**Author:** Raphaël Girard **Title:** “From Ochlochracy to Juristocracy: A Comparative Analysis of the Legitimacy of Constitutional Review in the United States and France Across Time” **Institutional Affiliation:** The London School of Economics and Political Science (LSE) **Contact information:** r.girard2@lse.ac.uk **Key words:** constitutional review; democratic legitimacy; United States; France

**Abstract:**

Since the emergence of the concept of the primacy of the constitution in the United States and in France, judges have designated themselves as the final arbiter of constitutionality in their respective jurisdiction. Over the years, both the United States’ Supreme Court and France’s Constitutional Council have acquired the power to invalidate legislation or executive actions that are incompatible with the constitution. However, this process was undertaken following two different ideal-types, which in turn have evolved into two separate models of constitutional review. On one side of the spectrum, judicial review has been a significant component of American constitutionalism since *Marbury v. Madison* was rendered in 1803. With its long, concrete decisions reviewing the constitutionality of enacted legislation, the Supreme Court has progressively asserted itself as a powerful and influential policymaker in the United States, raising questions about its democratic legitimacy. On the other side of the spectrum, separation of powers orthodoxies and the fear of a “*gouvernement des juges*” have delayed the introduction of constitutional review in France until the second half of the twentieth century. Even today, despite the addition of *ex post* constitutional review powers in 2008, the Constitutional Council has taken a back seat and has been reluctant to strike down laws, concerned it might usurp legislative powers.

The purpose of this paper is to explore, from a comparative perspective, the key differences between the American and the French models of constitutional review across time and to highlight the main sociohistorical factors justifying these two separate models. With reference to the 2011 Constitutional Council’s ruling in *Decision no. 2010-92 of January 2011* regarding the ban on same-sex marriage in France and the 2015 U.S. Supreme Court judgment in *Obergefell v. Hodges*, it will be argued that both models ultimately fail to sustain their democratic legitimacy. In France, the Constitutional Council tends to assume its expertise in an obscure and opaque way, without having completely asserted itself as the ultimate guardian of civil liberties and fundamental rights yet. In the United States, by contrast, the Supreme Court appears to show a certain level of distrust towards other democratic institutions, particularly towards Congress. If, as Pierre Rosanvallon argues, democratic legitimacy stems from both democracy and expertise, then constitutional courts are indeed justified as expertocratic institutions. Nonetheless, in order to maintain their legitimacy, constitutional courts should address the important concerns pertaining to their perceived lack of democratic legitimacy. Increasing the courts’ representativeness, improving judicial independence, making decisions more transparent and favouring a certain “dialogue” between the judiciary and the legislature are all ways in which constitutional courts could respond to these legitimate concerns.

The paper will be divided in three parts. The first part will provide an account of the key sociohistorical elements and events that have led to the emergence of separate models of constitutional adjudication in the United States and in France. The second part will identify the major differences between American and French constitutional review. The third and final part will highlight the inherent limits to these two models, with a particular focus on the concerns regarding their democratic legitimacy, and suggest ways in which these concerns could be addressed.