Abstract: Judicial review, whatever else it may be, provides a mechanism by which the judiciary can affect the implementation, contours, and the formulation of policy. As such, it provides a possible avenue of access to a variable ‘open’ state. Westminster democracies have historically avoided judicial review in order to concentrate policymaking authority in the legislature and responsible executive. In recent years a number of Westminster polities have incorporated and expanded judicial review. This paper explores how this occurred in three Westminster states, arguing that long-run processes shaped the conceptions of judges of their role in the constitutional order, affecting their willingness to assert powers of review. Importantly, structures of imperialism and federalism provided varying opportunities for the judiciary to assert this power. A full account of the emergence of judicial review needs to take account of these structural/institutional factors—the available resources of judges to assert a power to invalidate legislation and their institutionally shaped willingness to do so. I conclude with a discussion of how the different constructions of judicial review at the different moments in each state’s history affected the mobilization strategies of indigenous peoples, and the varying imposition of control by the state.
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PART I

Introduction

Central to the Westminster model of sovereignty is the notion that it is vested in the Crown-in-council, and that this council must maintain the confidence of the Parliament. Parliamentary supremacy is therefore at the heart of the Westminster model. Over the last century, however, a number of the classic Westminster polities have incorporated elements of judicial review in innovative and often unique ways.

Judicial review, whatever else it may be, provides a mechanism by which the judiciary can affect the implementation, contours, and the formulation of policy. As such, it provides a possible avenue of access to a variable ‘open’ state. Westminster democracies have historically avoided judicial review in order to concentrate policymaking authority in the legislature and responsible executive. This paper explores how this occurred in the United Kingdom, Canada, and New Zealand, arguing that long-run processes shaped the conceptions of judges of their role in the constitutional order, affecting their willingness to assert powers of review. Importantly, structures of imperialism and federalism provided varying opportunities for the judiciary to assert this power. A full account of the emergence of judicial review needs to take account of these structural/institutional factors—the available resources of judges to assert a power to invalidate legislation and their institutionally shaped willingness to do so. I conclude with a discussion of how the different constructions of judicial review at the different moments in each state’s history affected the mobilization strategies of indigenous peoples, and the varying imposition of control by the state.

The approach of this paper will be largely inductive, with any suggestion inferred from the analysis of the narrative being tentatively advanced as a possible explanation for convergence on judicial review, as well as its particular forms, as a result of commonalities and differences perceived in the historical trajectories of each country.

The paper will be divided into two parts and will proceed as follows: I begin with an extended discussion of the scope of this paper and the methodology employed. I will then develop in greater detail some of the central concepts that will be encountered in the discussion. Subsequently, in Part Two, I will examine the historical trajectories of each case, looking for comparable circumstances and associations. Finally, I will conclude with some tentative suggestions and a proposal for further research

Scope: Two Forms of Judicial Review

Prior to discussing the comparative methodology or the cases themselves, it is important to outline the scope of this paper by providing a brief account as to what is meant by judicial review. This paper is concerned primarily with judicial review of statutory legislation—“primary legislation enacted by the elected legislature of a polity” (Waldron, 2006: p.1354)—as opposed to judicial review of executive actions, or the so-called ‘soft law’ of administrative decision-making. Accordingly, the main power relationship of interest here is that which exists between
the judiciary and the legislature, as opposed to that which exists between the judiciary and the executive.¹

The form of judicial review emphasized in this paper is judicial review of primary legislation, and in the analysis will be referred to as either statutory judicial review or statutory review. This includes but is not limited to the classic American conception of judicial review that allows the judiciary (or a centralized judicial organ in the case of many European continental systems (Brewer-Carias 1989)) to overturn acts of the legislature; its defining characteristic is not, however, the right to set aside legislation but rather the right of the judiciary to review statutory legislation for conformity with higher order rights, processes, or jurisdictional divisions. This form of judicial review can be arranged on a continuum from ‘strong’—in which the right to set aside legislation is either explicitly or practically recognized—to ‘weak’—in which the courts are authorized to review legislation “for its conformity to individual rights [or processes] but they may not decline to apply it (or moderate its application)” (Waldron, 2006: p.1355). Of the countries considered in this study, only Canada has adopted what may be considered to be a ‘strong’ form of judicial review, albeit not as strong as that which has been successfully asserted in the United States; the form adopted by New Zealand is possibly the weakest form that could be adopted and yet still be considered as statutory review, while that of the UK lies somewhere in between.

The secondary form of judicial review, of administrative decision-making or executive action, will be referred to as supervisory judicial review or simply as supervisory review. This form involves reviewing the discretionary actions of the executive in applying statutory regulations, as well as review of executive action for compliance with the common law and other restraints such as ‘reasonableness’ and ‘fairness.’ In this instance, judicial review serves primarily, although not exclusively, to strengthen the position of the legislature vis-à-vis the executive. This is because the basis for supervisory review is often considered to be ensuring that the executive functions in accordance with the statutory guidelines and intentions of the legislature (Forsyth 2000). The legislature is considered the more democratically legitimate body and the representative for the source of all law in a democratic society. Since “it is almost universally accepted that the executive’s elective credentials are subject to the principle of the rule of law, and, as a result, that officials may be properly be required by courts to act in accordance with legal authorization” stemming from the representative legislature, supervisory review places the judiciary in an oversight role whereby they ensure that legislative control over the executive is maintained (Waldron, 2006: p.1354).

In his elaboration of the “case against judicial review,” Jeremy Waldron distinguishes between judicial review of legislation and “judicial review of executive active or administrative decisionmaking” and focuses his argument on the former (Waldron 2006: 1353-54). In so doing he excludes from his analysis “much of what is done by the European Court of Human Rights” and raises the possibility (articulated by Seth F. Kreimer in his “Exploring the Dark Matter of Judicial Review” (1997)) that “the majority of constitutional decisions by the United States Supreme Court concern challenges to the actions of low-level bureaucrats rather than

¹ As will be evident in the discussions of the cases, the theoretical division between executive and legislative power is often difficult to maintain in practical reality. Moreover, it has argued that judicial review (both statutory and supervisory) in the United Kingdom is increasingly concerned not with the appropriate sphere of particular state powers, but instead with power in its diverse public and private forms (Sedley, 2000).
The focus of this paper—the dependent variable being its establishment and the form in which it took in each of the three countries—an exclusive focus on this form of judicial review would be overly constraining. Waldron’s case is a normative one, whereas the research in this paper is concerned with discerning various causal pathways. It is accordingly imperative that the distinction between the two forms of review not result in the omission of one form from the case studies. In order to inductively infer associations, we must not exclude potentially related factors by definitional fiat; the primary concern with judicial review of statutory legislation cannot allow the exclusion of supervisory judicial review from the analysis.

I will therefore discuss judicial review of executive actions and discretion, not because it is the institutional process being analyzed but because it is conceivable that the roots of judicial review of statutory legislation are to be found in this domain. This could be because of the role that the judiciary constructs for itself in supervising executive actions might frame how they approach their relationship to statutory legislation, because countries with long traditions of supervisory review might be more trusting of the judiciary with a role in statutory review, or because the political dynamics that result in strong supervisory review might push the judiciary into an active role in statutory review.

These two forms of judicial review should not be conflated; nevertheless, it is likely that they are practically related. Although the emergence of statutory review is the point of convergence amongst the three cases (and the forms that this has taken are the points of divergence), supervisory review will be included in the descriptive narratives so as to better position us to infer possible causal associations.

