, the Court wrote that the California statute required that "suspicious" persons satisfy some undefined identification requirement, or face criminal punishment. Although due process does not require "impossible standards" of clarity, this is not a case where further details in the statutory language are either impossible or impractical.[129] Therefore, the statute was unconstitutionally vague on its face within the meaning of the Due Process Clause of the Fourteenth Amendment because it failed to clarify what it contemplated by the requirement that a suspect provide a "credible and reliable" identification.[130]

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128. U.S. CONST. amend. V ("[N]o person shall be . . . deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

129. *Kolender*, 461 U.S. at 361.

130. *Id.* at 353. However, in *Hibel v. Nevada*, the Supreme Court held that defendant's arrest for refusal to identify himself, in violation of Nevada law, did not violate his Fifth Amendment rights against unreasonable searches and seizures. *Hibel v. Nevada*, 542 U.S. 177 (2004). Quoting *Kolender*, the Supreme Court reminded that a statute is void when it provides no standard for determining what a suspect must do to comply with it. *Id.* at 184. In *Hibel*, the petitioner did not allege that the statute was unconstitutionally vague. Moreover, the Supreme Court said that the Nevada statute was narrower and more

Even if in France a Due Process Clause does not exist, due process as a component of the rule of law (*État de droit*) derives from several articles of the Declaration of Human and Civic Rights ("DHCR"). Article 16 of the DHCR refers to the "guarantee of rights" which involves classic maxims that are protected under the Due Process Clause.[131] Indeed, the Council has held that Article 16 includes the right to a fair trial.[132] For example, it ruled that the principle of the rights of the defense and the right to effective redress before the Court both derive from the same article.[133]

This interpretation of Article 16 of the DHCR seems to be analogous to the American requirement of procedural due process. The Constitutional Council has not precisely invoked due process as a requirement for the quality of law doctrine. Still, since the Council has held that the principle of intelligibility of law derives also from Article 16 of the DHCR, which refers to the "guarantee of rights," one may suppose that the Constitutional Council has found in this article a similar requirement as the Supreme Court. Yet, the Constitutional Council did not explicitly explain how an unintelligible statute might violate the "guarantee of rights" protected under Article 16 of the DHCR.

D. Retroactive Effects of Statutes

Despite the danger inherent in retroactive legislation, the Supreme Court has held that the U.S. Congress, within constitutional limits, has the power to enact laws with retroactive effect.[134] In order

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precise than the California statute in *Kolender*. *Id.* at 185. Whereas the California statute required a suspect to give the officer "credible and reliable" identification, the Nevada statute, as interpreted by the Nevada Supreme Court, required that a suspect disclose his name. *Id.* at 185. Even if the Supreme Court is sometimes willing to recognize constitutional limitations on the scope and operation of stop and identify statutes (e.g., *Kolender*), in *Hibel* the Supreme Court held that officer's request to disclose suspect's name was commonsense inquiry and did not violate the Fifth Amendment. *Id.* at 185.

131. THIERRY S. RENOUX, MICHEL DE VILLIERS, CODE CONSTITUTIONNEL, LEXISNEXIS, Paris, 2005, at 179.

132. CC decision no. 2004-492DC, Mar. 2, 2004, Rec. 66.

133. *Id.*

134. Still, both American and French constitutional laws contain a strict prohibition on the enactment of retroactive criminal statutes. In France this prohibition derives from Article 8 of the DHCR. In American constitutional law this precept is reflected in Ex Post Facto Clause. For one applicable to Congress, see U.S. CONST. art. I, § 9, cl. 3, and another applicable to state legislatures, see U.S. CONST. art. I, § 10, cl. 1). Nonetheless, it has long been established, in American constitutional law, that Congress can pass statutes that limit a person's rights based on past criminal convictions. *See generally* Bugajewitz v. Adams, 228 U.S. 585, 608–09 (1913) (upholding a law that provided for the deportation of

to determine the permissible retroactive effect of a statute, the Supreme Court provided a test in *Landgraf v. USI Film Productions,*[135] whose rationale tracks vagueness issues. "The first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with requisite clarity that the law be applied retrospectively."[136] As the Court has written, the standard for finding such unambiguous direction is a demanding one. The only cases where the Supreme Court has found retroactive effect adequately authorized by statute are cases in which the statute sustained only one interpretation. In *INS v. St. Cyr*[137] the Supreme Court held that the Attorney General could not retroactively apply the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") § 304(b)[138] since Congress failed for lack of clarity by not precisely requiring that the law be applied retrospectively.[139]

In this case, a citizen of Haiti pleaded guilty in a state court to a charge of selling a controlled substance in violation of Connecticut law.[140] This conviction made him deportable. Under pre-IIRIRA law applicable at the time of his conviction, St. Cyr would have been eligible for a waiver of deportation at the discretion of Attorney General.[141] However, removal proceedings against him were not

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a women convicted of prostitution); Hawker v. New York, 170 U.S. 189, 199–200 (1898) (upholding a public health law which prohibited a person convicted of a felony from practicing medicine) (citing Nancy Morawetz, *Determining the Retroactive Effect of Laws Altering the Consequences of Criminal Convictions*, 30 FORDHAM URB. L.J. 1743, 1743 (2003)).