In brief, judicial review should be considered as a distinguishable aspect of a broader, “worldwide” process of judicialization, being “the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators, that is, the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts” (Vallinder, 1994: p.91).

Methodology

**Historical Institutionalism**

Before turning to the case studies, it is important to articulate the methodology and comparative logic that underlies this project. Since its introduction to the field of public law, historical institutionalism has become an increasingly respected and promising approach to the study of judicial decisionmaking and the intersection of law, society, and politics. Historical institutionalists have expanded on the “behavioralist ‘political jurisprudence,’ which explains

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2 It will not, however, be considered as an aspect of “juridicalization” (Shapiro 1992) or “judicialization from within” (Vallinder 1992), in which “the language and norms of constitutional rights, to use Alec Stone’s phrase, ‘permeate and are absorbed by, political discourse’” (Stone 1992: ; Russell 1994: 173). Although some effects and some aspects of this will be discussed, it will not be a central feature of the narratives or analyses. In part this is due to space constraints: such an analysis would require a thick, highly detailed, and rigourously defined review of the evolution of political discourse and decision-making procedures within each case, which would well exceed the space available and would therefore come at the cost of the cross-country comparisons. It will be included in the discussions as a general process in which constitutional language and norms become increasingly salient in political discourse, because it is certainly plausible that it has played a role in the convergence on judicial review, but its specific evolution and direct application in decision-making and political mobilization will not be taken into account.
judicial decisions as services to interest groups and other political actors” while emphasizing the relative autonomy of judges concerned with doctrinal consistency and their own institutional power, and whose understandings of their role in the political-judicial system have been shaped in large part by their institutional position (Smith 2008: 53). Rogers M. Smith’s 1988 APSR article, “Political Jurisprudence, the ‘New Institutionalism,’ and the Future of Public Law,” encouraged scholars to move beyond the treatment of political institutions “as simply the product of complex interacting individual group choices and actions” and to recognize that “the role of institutions… goes well beyond the rules governing decision-making situations… [and that] it influences relative resources and the senses of purpose and principle that political actors possess” (Smith 1988: 92, 5). The ‘new institutionalists’ (later ‘historical institutionalism’) insisted that “analyses of politics should explore how relatively enduring structures of human conduct have shaped the existing array of resources, rules, and values, instead of simply taking that array as given” (Smith 1988: 98). The practical implications of this included a call for scholars to “explicitly conceive of their ‘independent variables’ as relatively enduring structures” and to “provide some indication of the origins of the structures or institutions they examine, with particular sensitivity to how those structures may have arisen from past, controversial political choices” (Smith 1988: 101-2).

Since its introduction to the study of law, historical institutionalist scholarship has contributed greatly to our understanding of the interaction between political actors, legal decisionmaking, and societal interests (Gillman 1993, 2002: ; Lovell 2003: ; McMahon 2004: ; Valelly 2004), stressing that “judges’ concerns about doctrinal consistency and their own institutional power, along with their sometimes distinct understandings of principles they share with ‘prominent elected officials,’ mean that their rulings often give such officials less, more and other than what the officials desired” (Smith 2008: 53). Moreover, it has also expanded our understanding of the genesis and maintenance of political-legal institutions that have provided resources, opportunities, and constraints to various societal and institutional actors, with a focus both on the *longue durée* and the gradual consolidation of institutional capacity, as well as on the contestations and retreats of what are frequently assumed to be steady processes of institutionalization. Keith Whittington, for instance, argues that the often-referenced ‘critical juncture’ of *Marbury* was less important in the consolidation of the power of statutory review in the United States than is often believed to be the case. ‘Judicial supremacy’ was not simply established by the strategic assertion of Chief Justice Marshall, but has been contested at various junctures by different institutional and societal actors. These contestations have been most successful when pursued by a ‘reconstructive’ regime, such as the Roosevelt New Deal coalition (Whittington 2007).

Furthermore, historical institutionalist scholars emphasize that the gradual consolidation of judicial review has been the result of a drawn out process in which the “institutional and coalitional pressures that push political actors to turn to the Court for constitutional leadership have become more pervasive over the course of American history. Political leaders have found increasing reason to support the Court, and decreasing capacity to resist the Court, over time. Unsurprisingly, this favorable environment has encouraged the Court to make ever more grandiose claims for its own authority as the ‘ultimate interpreter’ of the Constitution while recognizing ever fewer reasons to defer to the constitutional understandings of others” (Whittington 2007: 232). In a similar vein, Mark Graber argues that the process by which the
power of judicial review was consolidated was a drawn out one that frequently did not involve
the invalidation of statutes. Rather, the Court slowly and (for the most part) uncontroversially
“established important legal and political precedents for the judicial power to declare federal
laws unconstitutional [b]y routinizing the process of judicial review in politically uninteresting
matters” (Graber 2000: 78).

The research approach of this paper is squarely within the historical institutionalist
category, albeit with a comparative dimension. The ‘dependent variable’ is the emergence,
consolidation, and form of statutory review in the United Kingdom, Canada, and New Zealand;
the ‘independent variables’ highlighted by this study include the structure of colonialism and
imperial (later Commonwealth) jurisprudence, the institutionally developed understanding of
judges of their role in the constitutional order, and the coalitional constraints, opportunities, and
conflicts provided by federalism. This is not to discount the importance of societal actors, such
as those elite interested in securing neoliberal policies highlighted by Hirschl (2004). Rather, it is
to suggest that before the calculations and actions of societal actors are considered, we must first
have an understanding of the genesis of the structures and institutions within which they operate
and which they are seeking to influence.

As Smith noted, “a full explanation of a political institution’s genesis would normally
require a separate study” (Smith 1988: 102); it is with this aim in mind that I engaged in this
research. This study will hopefully be a contribution to a larger project, one in which the
institutions of judicial review are treated as quasi-parameters (Greif and Laitin 2004) that have
had crucial consequences on the mobilization and control of minority groups by exclusionary
states. A brief discussion of the intended line of research will be found in the conclusion.

Comparative Methodology and Preliminary Analyses

At this point I will outline the underlying comparative logic that shapes the framing of
the three narratives and that will be employed in drawing some general inferences in the
conclusion. Ran Hirschl has argued that the rationale and methodology of comparative
constitutional law has been under-theorized, with the result that “genuinely comparative,
problem driven, and inference oriented scholarship is still difficult to come by” (Hirschl 2005:
125). Two purposes of this paper are to 1) contribute to filling this gap in the literature with a
comparative and inference oriented study, and 2) to develop and employ a methodological
approach that is useful and appropriate for preliminary, concept focused analyses in which the
goal is the inductive inferring of possible causal relations and mechanisms that can then be
theoretically developed and tested in a more sophisticated analysis.

Any meaningful comparison must be based on an underlying logic, which in turn speaks
to the ambitions and objective of the analysis. The logic underlying much contemporary
comparative analyses is J.S Mill’s method of agreement and method of difference (Moore 1966: ;
Skopecol 1979: ; Katznelson 1985: ; Skopecol 1985: ; Stepan 1985: ; King et al. 1994). The
method of agreement holds that "if two or more instances of the phenomenon under investigation
have only one circumstance in common, the circumstance in which alone all the instances agree,
is the cause (or effect) of the given phenomenon," while the method of difference holds that "if
an instance in which the phenomenon under investigation occurs, and an instance in which it
does not occur, have every circumstance in common save one, that one occurring only in the
former: the circumstance in which alone the two instances differ, is the effect, or cause, or a
necessary part of the cause, of the phenomenon" (Mill 1974: 390-1).

There are a number of problems that arise, however, if this inductive logic is applied to
small-\(n\), multivariate analyses (Lieberson 1991); in fact, Mill himself warned that it they are
inappropriate methods for the social sciences, particularly the \textit{method of difference}, because the
“presence of more than one common causal variable makes it impossible for [this] method to sort
out the actual cause” (Mill 1974: ; Tilly 1984: ; Lieberson 1991: 308). Crucially, argues
Lieberson, Mill’s methods require no errors in measurement, a single cause, and no interaction
effects amongst different variables. As will be clear from the narratives in this paper this is rarely
the case.

In addition to the problems identified by Lieberson, there are additional problems of
measurement and definition that are inherent to social scientific analysis. One such problem is
that of bounding variables; causal inferences work best when we have discrete and easily
identified variables (the “one circumstance in common” in Mill’s terms). However, when
considering complex social phenomena, it becomes exceptionally difficult to delineate the
boundaries of variables, to isolate them from each other and to measure their presence or absence
as Mill’s methods require.\(^3\) For the research endeavour of this paper, should we conceive of the
outcomes in each country to be the adoption of a form of judicial review, and therefore consider
the process to be one of convergence, or should we give greater weight to the substantial
differences between the forms that were adopted, and therefore consider the process to be one of
divergence, or at the very least of distinctly separate outcomes within possible the state-space?
This is a problem not simply of how the process should be conceived, but of how the dependent
variable should be defined.

In addition to problems of measuring variables that are not discrete and easily
distinguishable is the problem of case selection and case definition: “What is a case? and Where
are its boundaries? are questions whose answer depends on the theoretical problem being posed”
(Rueschemeyer 2003: 320). As we shall see, New Zealand is a ‘case’ that was both a federal and
unitary state at different moments in its historical trajectory; if federalism is taken to be a key
element in the theoretical problem, then New Zealand can be considered as two separate ‘cases.’
One of the values of qualitative analyses of historical trajectories, however, is that they allow for
each ‘case’ to be disaggregated into multiple ‘cases,’ and allows the researcher to trace the

\(^3\) Consider the following example: a researcher puts forward the argument about European state-building that if
representative democratic institutions develop prior to sustained geopolitical competition, then the royal authority
will be forced to accommodate the legislature’s demands in return for taxation authority. However, the resulting
legitimacy of this authority will increase state power, ultimately resulting in a democratic, strong state, with a
rationalized administrative apparatus (this is a grossly simplified version of an argument appearing in Ertman’s \textit{The
Birth of the Leviathan} (1997)). When testing this claim against the historical record, numerous problems of
measurement arise: 1) considering that most European states had some form of representative assembly in the
Middle Ages, how should these be categorized? How should we measure the degree of representation? Or does the
form of representation (municipally versus class based or some other arrangement) matter more? 2) Likewise with
geopolitical competition: is it the degree of competition that is important, or is it the form of organization of the
military forces, or some other factor? 3) Of course, measuring the degree to which an administrative apparatus (part
of the outcome being explained) is rational is itself a difficult task, considering that all such arrangements will have
mixtures of rational and non-rational elements. Are we measuring whether rational relationships are more common,
or whether they are the more important relationships within the apparatus? This example should serve to illustrate
the problems of how we define, bound, and measure the variables in an analysis.
interaction and feedback of different variables: “Comparative historical work that uses both within-case and cross-case analysis can explore more complex interactions among causal factors, it can better trace multiple paths of causation, and it does not make the assumption of a linear relation between independent and dependent variables that – in the absence of historical information suggesting other relations between causal factors and outcomes – multiple regression analyses often adopt” (Rueschemeyer, 2003: p.324).

None of these problems are insolvable, but they require determinations that can only be made through judgment in close discussion with historical accounts and with sensitivity to changes across time within individual ‘cases.’ As noted by Savolainen (1994), and earlier by Cohen and Nagel (1934), the methods of agreement and difference are better at refuting theories than they are at vindicating them. Furthermore, by employing them in the framing of the narrative, we encourage the development of an inductively generated theory that is amenable to more sophisticated comparisons. This is because these methods involve a foregrounding of different potential variables to be compared.

One of the things that these methods are good for in a small-n, multivariate analysis is the inductive inference of general features that seem to correlate with a particular outcome. “As a large methodological literature suggests, the fundamental basis of within-case analysis is the identification of ‘causal-process observations’… [with which] one needs neither to move away from the country level of analysis nor to substantially increase the N to achieve powerful leverage for causal inference” (Collier et al. 2004: ; Mahoney 2007: 35). These “causal-process observations,” while problematic due to the fact that they represent particular historical readings that are often contested or ambiguous (Lustick 1996), nevertheless provide detailed accounts of direct causal associations. When combined with a comparative logic such as the methods of agreement and difference, we are well situated to identify cross-case patterns that may reflect deeper causal dynamics.

Ultimately, small-n application of the methods of agreement and difference to the “causal-process observations” identified in historical trajectories is better at the initial phase of theory construction, in which the researcher looks for patterns in the data that correlate with the dependent variable from which a testable causal claim might be inferred, than the later phases in which the claim is tested against as much data concerning the phenomenon in question as can be gathered. The underlying logic of comparison is crucial for determining what constitutes justifiably comparable ‘cases,’ and the methodology employed should fit the demands of the research programme as well as provide a logical basis for causal inference.5

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4 This can, however, be accomplished within quantitative accounts: note the different codings of the French state in the twentieth century, in which the Fourth Republic is coded as a unique case from the Fifth Republic, despite both occurring within the same country ‘case.’ The value of qualitative analyses at the present juncture of the research, however, is that in order for one country-case to be distinguished into separate ‘within case cases,’ there must be a theoretical basis for the distinction: if federalism is a key component of the theory then federal and post-federal New Zealand can be separated, or if state organization is a key component then France IV and France V can be separated. This need to clearly delineate different stages is most important in quantitative research, while qualitative research is valuable at preliminary stages in which a sensitivity to ‘within case cases’ is desirable, but a clear delineation and separation might not be suitable due to the fact that a clear theoretical model has not yet been constructed.

5 From a practical perspective, the ‘cases’ with which the researcher is familiar, has access to (in terms of knowledge of a language as well as potential political restrictions on needed data), or fit within a deductive theory that is being tested will determine the appropriate comparative methodology. The degree to which this is a problem is debatable: by selecting a methodology that corresponds to a deductive theory, or with pre-existing limits of language knowledge, available funding, or scholarly interest, are we committing an error akin to selecting on the dependent
I have outlined the logic of these methods at the outset because they inform the selection of cases and how the particular cases are presented. I consider over-time changes within each case, thereby implicitly disaggregating each case into several periods that can be separately compared; I consider the judicial review in each country (and its different formations and practical construction over time) to be both a broadly similar outcome as well as three unique forms that require explanation. Although I argue that these cases present three forms of judicial review of statutory legislation and place them along a continuum of judicial authority, I do not similarly outline the disaggregated ‘within case cases.’ Instead, at this stage of the analysis, I present historical trajectories in which each ‘within-case case’ is contained within a single ‘country-case’ narrative, that is to say that the framing of the narratives presents each case as a single fluid trajectory instead of being delineated and separated out into clearly distinct cases. I present the cases in this manner, as opposed to one in which each ‘within-case case’ is explicitly disaggregated and separated out, because of the preliminary stage of the analysis and the limited ambitions of this paper. Without a causal model at the outset, I want to maintain as coherent a narrative as possible so as to explore fully the possible processes at work; since the purpose is to inductively identify patterns, I want to limit as much as possible the consequences of any artificial bounding or separation of variables or cases.6

I apply both of the comparative logics discussed in order to infer some very general claims and observations about the commonalities and differences of the processes that led to the adoption of judicial review. By considering judicial review to be a broadly defined variable that was a common outcome in each country, I can try to isolate the factors present in each case and that could, in examination of the historical narratives, plausibly be attributed as a causal factor; and by contrast, by considering each form of judicial review to be a distinct variable, and therefore each country to have had a different outcome, I can try to isolate the factors that were distinct to each case and that are plausible factors for the emergence of judicial review. By comparing different moments at different points along a country’s trajectory, and by placing these disaggregated periods within the larger cross-country comparison, we are able to better identify why changes in judicial review occurred when they did.