135. 511 U.S. 244 (1994).

136. INS v. St. Cyr, 533 U.S. 315, 316 (2001) (citing Martin v. Hadix, 527 U.S. 343, 352 (1999)).

137. *Id.*

138. Pub.L. 104-208, Div. C, 110 Stat. 3009-546 (1996).

139. *St. Cyr*, 533 U.S. at 315 ; *see also* Hamdan v. Rumsfeld, 548 U.S. 557 (2006). In this case, the Supreme Court held that Congress expressly provided that subsections (e) (2) and (e) (3) of section 1005 of Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, 119 Stat. 2739, applied to pending cases. But it chose—after having been presented with the option—not to so provide the same for subsection (e) (1). Referring to the "negative inference" principle, the Supreme Court explained that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Hamdan*, 548 U.S. at 578 (quoting Russello v. United States, 464 U.S. 16, 23 (1983)). Since the Congress did not expressly provide that subsection (e) (1) applied to pending cases, "the omission is an integral part of the statutory scheme that muddies whatever 'plain meaning' may be discerned from blinkered study of subsection (e) (1) alone." *Id.* at 584.

140. *St. Cyr*, 533 U.S. at 289.

141. *Id.* at 315.

commenced until April 10, 1997, which is after IIRIRA became effective.[142] Therefore, the Attorney General interpreted the new legislation as depriving him of the discretion to grant such a waiver.[143]

The Supreme Court held that Congress did not precisely identify which set of proceedings would apply to aliens whose exclusion or deportation proceedings began prior to the new law's effective date.[144] It added that Congress made some provisions of IIRIRA expressly applicable to prior convictions, but did not do so in regard to § 304(b). For the Supreme Court this was an indication "that Congress did not definitively decide the issue of § 304's retroactive application to pre-enactment convictions."[145]

The Supreme Court delivers in this case another approach to vagueness, which seems to reinforce the requirement of clearness in cases involving aliens. In this case, the Supreme Court, before analyzing the second prong of the *Landgraf* test, held that:

> [T]he presumption against retroactive application of ambiguous statutory provisions, buttressed by the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of aliens, forecloses the conclusion that, in enacting § 304(b), Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.[146]

In France, the Constitutional Council applies the equivalent of "strict scrutiny" when looking at the retroactive effect of statutes. Under Article 8 of the DHCR "the Law must proscribe 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."[147] Therefore, the Constitutional Council has held in many cases that the criminal law cannot have a retroactive effect unless it has an *in mitius* retroactive effect.[148] The strict scrutiny of retroactive effect does not involve an assessment on quality of law grounds as the American

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142. *Id.*
143. *Id.* at 297.
144. *Id.* at 320.
145. *Id.* (citation omitted).
146. *Id.* (citations omitted).
147. Declaration of Human and Civic Rights of 26 August 1789, art. 8 (1789) (Fr.).
148. "*In mitius* retroactive effect" means that the new statute is favorable to plaintiffs.

Supreme Court cases do. Nevertheless, the principle that only the Law defines crimes and punishments derives from Article 8 of the DHCR. The Constitutional Council has held that according to this principle the criminal law, in order to avoid arbitrary decisions, must define crimes and punishments in sufficiently precise terms.[149] This obligation emanates from Article 8 and is not a component of the principle of accessibility and intelligibility of the law. For the Constitutional Council, the clarity must be inherent to the criminal law. This reasoning affirms once again the Constitutional Council's position. The Constitutional Council fails to provide a global vagueness doctrine and a unique constitutional requirement. Even if the necessity of clarity of law appears in different cases, it is dispersed in multiple articles of the Constitution and does not provide a precise rationale.

III. Similar Prongs for the Vagueness Test and the Quality of Law Test

A. Standards of 'Ordinary Intelligence' and 'Sufficient Knowledge'

Vagueness and unnecessary complexity in law breaches the core of the rule of law since it does not protect our current expectations about the future legal consequences of our conduct. Indeed, the law has to be drafted in clear terms so that the public (i.e., people of ordinary intelligence) are aware of what it prohibits. Therefore, the Supreme Court has established a principle of "ordinary intelligence" in clarity to satisfy due process.[150] This means that the law must provide notice to people of ordinary intelligence for its proscriptions. For the Supreme Court this prong is the first requirement for the vagueness test.