I compare three countries, relatively similar at the outset, which incorporated different forms of judicial review at different moments in their histories. These countries converged on judicial review of statutory legislation, but they diverged in the forms that they adopted.

I am tracing different paths of causation, but the comparison is not intended to isolate all relevant variables or provide a generalizable argument about judicial review; because I am not aiming to infer a definitive causal relationship, my approach will be somewhat different than most comparative analyses. Since I am not testing a causal claim, I will not need to carry the logic of the method of agreement and difference to its conclusion and seek out potential counterclaims and negative cases. Furthermore, the above noted problems with these methods

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6 Nevertheless, the logic of disaggregating ‘within case cases’ has been employed in emphasizing periods of change within each ‘country case’; at this stage, however, this logic is primarily relevant in how the individual narratives are structured and which features are emphasized. Later analyses building on the foundation laid here will provide a more explicit disaggregation (making the ‘within case cases’ more discrete units of comparison).
will not be relevant here, as they relate to the ability to infer a definitive causal claim about a phenomenon. Although the logic of Mill’s methods will underlie the inferences I draw in the conclusion, these will not be presented as having passed the rigour required of a causal claim. Instead, this paper should be seen as a preliminary analysis, one that seeks to outline three cases in the hope that some useful inferences can be drawn from their comparison. It is an inductive approach: I do not posit any causal associations at the outset, and in the conclusion I will only suggest patterns that emerge from the trajectories of each country and possible inferences that might be constructed based on these patterns. This approach is better suited to theory construction than theory testing; perhaps more importantly, this approach is well-suited to sophisticating our understanding of the different functions that judicial review serves.

Hirschl identifies four forms of comparative approaches in constitutional law: 1) freestanding single-country studies that are assumed to be comparative because they deal with a ‘foreign’ country with which the reader is presumably unaware and implicitly comparing with their own country; 2) normative and self-reflexive comparisons; 3) “comparative research aimed at generating ‘thick’ concepts and thinking tools through multi-faceted descriptions”; and 4) “studies that draw upon controlled comparison and inference-oriented case selection principles in order to assess change, explain dynamics, and make inferences about cause and effect through systematic case selection and analysis of data” (Hirschl, 2005: p.126). The approach being advanced in this paper falls primarily in the third approach; it is a preliminary analysis, one that seeks to sophisticate our understanding of judicial review through “multi-faceted descriptions,” and yet the presentation and selection of the cases is guided by a comparative logic that allows for some preliminary inferences to be drawn. As such, it is a useful method for preliminary comparative analyses in that it allows for inductive inferences to be drawn that can then be theorized and tested across a larger set of cases with a more rigourously employed methodology.

Key Concepts: Parliamentary Supremacy and the doctrine of *ultra vires*

**Parliamentary Supremacy**

Having outlined the scope and methodology of this paper, I will now define some of the key concepts that will be engaged in the discussion. Having already conceptualized and distinguished between statutory and supervisory judicial review, I will outline the concept of parliamentary sovereignty that is central to the Westminster system shared in its broad outlines by all three countries, as well as the doctrine of *ultra vires*, which as we shall see, was ubiquitous in the development of judicial review.

The “essence of the Westminster model is majority rule” asserted Lijphart, and amongst its core features is the absence of statutory judicial review and the supremacy of Parliament: “The courts do not have the power of [statutory] judicial review. Parliament is the ultimate, or sovereign, authority. Parliamentary sovereignty is a vital ingredient of the majoritarianism of the Westminster model, because it means that there are no formal restrictions on the power of the majority of the House of Commons” (Lijphart 1984: 9). In this model, “legislation adopted by Parliament is supreme: it cannot be challenged—not by the head of State, not by the government, not by the courts, not by the citizens…. No court [is] entitled to question the legal validity of a

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7 Other features that might prove relevant to this discussion include the concentration of executive power in the Cabinet, the fusion of the legislative and executive powers,
The classic formulation of this doctrine was that of Dicey, and was outlined during the period in which the practical reality of Parliamentary supremacy had reached its apotheosis and was most closely aligned with its theoretical formulation: the sovereignty of Parliament “means neither more nor less than this, namely, that Parliament... has under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament” (Dicey 1885: 36). As others have noted, Dicey’s formulation “enjoyed a generally unrivalled dominance” and “bequeathed a legacy which served to eulogize parliamentary sovereignty and raised the notion of the unitary state... almost to a deity” (Burgess 1995: 17). Dicey’s formulation is crucial because despite having been written as a description of how the British constitution had evolved since 1688, it was transformed into a normative doctrine: “the doctrine of the sovereignty of Parliament was taken to mean that the British constitution ought to be arranged on that basis or... that the British constitution could only work well when it operated in accordance with the theory” (Koopmans, 2003: p.16). Dicey’s formulation therefore did much more than simply describe the functioning of the British political-legal system: it helped to consolidate the growing strength of the government in Parliament and provided theoretical leverage for a diversity of actors who would find this doctrine well-aligned with their interests and ambitions. Although Dicey accurately described the British state at the time, his formulation both reflected and made near-hegemonic a conception of British government as involving unquestioningly the supremacy of Parliament (Burgess 1995: 17).

In practice, however, there have been significant deviations from the “pure” Westminster model, both in British history as well during the doctrine’s spread throughout the Commonwealth (Brewer-Carias, 1989: p.177), with an increased role for written and “entrenched” documents, federalism and devolution, and a corresponding erosion of Parliamentary sovereignty. In British history, there has long been a subordinate discourse of federalism, one that has lead scholar Michael Burgess to identify a ‘British Tradition of Federalism’ and one that was not entirely consistent with the doctrine of Parliamentary supremacy (Burgess 1995). In 1931 Sobei Mogi published The Problem of Federalism, in which he remarked that “Experience in local self-government and the training given by parliamentary institutions, enlightened by the tolerant teaching of Protestantism and the growth of political philosophy, determined the essential features of federalism as developed by the people of Great Britain” (cited in Burgess 1995: 6). William Livingstone likewise argued that “many elements of federalism in the British society, and the diversities that constitute this federal quality,” were the result of various British traditions (Burgess 1995: 6). James Bryce had earlier argued that federalism was not antithetical to British traditions, but was rather an “essentially English institution[] adapted to American circumstances” (Wright 2001: 107). For the most part, however, these authors recognized that even if Great Britain had a deeply rooted tradition of some form of federalism, by the 19th century the doctrine of Parliamentary supremacy was absolutely dominant; what remained of British ‘federalism’ (“the bewildering mass of local institutions—parish vestries, courts baron, courts leet, village communities—each accustomed to making bylaws, appointing officers, and levying rates” (citing Thomas 1978: 67; Burgess 1995: 7) continued to exist at the pleasure of Parliament.
It is the central purpose of this essay to highlight some of the deviations from Parliamentary supremacy and examine their possible role in the incorporation of statutory judicial review. It is worth noting, however, that as late as 1984 Arend Lijphart considered the New Zealand system of government to be a “virtually perfect example of the Westminster model of democracy,” with very little deviation from any of its majoritarian provisions (Lijphart, 1984: p.16).

Although a written constitution is often associated with statutory judicial review (Brewer-Carías, 1989: p.1), Lijphart demonstrates that this is not necessarily the case, finding that in a number of countries with written constitutions the high courts have been explicitly denied this power, with the “parliaments [being] the ultimate guarantors of the constitution” (Lijphart, 1984: p.192). Even in the United States, often taken as the exemplar of constitutionalism and judicial review, recent work has undermined the oft-cited Tocquevillian thesis that “scarcely any political question arises in the United states that is not resolved, sooner or later, into a judicial question” (Tocqueville 1945: 280). Mark Graber has demonstrated that although the “Tocquevillian paradigm… presents the transformation of political questions into judicial questions as a fairly automatic process[,] [t]he actual processes are more complicated and not automatic” (Graber 2004: 7). Therefore, in order to understand the emergence of statutory judicial review, we must probe deeper than the mere presence of a written constitution. We must look also at the changing political dynamics and the construction of parliamentary supremacy.

“It has been said that [statutory] judicial review is the most distinctive feature of the constitutional system of the United States of America, and it must be added that it is, in fact, the most distinctive feature of almost all constitutional systems in the world today….By contrast, the system in the United Kingdom is quite different as the main feature that distinguishes the British constitutional system is precisely the lack of judicial review of legislation” (Brewer-Carías, 1989: p.1). Although most of the Commonwealth countries have adopted some form of statutory judicial review, most notably the more recently independent colonies (Brewer-Carías, 1989: p.177), older “dominions” such as Canada, Australia, and New Zealand have traditionally been more limited in their willingness to allow the judiciary to review, let alone set aside, primary legislation. Rather, these dominions vested plenary legislative capacity.

In Canada, as we shall see, there was little statutory review on grounds other than federalism, despite the early entrenchment of language and religious rights in the British North America Act. Similar to the British Parliament, in Canada “the legislatures have power to interfere with the contracts of anyone” (Hassard 1900: 77), and James Bryce was of the opinion that the Canadian people “are subject to no such restrictions as American Constitutions impose. Were there any revolutionary spirit abroad in Canada, desiring to carry sweeping changes by a sudden stroke, these could be carried swiftly by Parliamentary legislation” (Eaton 1958: 49). In Australia, it was Parliament that was given the power to confer jurisdiction to the High Court over any matter “arising under any laws made by the Parliament” (Commonwealth of Australia Constitution Act—Section 76), and although statutory review was provided (Burch 1924: 674) it did not include a bill of rights, was limited to Imperial and federal affairs, and provisions were available for review of High Court decisions by Queen-in-council. In South Africa until 1994, and throughout Commonwealth Africa through 1979, “the courts treat[ed] Parliament, government, and even civil servants as virtually untouchable” (Franck 1979: 304). In New Zealand there remains debate as to whether the 1990 Bill of Rights Act (BORA) provides for
genuine statutory judicial review, and the arguments against the BORA and its earlier drafts were framed precisely in terms of Parliamentary supremacy. The transfer of parliamentary supremacy from Great Britain to the colonies/dominions was the result of historical constructions, notably the Colonial Laws Validity Act (which will be discussed further below): the result, however, was that “legislative supremacy over the common law prevailed in the colonies, as it did in the UK itself” (Walters 2001: 120). In discussing the emergence of judicial review, therefore, it is important to pay attention to the particular construction and salience of the doctrine of Parliamentary supremacy within each country at any given time.

**Ultra Viros**

Another crucial concept, and one intrinsically related to the concepts of Parliamentary supremacy and judicial review, is the doctrine of *ultra vires*. The doctrine of *ultra vires* refers to the ability of the courts to declare a particular action or decision (or ‘secondary’ legislation) as being beyond the scope of powers that had been delegated by the Parliament to the officer or body in question. By reviewing the actions and decisions of the executive or subordinate bodies and declaring these to constitute “illegality” (Feldman 2000: 246) if they go beyond the scope intended by Parliament, this doctrine both upholds Parliamentary supremacy and provides a key basis for supervisory judicial review.

This doctrine has been described as “the central principle of administrative law” in Westminster systems and has been a crucial instrument by which “courts enforce the express or implied will of Parliament in respect of powers granted to subordinate decision-makers” (Wade and Forsyth 1994: 41; Feldman 2000: 246). Despite having come under criticism from academics and British judges, primarily due to its presumed silence in regard to private power or relating to issues not addressed by Parliament, its historical importance is largely accepted and it is acknowledged as having been a key theoretical basis for supervisory review throughout the 19th and early 20th centuries (Forsyth 2000: 29). As we shall see in the review of the cases, the *ultra vires* doctrine played a key role in the development of supervisory review in the three countries, and was of critical importance (to differing degrees) in the emergence of statutory review.

Their broad similarities, especially during the periods of divergence (the somewhat extended period during which New Zealand and Canada became independent, politically and culturally, from the United Kingdom) limits the number of variables that might influence the course of development, and the common ideological, legal-political, and institutional heritage of

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8 Instead of conceiving of sovereignty as a discrete and contained characteristic, it is perhaps more appropriate to conceptualize it in terms of a gradation: it is the varying ability of an institution to exercise power authoritatively over a given territory, population, and other institutions within its claimed reach. By conceptualizing sovereignty in this fashion we are better able to appreciate the relationship between judicial review and parliamentary supremacy in Westminster democracies. This is in part due to the fact that the division between supervisory and statutory legislation in Westminster systems is blurred somewhat by the fact that the executive power is fused with the legislative: since any judicial review of executive actions can be overturned by an act of parliament, which in reality means the same government whose actions were rejected by the judiciary, parliamentary supremacy really means the supremacy of the elected government vis-à-vis all other institutions.

9 “One of the commonest criticisms of the ultra vires doctrine is that it can provide no explanation for the fact that non-statutory bodies exercising non-legal powers may be subject to judicial review” (Forsyth, 2000: p.30). It should be noted, however, that this criticism reflects an attempt to base judicial review on the common law.

10 This can, as shall be discussed in the case of New Zealand’s relation to the UK, also be considered as the growing independence of the UK vis-à-vis its former colonies and the Commonwealth as it integrated into the European Community.
these three countries makes them well-suited for cross-country comparisons. Furthermore, all three countries constructed strong welfare states in the post-WWII era (with New Zealand’s being the strongest and Canada’s being the weakest), all three countries have substantial ethnic and national minorities that are territorially based, all three countries became increasingly ethnically and culturally diverse as a result of immigration, most notably during the 1960s (with Canada having the longest and most profound experience of cultural diversity through immigration and New Zealand having the shortest and smallest experience), and all three states experienced a sharp roll-back of their capacities in providing welfare provisions in the 1980s.