The Supreme Court has written that, "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."[151]

The French Constitutional Council has adopted a similar, albeit less explicit, principle. It requires that the citizen should have a

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149. CC decision no. 80-127DC, Jan. 19-20, 1981, Rec. 15.

150. *See* Coates v. City of Cincinnati, 402 U.S. 611, 613–14 (1970).

151. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

"sufficient knowledge" of laws that apply to him.[152] The commentators of Constitutional Council's cases interpreted this prong as providing to the quality of law doctrine the requirement that derives from the Latin term of art: *nemo censetur legem ignorare* (every man is presumed to know the law).[153] But, depending on the case, the Constitutional Council makes use of different approaches to explain the standard of "sufficient knowledge."

In 2004, the Council held that the principle of accessibility and intelligibility of law implies that the law should have no double meaning.[154] Therefore, the legislature should use unequivocal language. In some other cases the Constitutional Council replaced the requirement of "sufficient knowledge" by a new formulation: a statute must contain provisions which are "sufficiently precise and unequivocal."[155] The purpose of the standard of "sufficient knowledge" seems to be similar to the American standard of "ordinary intelligence." Indeed, when the Constitutional Council asserts that the law should be drafted in "sufficient" clear terms, the adjective "sufficient" refers to the ability of an ordinary citizen to measure the scope of the law.

However, the Constitutional Council has not yet precisely ruled whether the standard of "common understanding" is an objective standard or a subjective one. Scholars pointed out that the principle of intelligibility and accessibility of law refers to a subjective standard of "common understanding" since the words "intelligibility" and "accessibility" involve citizens' positive action towards statutes' meaning.[156] But Constitutional Council cases do not furnish further details.

The U.S. Supreme Court has dealt with the same issue, namely considering whether the standard of "ordinary intelligence" is an objective or a subjective standard. In *Coates v. City of Cincinnati*,[157] the plaintiffs challenged an ordinance on vagueness grounds. The ordinance provided that it "shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any sidewalks . . . and there conduct themselves in a manner annoying to

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152. CC decision no. 99-421 DC, *supra* note 43.

153. Milano, *supra* note 41, at 641.

154. CC decision no. 2001-455DC, *supra* note 45.

155. *Id.*; *see also* CC decision no. 2004-503DC, Aug. 12, 2004, Rec. 144.

156. Mathieu & Verpeaux, *supra* note 47, at 17.

157. 402 U.S. 611.

persons passing by."[158] The Ohio Court of Appeals explained that "the standard of conduct which it specifies is not dependent upon each complainant's sensitivity."[159] The Supreme Court held that the construction put upon the ordinance by the state court was an unexplained conclusion since "it did not indicate upon whose sensitivity a violation does depend—the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man."[160] The Court noted that "conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative conduct, but rather in the sense that no standard of conduct is specified at all."[161]

The Constitutional Council does not provide a precise definition of the principle of intelligibility and accessibility of law. Even if the standard of "sufficient knowledge" seems to be similar to the vagueness doctrine's first prong, the Constitutional Council does not always explain in its cases how a vague statute could deprive citizens of the rights protected under Articles 4, 5, and 16 of the DHCR.

In sum, one can see that the standard established by the Supreme Court is more sophisticated than the Constitutional Council's test. This is because the French Constitutional Council has failed to provide a thorough explanation of the reasoning behind the quality of law doctrine.

B. Prevention of Discriminatory and Arbitrary Decisions

According to the U.S. Supreme Court a statute can be held unconstitutionally vague for two independent reasons. A statute is vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits or "if it authorizes or even encourages arbitrary and discriminatory enforcement."[162] Therefore:

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law *impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad*

158. *Id.* at 611 n.1 (quoting Section 901-L6, Code of Ordinances of the City of Cincinnati (1956)).

159. *Id.* at 613 (citation omitted).

160. *Id.*

161. *Id.* at 614.

162. Hill v. Colorado, 530 U.S. 703, 732 (2000) (citation omitted).

> *hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.*[163]

The danger of arbitrary enforcement appears also in Constitutional Council's cases. In 2007, the Members of the National Assembly and Senators addressed a referral to the Constitutional Council against the Act relating to the control of immigration, integration and asylum.[164] Section 13 of the statute required genetic testing for certain visa applicants in order to establish the family relationship between the host in France and the applicant.[165] The parties making the referral argued that the provision of section 13 violated both Article 34 of the Constitution and the principle of intelligibility and accessibility of law.[166] Indeed, they argued, the legislature failed to act within the scope of its powers and abdicated its power leaving to a decree (executive act) to draw up the list of countries in which the genetic testing of persons for identification purposes shall be introduced on an experimental basis.[167] Moreover, they argued that Parliament did not provide sufficient legal protections for the genetic testing of persons.[168] Therefore, this procedure was unintelligible. The Constitutional Council held:

> 19. Parliament must exercise to the full the powers vested in it by the Constitution and in particular by Article 34 thereof. The full exercise of such powers, together with the object of constitutional status that the law be intelligible and accessible, which derives from Article 4, 5, 6 and 16 of the Declaration of 1789, place it under a duty to enact provisions which are sufficiently precise and unequivocal. *Protection must be afforded to all from interpretations which run counter to the Constitution or from the risk of arbitrary decisions, without leaving it to courts of law or administrative authorities to determine rules which the Constitution provides should be the sole preserve of statute law.*[169]

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163. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (emphasis added).

164. CC decision no. 2007-557DC, Nov. 15, 2007, Rec. 360.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*; *see also* CC decision no. 2006-540DC, June 27, 2006, Rec. 88 (Loi Relative aux Droits d'Auteur et aux Droits Voisins dans la Société de l'Information [Act pertaining to Copyright and Related Rights in the Information Society] (emphasis added)).

In this case, the Constitutional Council disallowed the petitioners' referral.[170] Nevertheless, it seems to provide the same argument as the American Supreme Court. According to the Constitutional Council, the quality of law doctrine requires that a statute should be clear enough to prevent citizens from the risk of arbitrary decisions. Therefore, as the Supreme Court said, the legislature must establish guidelines to govern law enforcement[171] in order to protect citizens from all forms of unjust enforcement.[172]

C. Intelligible Principle Doctrine

In cases concerning the delegation of legislative power to federal agencies (or executive power), the Supreme Court has held that when Congress delegates legislative power it must provide criteria—"intelligible principles"—to guide the agency's exercise of discretion.[173] Thus, vague or overly broad delegations, which lack an "intelligible principle" to guide the agency, may violate Separation of Powers principles.

Overly broad or vague delegations of power to agencies outside of the legislative branch[174] undermine the structural protections provided in Article I of the U.S. Constitution, such as bicameralism and presentment.[175] The requirement of an "intelligible principle" in legislation delegating power assures that basic policy is being made by Congress and not by the President or private parties.

This doctrine appeared during the New Deal period as the "non-delegation" doctrine. Yet, the Supreme Court invalidated only two statutes for over-delegating legislative power. In *Panama Refining Co. v. Ryan* the Court held that a statute did not literally provide any guidance for the exercise of president's discretion.[176] As a result, it

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170. *See* 21 LES CAHIERS DU CONSEIL CONSTITUTIONNEL 13 (2006).

171. *See* Smith v. Goguen, 415 U.S. 533, 573–74 (1974); *see also* Goldsmith, *supra* note 3, at 288–90.

172. *See* Hill v. Colorado, 530 U.S. 703 (2000).

173. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 319–22 (Gaithersburg ed., Aspen Publishers 2002) (1997).

174. Most administrative agencies in the U.S. reside within the Executive Branch. Administrative agencies (les autorités administratives indépendantes) in France are new. They first appeared in 1978. They also reside within the Executive Branch. *See* LES AUTORITÉS ADMINISTRATIVES INDÉPENDANTES, 52 ÉTUDES ET DOCUMENTS DU CONSEIL D'ÉTAT (E.D.C.E.) 2001.

175. *See* U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House . . . and the Senate, shall, before it become a Law, be presented to the President . . . .").

176. Panama Refining Co. v. Ryan, 293 U.S. 388, 415 (1934).

invalidated a provision of the National Industrial Recovery Act ("NIRA") that authorized the president to prohibit the shipment in interstate commerce of oil produced in excess of state-imposed production quotas. Not only was the statute an impermissible delegation of legislative power, but it also failed to provide any standard in order to limit president's discretion. In *Schechter Poultry Corp. v. United States,* the Supreme Court invalidated another regulation adopted under the NIRA.[177] The Court held that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."[178] The regulation was therefore found unconstitutional as an impermissible delegation of legislative power. The Supreme Court admitted the need for regulations to deal with the "host of details with which the national legislature cannot deal directly"[179] but it further explained that "the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."[180] Although the non-delegation doctrine has not been overruled, in the more than seventy years since *Panama Refining*, the Court has not found a single federal law invalid on this basis.[181]

In *Mistretta v. United States*,[182] the Court upheld the Sentencing Reform Act of 1984, which, *inter alia*, created the United States Sentencing Commission as an independent body in the Judicial Branch with power to promulgate binding sentencing guidelines establishing a range of determinate sentences for all categories of federal offenses and defendants according to specific and detailed factors. The Supreme Court held that:

> In light of our approval of broad delegations, we harbor no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements. Congress charged the Commission with three goals: to "assure the meeting of the purposes of

177. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).

178. *Id.* at 529.

179. *Id.* at 530.

180. *Id.* (citation omitted).

181. CHEMERINSKY, *supra* note 173, at 321.

182. Mistretta v. United States, 488 U.S. 361 (1989).

> sentencing as set forth" in the Act; to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records . . . while maintaining sufficient flexibility to permit individualized sentences" where appropriate; and to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.[183]

In addition the Supreme Court said, "Congress prescribed the specific tool (the guidelines system) for the Commission to use in regulating sentencing" and "to guide the Commission in its formulation of offense categories."[184] Therefore, the Act was constitutional since it "set forth more than merely an 'intelligible principle' or minimal standards."[185]

The Supreme Court provided the "intelligible principle" test in 1928 as the measurement standard for the delegation of legislative power.[186] In *Industrial Union Department v. American Petroleum Institute*,[187] the Supreme Court included the "intelligible principle" within the non-delegation doctrine. It held that:

> [T]he non-delegation doctrine serves three important functions. First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.[188]

Nevertheless, even if the Supreme Court has a broad interpretation of the impermissible delegation of legislative power, the "intelligible principle" requirement seems to be the most

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183. *Id.* at 374 (citing 28 U.S.C. § 991(b)(1)).

184. *Id.*

185. *Id.* at 379.

186. J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

187. Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980).

188. *Id.* at 685–86 (Rehnquist, J., concurring).

significant constitutional limit on congressional grants of power to administrative agencies.

In *Whitman v. American Trucking Ass'n*,[189] the Supreme Court held that: "Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes."[190] In this case, the Supreme Court ruled that "[i]n a delegation challenge, the constitutional question is whether the statute has delegated pure legislative power to an agency. Article 1, section 1, of the Constitution vests all legislative Powers herein granted . . . in a Congress of the United States. This text permits no delegation of powers."[191] Therefore, the Supreme Court wrote "when Congress confers decision making authority upon agencies Congress must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform."[192]

However, in that case the Supreme Court upheld section 109 of the Clean Air Act that instructed the Environmental Protection Agency to set "ambient air quality standards." The Court unanimously rejected the challenge to section 109 of the CAA as an impermissible delegation of legislative power. Justice Scalia wrote for the Court that the "EPA . . . set air quality standards at the level that is requisite—that is, not lower or higher than it is necessary—to protect the public health with adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent."[193]

This requirement seems to be similar to the Constitutional Council's principle of intelligibility of law. Both courts use the notion of "intelligibility." The Constitutional Council asserts that Parliament must set intelligible statutes in order to prevent courts of law or administrative authorities' interpretation of rules in order to avoid arbitrary decisions.[194] In the same way, the Supreme Court requires that Congress give an "intelligible principle" to guide the agency in its exercise of discretion.

When looking closely at the Supreme Court's test for "intelligible principles," this doctrine seems to be analogous to the

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189. Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001).

190. *Id.* at 472.

191. *Id.*

192. *Id.*

193. *Id.* at 476.

194. CC decision no. 2007-557DC, *supra* note 164.

French clarity of law principle. Even though the Constitutional Council renounced its clarity of law doctrine, this doctrine could still reappear as a separate doctrine from the principle of intelligibility and accessibility of law. Therefore, the comparison with the American intelligible principle provides a new reading of the French clarity of law principle.

Indeed, on one hand, behind these two doctrines (clarity of law and intelligible principle) stands the idea of the vague delegation of legislative power. For the Supreme Court, the intelligibility doctrine is a limit on insufficiently defined delegations. The Constitutional Council had the same reasoning since it declared that the principle of clarity of law derived from Article 34 of the Constitution. Under the French Constitution, Parliament must act within its enumerated powers, which are listed in Article 34 of the Constitution.[195] The Government has general powers under Article 37 of the Constitution.[196] Therefore, the Council held that Parliament would violate Article 37 of the Constitution by acting in matters not enumerated by Article 34 (*incompétence positive*).[197] However, the Council has always given a very broad interpretation of matters enumerated by Article 34.[198] But above all the Constitutional Council

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195. 1958 CONST. art. 34 (Fr.) (Statutes should determine the rules concerning: Civic rights and fundamental guarantees granted to citizens for the exercise of their civil liberties; freedom, pluralism and the independence of the media; obligations imposed for the purpose of national defense upon the person and property of citizens; nationality; the status and capacity of persons; matrimonial property system; inheritance and gifts; determination of serious crimes and other major offences and the penalties they carry; criminal procedure; amnesty; the setting up of new categories of courts and the status of members of the Judiciary; the base, rates and methods of collection of all types of taxes; and the issuing of currency. Statutes shall also determine the rules governing: The system for electing members of the Houses of Parliament, local assemblies and the representative bodies for French nationals living abroad, as well as the condition for holding elective offices and positions for members of the deliberative assemblies of the territorial communities; the setting up of categories of public legal entities; the fundamental guarantees granted to civil servants and members of the Armed Forces; nationalization of companies and the transfer of ownership of companies from the public to the private sector. Statutes shall also lay down the basic principles of: The general organization of national defense; the self-government of territorial communities, their powers and revenue; education; the preservation of the environment; systems of ownership, property rights and civil and commercial obligations; employment law, Trade Union law and Social Security.).