PART II

The United States Literature

Mark Graber’s 1993 essay “The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary” (1993) sparked an increased interest amongst public law scholars on the relationship between the judiciary and other institutions of American government, encouraging “scholars to analyze the Court’s decisions and doctrines in relation to the positions of the dominant political party, of Congress, and of the Executive Branch” (Smith 2008: 53). Much of this interest focused on the “Court’s long political struggle to establish the power of judicial review” which was increasingly recognized as having neither “emerge[d] as a fully formed and political dominant constitutional theory at the time of the Founding or in the early years of the nation’s history, as legal theories emphasizing the Marbury precedent might suggest” (Whittington 2007: 10). Graber outlined the gradual and strategic construction by the judiciary of a power of judicial review, to invalidate statutes, to interpret treaties (Graber 1998), and to misconstrue and deliberately misinterpret statutes so as to “correct” legislative oversight (Graber 2000). Keith Whittington in turn has persuasively argued that the construction of judicial supremacy in interpreting the Constitution has been an inconsistent process, one that has been frequently contested and that has been subject to reversals by ‘reconstructive’ presidents (Whittington 2007). In a different approach, Jack Knight and Lee Epstein have argued that the “emergence and maintenance” of judicial review must be understood not as the result of “intentional design of long-run constitutional principles but rather in the short-run strategic choices of political actors” (Knight and Epstein 1996: 88).

Despite substantial differences in the recent work on judicial review in the United States, there exists broad agreement on the claim that judicial review was not an automatic consequence of either federalism or constitutionalism but rather was an institution that was constructed historically, through the interplay of strategic judicial (and other actors) behaviour within the context of particular institutional arrangements.

\[11\] The most relevant institutional legacies were the Westminster model, the doctrine of Parliamentary supremacy, and a shared legal heritage including the common law and the doctrine of *ultra vires*. As noted by Hirschl (2000: p.1062) because the development of statutory judicial review in each country was not accompanied by radical regime change and because they were all descended from a common legal tradition and yet each developed a unique form of statutory review, they are well suited for a comparative analysis in that “the significance of institutional factors can… be assessed while accounting for variations in legal activity and judicial interpretation of constitutional rights” among the polities.
I intend to demonstrate that this claim holds equally well for non-United States instances of judicial review.

**HISTORICAL TRAJECTORIES**

Having outlined the scope and methodology of this paper, as well as the central concepts related to judicial review, it is time to review the cases. As discussed above, the cases will be presented as historical trajectories, as a narrative taking into account the variety of elements and factors that plausibly played a role in the emergence of statutory judicial review. The determination of what was included and emphasized versus what was excluded was based on the comparative logic of the methods of agreement and difference (in that I sought out elements that could explain both convergence and divergence and whose presence or absence in different cross country and within-country cases could be compared) and judgments based on a wide reading of historical literature on this and related topics.\(^{12}\) I will begin with the shared origins of Parliamentary supremacy and the Westminster model (as this is one of the key factors that make these cases comparable) and will note the periods in which each case diverged from the others.\(^{13}\) I will then review each individual case beginning with the period in which its path separated from the others.

**Glorious Revolution, Parliamentary Sovereignty, and the retreat of the Judiciary**

**Pre-1688 Judicial Review**

The Glorious Revolution of 1688 was a victory of Parliament against the Crown, and it is as such that it is primarily remembered (Rakove 1997: 1052); importantly, it was also a victory of Parliament against the judiciary. The judiciary in pre-1688 Britain had often constructed the common law so as to hold that “the King could not, on the basis of his powers and prerogatives as a monarch, make any change in the general law of the land without the support of Parliament” and soon found that punishable acts could only be defined by Parliament: the King could not “make a thing unlawful which was permitted by the law before” (Koopmans, 2003: p.17). Nevertheless, it was far from a loyal servant of Parliament against the Monarchy, and was frequently allied with the King against Parliament and had declared its willingness to set aside Acts of Parliament on the basis of the its reading of the common law. As Sir Edward Coke proclaimed, “it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void” (*Dr. Bonham’s Case*, 8 Co. Rep. 107a, 114a C.P. [1610]).\(^{14}\)

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\(^{12}\) As with any such analysis, a great deal of weight is placed on the discerned judgments as to what to omit and what to include; the only counter-weight to this problem is to insist upon a high degree of sensitivity to the historical material and to search out as many differing accounts as is feasible.

\(^{13}\) It is possible that the timing of independence or the founding of a distinct legal tradition might be relevant; the conception of Parliamentary supremacy in any of these countries might in fact reflect a particular ‘fragment’ of whichever construction of this concept was in the ascendancy in the United Kingdom during the relevant period.

\(^{14}\) There has been much debate over whether Sir Edward Coke intended this as a radical claim for the judiciary to be able to overturn legislation based on the common law, and this debate has centred on the degree to which this would constitute a violation of Parliamentary sovereignty (Gough, 1955: pp.43-45; Craig, 2000; Hadfield, 2000: p.199): “There is nothing in principle inconsistent in positing the existence of judicial review on the capacity of the common law to control public power, while accepting at the same time that Parliament might, with sufficiently clear words
Coke’s *dictum* received considerable judicial support in the 17th century, albeit far from unanimous, and some scholars have claimed that Coke “based his conclusion upon medieval authorities that indicated that courts did indeed declare statutes void” (Walters 2001: 111). It received substantial judicial support in Hobart C.J’s *obiter dictum* in *Day v. Savadge* (1615), in which it was observed that “an Act of Parliament, made against natural equity, as to make a man judge in his own case, is void in itself: for *jura naturae sunt immutabilia*, and they are *leges legume*” (Walters 2001: 111). Support was also expressed in *Lord Sheffield v. Radcliffe* (1615), *R. v. Love* (1653), *Thomas v. Sorrell* (1677) and in the *Case of Ship-Money*, whereby Finch C.J. stated that “No act of parliament can bar a king of his regality… they are void acts of parliament to bind the king not to command his subjects…. Acts of parliament may take away flowers and ornaments of the crown, but not the crown itself” (Walters 2001: 112). This support was in part indicative of the increased attention given to the judiciary as it was forced to mediate between the King and Parliament over the course of the factitious 17th century.

It was against the lawmaking powers of both the King and the judiciary that the 1688 Bill of Rights “proclaimed loudly that proceedings in Parliament ought not to be questioned or impeached in any court or any other place” (Ewing, 1999: p.79). The Bill of Rights, and the subsequent consolidation of the revolutionary advances made by Parliament, established the sovereignty of Parliament as the central basis of the modern British constitution: “the ‘emergence’ of parliamentary supremacy *post* 1688 and its entrenchment (through widespread acceptance by the key constitutional players) indicate a particular constitutional relationship between Parliament and the courts, in which the essential principles are that judicial power is derived and subordinate and is not autonomous (and co-equal) with Parliamentary power” (Hadfield 2000: 195-6). The Act of Settlement, 1701, was crucial in assuring widespread acceptance amongst the judiciary by guaranteeing judicial independence relative Parliament. The effect of the Revolution, however, was to effectively bury the possibility that the judiciary would engage in review and possible invalidation of Parliamentary statutes.

Although Coke’s *dictum* would be invoked at various points in the 18th and early 19th centuries, either by judges such as Holt C.J. in *London v. Wood* (1701) or by lawyers, “this support usually came in *obiter dicta* or in unsuccessful arguments at bar” (Walters 2001: 112). Writing at the height of the doctrine of Parliamentary supremacy, James Bryce noticed that “Common Right and Reason” had been frequently expressed as a basis for the invalidation of positive enactments repugnant to it, but that “little (if any) effect has ever been given” to these assertions (Bryce 1901: 601).}

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15 This claim was put forward by Charles McIlwain in his *The High Court of Parliament and its Supremacy: An Historical Essay on the Boundaries between Legislation and Adjudication in England* (New Haven: Yale University Press, 1910). It has been challenged, however, by T.F.T Plucknett in *A Concise History of the Common Law*, who argues that McIlwain misread the medieval precedents and “that there is no evidence of courts actually declaring statutes void for repugnance to natural law” (Walters 2001: 111; Hirschl 2004).

16 Bryce does suggest that the “extension which… Lord Mansfield gave to the enforcement of implied contracts” was a possible instance of common law being asserted against statutory legislation (Bryce 1901: 601). Another possible instance raised by Bryce was “the British Order in Council for Southern Rhodesia, of October 20, 1898” which “directs the Courts of that territory to be ‘guided in civil cases between natives (i.e. Kafirs) by native law, so far as that law is not repugnant to natural justice or morality, or to any Order made by Her Majesty in Council’” (Bryce 1901: 605). This, however, cannot be accepted as an instance of judicial review or a step away from
The development of Parliamentary sovereignty in the late 17th and its consolidation throughout the 18th century was later to be paralleled by a retreat of supervisory review in the 19th and early 20th centuries, as courts became increasingly deferential to the executive and curtailed their review of administrative decision-making and executive actions. Writing in the late 20th century, Sir Stephen Sedley would lament this century-long retreat, calling it the “long sleep of judicial review in Britain” (Sedley 1994: 274). It should be noted that this process occurred alongside the growth of cabinet government and strong parliamentary political parties; that is to say that although one can consider the loss of statutory review and the retreat of supervisory review as two separate phenomena, one entailing a growth in the power of Parliament the other a growth in the discretion of the executive, the fusion of powers and the growing dominance of cabinet government ultimately means that these two processes were two sides of the same coin. They both entailed the growth of the power of the government (Crown-in-council and simultaneously the dominant faction within Parliament) vis-à-vis the judiciary and the common law, and the supervisory review that did occur was increasingly founded on the doctrine of ultra vires: “in historical terms [supervisory] judicial review was not originally founded on the idea of effectuating legislative intent, and… this only became a focus in the nineteenth century” (Craig 2000: 61). The increasing use of ultra vires reaffirmed the sovereignty of a Parliament controlled by disciplined political parties under the control of the Cabinet, and therefore the retreat and changes to supervisory review and the denial of statutory review should both be considered in terms of an expansion of governmental power against the judiciary.

It was during this period that both Canada and New Zealand gained nominal independence; however, it should be noted that the legal tradition in Canada had been developing since the 1791 Constitutional Act, from the mid-1800s in New Zealand, and that both remained highly integrated in Commonwealth jurisprudence until these bonds began to dissolve with the Statute of Westminster, 1931. I will now briefly discuss the legal structure of the British Empire as it relates to the self-governing colonies.

Empire

As noted by Hassard in his 1900 overview of Canadian constitutional law, there were “three great authorities which have power to enact… legislation…: 1. The Imperial Parliament, 2. The Canadian Parliament, and 3. The Provincial Legislatures…. The first of these authorities has unlimited powers; while from it the others derive their entire jurisdiction” (Hassard 1900: 68). The same subordinate and integrated order held true throughout the white self-governing colonies of the Empire, albeit without the institution of federalism in most of the dominions.

The Empire was a hierarchal relationship between the British Parliament and the subordinate colonial bodies, and the attempts to transform the Empire into a genuine federation—the schemes for an Imperial Federation (see Tyler 1938; Cheng 1968)—while popular at various points amongst important elite actors, were never fully pursued. Edward Freeman, the author of the classic work History of Federal Government from the Foundation of the Achaian League to the Disruption of the United States (1863) and alongside James Bryce considered the foremost British expert on federalism, articulated the relationship in his criticism.
of the Imperial Federation movement: “The question in truth comes to this: shall an ‘empire’ break up or shall it be changed into a federation? To speak of changing an imperfect federation into a perfect one gives a false idea of the case. What is really proposed... is to bring federation, as a perfectly new thing, where at present there is no federation, but its opposite, subjection.... The proposal that a ruling state... should come down from its position of empire, and enter into terms of equal confederation with its subject communities, is a very remarkable proposal, and one which has never before been made” (Burgess 1995: 52-3 emphasis added). Imperial legislation and jurisprudence, being at first the laws of the British Parliament and the Common Law of England, and after the Colonial Laws Validity Act (CLVA) of 1865 the laws of the Imperial Parliament (being legislation passed by the British Parliament but explicitly applied to the colonies), was dominant over the legislation of the subordinate legislative bodies. “Colonial legislatures within the British Empire... were examples of subordinate legislative bodies within a single legal order. The validity of a subordinate norm is determined in such a legal order by reference to a higher legal norm” (Fazal 1997: 19).

There was an integrated body of Imperial jurisprudence and a hierarchal relationship between the different legislative bodies. As we shall see, this would allow for occasional but significant acts of statutory review by the judiciary. The opportunities for the invalidation of legislation by colonial legislatures would be limited, but not removed, by the 1865 passage of the CLVA. This will be discussed in more detail when we consider the Canadian case.

Before continuing with the narrative of judicial review in the United Kingdom, it is worth noting that the tradition of judicial review that had developed in 17th century England and referenced in obiter dicta during the 18th century, became prominent in the American colonies during the pre-Revolution crises. Here the dictum of Coke was articulated by American elites who were beginning to assert an independence vis-à-vis Parliament: “Just as Bonham’s Case was becoming a historical curiosity in the UK, in the British North American colonies it was being invoked in legal arguments that were instrumental in the events leading up the American Revolution” (Walters 2001: 114). In Paxton’s Case, which one line of legal history has considered to be crucial in the development of the “American theory of judicial review of legislation” (see Thayer 1893: ; Corwin 1928: ; Haines 1959), James Otis argued that “As to acts of Parliament. An act against the Constitution is void: an Act against natural equity is void: and if an Act of Parliament should be made, in the very words of this Petition, it would be void. The Executive Courts must pass such Acts into disuse” (Walters 2001: 115).

The American colonies had of course been in a similar subordinate relationship to the British Parliament as existed under the later Empire. James Bryce, in his American Commonwealth (which would later become the “bible” of the founders of the Australian federation), argued that although there was an “abstract” reason for why federalism tended towards judicial review17, there was also a historical one: “Many of the American colonies received charters from the British Crown... and endowed [their assemblies] with certain powers of making laws for the colony. Such powers were of course limited, partly by the charter, partly by usage, and were subject to the superior authority of the Crown or of the British Parliament. Questions sometimes arose in colonial days whether... statutes... were in excess of the powers

17 Namely the functionalist argument that judicial review is needed in order to maintain the federal principle (Elazar 1987: 183). As will be discussed in more detail below, judicial review is only one mechanism by which this is achieved, others including disallowance and referendum.
conferred by the charter; and if the statutes were found to be in excess, they were held invalid by the courts... by the colonial courts, or, if the matter was carried to England, by the Privy Council” (Bryce 1905: 181-2). Judicial invalidation of legislation, in America, had been a feature of the pre-Revolution era, and even prior to the 1787 Constitution State Supreme Courts had exercised this power against statutes enacted by the new State legislatures. But the argument made by Otis in Paxton’s Case was ultimately rejected, the laws of the British Parliament being declared supreme. I will return to discuss the later colonial divergences, but for the moment I will continue with the narrative of judicial review in the United Kingdom.