196. 1958 CONST. art. 37 (Fr.) (Matters other than those coming under the scope of statute law should be matters for regulation.).

197. CC decision no. 68-35DC, January 30, 1968, Rec. 19.

198. *See* LOUIS FAVOREU, *Preface* to JEAN BOULOUIS, LE DOMAINE DE LA LOI ET DU RÈGLEMENT (1981). *See also* JÉRÔME TREMEAU, LA RESERVE DE LOI (1997).

has held that Parliament could not delegate its power.[199] Rather, the legislature itself had to create rules in those matters, which Article 34 of the Constitution mandates should be the sole preserve of the statute. This reasoning is known as "*incompétence negative*" doctrine.[200]

First, Parliament cannot explicitly delegate its legislative power, except under Article 38.[201] Second it has to exercise the full powers vested in it by Article 34. This requirement is meant to avoid implicit delegations of legislative power.[202] When the principle of clarity of law appeared, the Constitutional Council used it at the same time as this second aspect of the *"incompétence négative"* doctrine.[203] When drafted in terms lacking sufficient clarity, a statute may encourage discretionary interpretation and implementation.[204] The Council seems to say that if the executive has to interpret and implant a broad statute, this inevitably includes an implicit and thus impermissible delegation of legislative power.[205]

But the Council did not explicitly describe its clarity of law doctrine, but rather confused it with the principle of intelligibility and accessibility of law.[206] Therefore, scholars did not analyze the principle of clarity of law as an additional prong to the constitutional non-delegation requirement but as a component of the quality of law movement undertaken by the Council.[207] In consequence, the U.S. intelligible principle doctrine provides a new understanding of the French clarity of law doctrine. The Supreme Court and Constitutional Council use similar prongs for their respective non-delegation doctrines.

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199. CC decision no. 75-56DC, July 23, 1975, Rec. 22.

200. TREMEAU, see *supra* note 198.

201. *See supra* note 57.

202. Florence Galletti, *Existe-t-il une obligation de bien légiférer? Propos sur "l'incompétence negative du législateur dans la jurisprudence du Conseil Constitutionnel*, 58 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL [R.F.D.C.] 387, 387 (2004) (Fr.).

203. Georges Schmitter, *L'Incompétence Negative du Législateur et des Autorités Administratives*, 5 ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE (A.I.J.C.) 387 (1989) (Fr.).

204. *See* Milano, *supra* note 41, at 650. *See also* Lucienne-Victoire Fernandez-Maublanc, *Accessibilité et Intelligibilité de la Loi ou la Réhabilitation de la Loi par le Conseil Constitutionnel, in* LA CONSTITUTION ET SES VALEURS, MELANGES EN L'HONNEUR DE DIMITRI-GEORGES LAVAROFF 163 (2005) (Fr.).

205. Fernandez-Maublanc, *supra* note 204, at 168.

206. Milano, *supra* note 41, at 650.

207. *See, e.g.*, Daniel Chamussy, *Le Conseil Constitituionnel et la Qualité de la Législation*, REVUE DE DROIT PUBLIC ET DE LA SCIENCE POLITIQUE 1037 (2004) (Fr.).

On the other hand, the U.S. intelligible principle doctrine and French clarity of law doctrine seem to affirm that statutes should be self-contained. The "incompleteness" of a statute raises another vagueness question. "Incompleteness" is "ordinarily a feature of explanations, reports, descriptions, and so on."[208] For both the U.S. Supreme Court and Constitutional Council, this form of vagueness is tightly linked to, even if not expressly affirmed by, the principle of separation of powers since it stands behind the non-delegation doctrine. The impermissible delegation of legislative power is a violation of the principle of separation of powers since it leads to a concentration of powers. A lack of clarity can generate an implicit delegation of legislative power and in consequence violate the core of the principle of separation of powers under the French constitution.[209] The law should, therefore, reflect in its wording that the principle of separation of powers has been respected.

Yet, the U.S. intelligible principle doctrine cannot be fully understood without examining some other cases in which the Supreme Court was asked to examine the constitutionality of agency regulations. In these cases the Court sought to find whether Congress provided an unambiguous delegation to federal agencies.

In *Chevron v. NRDC*,[210] the Supreme Court held:

> When a court reviews an agency's construction of a statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[211]

If not, the second question for the Court is whether the agency's interpretation of its delegated powers is based on a permissible construction of the statute. In *Chevron*, the Supreme Court ruled that EPA's decision to allow States to treat all pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is a permissible construction of the statute "which seeks to accommodate progress in reducing air

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208. ENDICOTT, *supra* note 1, at 38.

209. Milano, *supra* note 41, at 641.

210. *Chevron v. NRDC*, 467 U.S. 837 (1984).

211. *Id.* at 842–43.

pollution with economic growth."[212] On the first prong, the Court held that Congress did not precisely determine the meaning of the "stationary source" that the Agency had to regulate.[213] Thus, under *Chevron's* second step, the Court deferred to the agency's determination under the statute.

Therefore, an ambiguous statute is not necessarily unconstitutional, and federal agencies' regulations remain valid if based on permissible constructions of the statute. Yet, ambiguity is another interesting aspect of poorly drafted statutes. Ambiguity is somewhat different from vagueness. A vague word "has one meaning (and its application is unclear in some cases)" whereas an ambiguous word "has more than one meaning (and it may be unclear, in some cases, which is in use)."[214] The Supreme Court provides this distinction even if ambiguous statutes, as we have seen above, are valid for constitutional purposes. The Constitutional Council does not seem to make this distinction in its cases as it uses "ambiguous" as synonymous with "imprecise."[215] And yet, imprecision is a vagueness problem. Timothy Endicott explains that "imprecision is the typifying feature of words that are vague in the broad sense."[216] Therefore, the Council has failed to distinguish "ambiguity "from 'unintelligibility.'"[217] It uses these two notions together, within the principle of intelligibility and accessibility of law.[218]

D. The Foreseeable Nature of the Law

The Constitutional Council has not exactly defined the foreseeable nature of the law as a component of the quality of law doctrine, but some commentators have read this additional prong into the Constitutional Council's cases.[219]

The foreseeable nature of the law is an argument used by the European Court of Human Rights ("ECHR"). According to European judges:

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212. *Id.* at 866.
213. *Id.* at 860-62.
214. ENDICOTT, *supra* note 1, at 30.
215. CC decision no. 2003-475DC, *supra* note 65.
216. ENDICOTT, *supra* note 1, at 33.
217. *See* CC decision no. 2003-475DC, *supra* note 65.
218. *Id.*
219. *See* Milano, *supra* note 41, at 640.

> First . . . the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent are vague and whose interpretation and application are questions of practice.[220]

As it usually does, the ECHR sets in the same paragraph the principle and its limits. Here, the principle of the foreseeable nature of the law is a requirement that permits the Court, in the same way that the U.S. Supreme Court does, to define a useful prong in order to protect citizens' rights from vague laws.[221]

One will not be surprised to find in ECHR cases a direct influence from the Supreme Court's vagueness test. Even if the Supreme Court does not use the same formulation, the purpose of the foreseeable nature of the law and the purpose of the first prong of vagueness test seem to be very close. The citizen for both ECHR and Supreme Court must be able to regulate his conduct.

The Constitutional Council does not use in its cases the foreseeable nature of the law as an argument. Nevertheless, the "sufficient knowledge" that the law must provide to the citizens seems also to carry with it the principle of the foreseeable nature of the law. Thus, in 2005, in a case in which the constitutionality of the Finance Act was challenged, the Constitutional Council wrote that the citizen should be able to foresee to a reasonable degree (*prévisibilité raisonnable*) the amount of tax according to different options that the statute opens to him.[222]

Using different wording than the Supreme Court, the ECHR and the Constitutional Council look to communicate a similar principle.

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220. Sunday Times v. United Kingdom, 2 Eur. Ct. H.R. 245, 271 (1979–80).

221. *See* Coates v. City of Cincinnati, 402 U.S. 611 (1970); Grayned v. City of Rockford, 408 U.S. 104, 108, 108–09 (1972).

222. CC decision no. 2005-530DC, *supra* note 85.

In their theoretical constructions, these three courts seek to endow the citizen with a new argument against the infringement of his rights.

But, where the Supreme Court and the ECHR both provide a clear vagueness doctrine, the Constitutional Council fails to do so. Indisputably, the reason of the doctrinal void that the Constitutional Council has left is due to the abstract nature of its judicial review. Perhaps if the Council could hear concrete cases, it would have greater opportunity to develop its quality of law doctrines, perhaps even borrowing vagueness principles from the Supreme Court.

The several types of vagueness we have explored in this paper (i.e., ambiguity, complexity, accessibility, delegation) are often better suited to concrete cases than to abstract *a priori* judicial review. In a sense, vagueness is hard to determine with vague facts. As a result, vagueness challenges brought before a challenged law is enforced may be found to be unripe for review in Article III courts.[223] Indeed, lower courts in the United States have interpreted the Supreme Court to suggest that "outside the domain of the first amendment, vagueness challenges must be assessed 'as applied.'"[224] On a like theory, the Constitutional Council's hesitation to fully develop a vagueness doctrine within its limited jurisdiction of *a priori* review is quite understandable. However, that may be now changing.

E. Raising a New Quality of Law Doctrine Through the Procedure of 'Question Préjudicielle'

In summer 2008, the French Constitution was amended in order to grant to citizens the right of referral to the Constitutional Council. Among the other amendments of the Constitution that the Government achieved to pass that summer, the new process of "*question préjudicielle*" ("preliminary question") is indisputably the most important.[225] An institutional act has to be adopted before we

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223. *See, e.g.*, Zanders v. Swanson, 573 F.3d 591, 593 (8th Cir. 2009); Nova Health Sys. v. Gandy, 416 F.3d 1149, 1159–60 (10th Cir. 2005).

224. Hope Clinic v. Ryan, 195 F.3d 857, 864–65 (7th Cir. 1999), *rev'd on other grounds*, 530 U.S. 1271 (citing Maynard v. Cartwright, 486 U.S. 356, 361 (1988); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494–95 (1982)). *See also* NRA of Am. v. Magaw, 132 F.3d 272, 291 (6th Cir. 1997).

225. New article 61-1 reads:

> 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 Conseil d'État or by the Cour de Cassation to the Constitutional Council which shall rule within a determined period... An institutional Act shall determine the conditions for the application of the present article.

really know how this new procedure will be applied, but we can already presume that the quality of law doctrine more and more closely resembles the vagueness doctrine.[226]

The "preliminary question" is a procedure that permits a citizen, whose rights are infringed, to challenge the constitutionality of a statute before the court.[227] The ordinary judge in front of whom the constitutional issue is raised has to *surseoir à statuer* (stay the proceedings), draw up the preliminary question, and send it to the Constitutional Council.[228] The latter will control the constitutionality of this statute and provide an answer to this question in order to permit the ordinary judge to resolve the case.[229] This procedure is roughly analogous to the procedure of "certified question" in the United States[230] and certification by national courts in the European Court of Justice.[231]

The preliminary question introduces an element of concrete judicial review in the French system by granting the right of referral to the appellate and administrative courts. This new procedure will enable the Constitutional Council, if future plaintiffs challenge the constitutionality of a statute on the grounds of the quality of law doctrine, to assess the vagueness of a statute in a concrete case. This new procedure may very well oblige the Constitutional Council to fill the doctrinal void it has left in the past.

Conclusion

The lack of a concrete judicial review in France leaves the Constitutional Council far behind the U.S. Supreme Court. The quality of law doctrine compared to the vagueness doctrine seems to be itself vague and ambiguous. The abstract review does not permit the French Constitutional Council to deal with "cases and

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2008 CONST. art. 61-1 (Fr.).

226. Some Articles of the French Constitution are not self-executing. Thus, Institutional Acts have to be adopted. This is the case for Article 61-1 of the Constitution.

227. Hugues Portelli, *Rapport*, fait au nom de la commission des lois constitutionnelles, de legislation, du suffrage universel, du Réglement de l'administration générale sur le projet de loi organique, adopté par l'Assemblée Nationale, relatif à l'application de l'article 61-1 de la Constitution, no. 637, Sep. 29, 2009.

228. *Id.*

229. *Id.*

230. Certification to federal court is a method of taking case from U.S. Courts of Appeals to Supreme Court in which former court may certify any question of law in any civil or criminal case as to which instructions are requested. 28 U.S.C. § 1254 (2006).

231. Treaty Establishing the European Community, Nov. 10, 1997, J.O (C 340) 234.

controversies," and therefore to measure vagueness challenges in a concrete case.[232] The U.S. Supreme Court since 1875 has developed a tangible and logic-based scrutiny for its vagueness doctrine. Moreover, the U.S. Supreme Court's vagueness doctrine may help Congress with statutory drafting. That is not the case in France. The lack of a clear explanation for such decisions made by the French Constitutional Council has led to confusion in the legal world, both among practitioners and academics.

Therefore, the new procedure of "preliminary question" seems to be the right occasion for the Constitutional Council to build a stronger reasoning for the quality of law doctrine. The U.S. Supreme Court's vagueness doctrine may provide much-needed guidance to the Council.

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232. *See* Hope Clinic v. Ryan, 195 F.3d 857, 864–65 (7th Cir. 1999), *rev'd on other grounds*, 530 U.S. 1271; Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494–95 (1982)).