**UNITED KINGDOM**

In 1998, the Westminster Parliament incorporated the ECHR into British law through the Human Rights Act 1998. This was done not by making the Convention rights “‘part of our substantive domestic law,’” but by giving certain Convention provisions a “defined legal status” (Ewing 1999: 84): “Convention rights are now free standing and autonomous (even if not ‘substantive’) rights of British law which the judges are empowered to develop as they wish, guided but unconstrained by the Convention jurisprudence” (Ewing 1999: 86). British judges are given the authority to review Acts of Parliament to assess whether they are in conformity to the ECHR, and if necessary, issue a declaration of incompatibility to which the government will have to respond. Furthermore, the process of reviewing the compatibility of legislation with the ECHR is incorporated into the legislative process, with the Justice Minister being obliged to declare whether a Bill is expected to be incompatible with Convention rights. This is a clear transfer of substantial power to the judiciary, although it does not create a strong form of judicial review in which the judiciary can set aside legislation. Nevertheless, it is widely considered to be a constitutional watershed.

Due to the longstanding tradition of Parliamentary supremacy and the relatively recent incorporation of a form of statutory review through the incorporation of the European Convention on Human Rights (ECHR), there is not much of a historical narrative to present in regards to this form of judicial review, especially for the pre-1960s period during which debates about a British Bill of Rights and the relationship between the UK and the European Community (EC) began to ferment. Nevertheless, the roots of statutory review are likely to be found in this period, as by the 1970s it had already become a hotly debated topic (Jaconelli 1980: ; Zander 1985: ; Brazier 1991). I will begin by tracing some of the history of supervisory review, as this speaks to the judiciary’s conception of their role vis-à-vis the other branches of government.

**Supervisory Review in the UK**

As discussed above, the power of the judiciary vis-à-vis Parliament and the executive had gradually diminished in the United Kingdom until after the Second World War, as the judiciary was increasingly reluctant to exercise supervision of executive actions. When it did it based its review on the doctrine of ultra vires, thereby reaffirming the power of a Parliament whose powers were effectively fused with those of the executive. Political scientist and minister in a number of Labour cabinets R.H.S Crossman decried this retreat of the judiciary from its

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18 In 1786 the Supreme Court of Rhode Island “held that a statute of the legislature which purported to make a penalty collectible on summary conviction, without trial by jury, gave the court no jurisdiction, i.e. was invalid, the colonial charter, which was then still in force as the Constitution of the State, having secured the right of trial by jury in all cases” (Bryce 1905: 182).
supervisory role and considered it equivalent to the growing domination of Parliament by the Cabinet: “To restore Parliamentary control of the Executive, however, is not sufficient for our Socialist purpose of liberating the community from the abuse of arbitrary power. The next step will be to reform the Judiciary, so that it can regain its traditional function of defending individual rights against encroachment. That function has steadily narrowed for the last hundred years, as small-scale capitalism has been transformed into oligopoly and the flimsy structure of the Victorian State has developed into the Leviathan which now dominates our lives” (cited in Vallinder, 1994: p.95).

This retreat is perhaps exemplified by the 1915 case Local Government Board v. Arlidge ([1915] AC120) in which it was decided that “administrative bodies need follow only the procedural standards required by Parliament, not common-law standards of fair procedure as required in the courts” (Epp 1998: 115). It should be stressed, however, that this was not simply a process of judicial retreat, but involved an explicit attempt by Parliament to shield administrative processes from supervisory through increased use of exclusionary clauses: “the expansion of executive action [corresponding to the growth in the welfare state] has been accompanied with efforts to keep the controversies arising… off the bounds of review by courts. There has been frequent incorporation of statutory exclusionary clauses purported to clothe the administrative action with a scrutiny-proof waistcoat” (Wani 1986: 6).

Following the Second World War period, however, and in reaction to the expanded reach of the burgeoning welfare state, there was a marked increase in judicial activism in supervisory review. Amongst the early cases in which the judiciary asserted a stronger supervisory role was that of Associated Provincial Picture Houses v. Wednesbury Corporation, in which the concept of Wednesbury unreasonableness was advanced (1 KB 223 [1948]). Although this standard is usually considered to be a rather high threshold for supervisory review, it was nevertheless an important example of the increasing judicial concern with supervisory review, and has since become one of many ‘tools’ constructed by the judiciary in order to strengthen its supervisory role. Subsequent to Wednesbury, most occasions of supervisory judicial review, although referencing Wednesbury, have occurred when the “official body being reviewed has behaved in a manner that was coolly rational… and the ultimate reason for intervention could as easily have been cast in principle as pragmatism—and increasingly is” (Jowell 2000: 334). The judiciary, has expanded on Wednesbury in order to pursue an agenda of increasingly active review of administrative actions.

In doing this, they drew not only on ultra vires—and this they drew on less and less—but on ‘rediscovered’ principles of natural justice, the common law, as well as an increasing concern with a broadly conceived conception of power. Writing in the 1970s, B.O Nwabueze, an explicit advocate of strong judicial review (both supervisory and statutory) found that “there [was] some cause for satisfaction at the revival of judicial activism thanks to the rediscovery of ‘natural justice’” (Nwabueze 1977: ; Franck 1979: 309), a rediscovery that was fleshed out in decisions such as Ridge v. Baldwin (AC 40 [1964]). Lord Justice Laws notes that “the development of [supervisory] judicial review since the seminal cases in the 1960s—Ridge v. Baldwin, Padfield, Anisminic—and the reforms to Order 53 of the Rules of the Supreme Court in 1977 have vouchsafed the submission of the executive to the rule of law,” and that these cases indicated a

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19 This standard holds that an action is subject to review if it is deemed to be so unreasonable that no rational person would ever consider it.
much more broadly conceived basis for supervisory review and a broader conception of the role of the judiciary in the constitutional order of the UK (Laws 1995: 185).

This process, however, did not occur in a societal vacuum; rather, judicial activism was inspired and encouraged by growing concerns about the abuse of authority and the expansion of the State, perhaps best captured by the disgust of R.H.S Crossman in regards to his government’s decision to deny entry to a hundred thousand British subjects residing in Kenya: this law, he asserted, “would have been declared unconstitutional in any country with a written constitution and a Supreme Court” (Lijphart, 1984: p.192). Likewise, and perhaps more relevant to the growth of judicial activism in supervisory review, was the “growing rights based criticism of the British criminal process and prisons” that began in the mid 1970s with allegations of injustice regarding suspected IRA terrorists: it became evident to “most observers that ‘miscarriages of justice,’ as they were called, occurred frequently in the prosecutions and trials of suspected political activists as well as in convictions on other serious charges…. The miscarriages of justice became causes célèbres and drew attention to unfairness in the criminal justice process and to appalling conditions, overcrowding, and fundamental denials of due process in Britain’s prisons” (Epp, 1998: p.113-114).

The increasing exposure given to unfairness in administrative decision-making and executive actions was supported by civil society coalitions—such as the Catholic civil rights movement in Northern Ireland, the Campaign against Racial Discrimination, the woman’s movement, etc—who mobilized in opposition to what they considered unfair and arbitrary administrative practices and in support of civil liberties. Within British society there was a growing concern with the power of the state against the rights of the individual, a concern that was informed and encouraged by the developing norms of international human rights. As early as 1964 Bernard Crick observed that “the very concept ‘civil liberties’ until quite recently seemed somewhat un-British… but recently the concept is on everyone’s lips,” indicating the degree to which the understandings of the British constitutional order were being transformed (cited in Epp, 1998: p.114). This transformation was increasingly evident in the willingness of the judiciary to expand its supervisory review. It is likely that there was a feedback process between changing norms and understandings of the constitutional order at a societal and academic level and the increased assertiveness of the judiciary in this regard, with each new case signalling to the civil society organizations that the courts were willing to act against arbitrary and unfair administrative actions as well as providing exposure of these practices to the larger population.

This growing willingness to subject administrative actions to judicial review led to a broader concern with natural justice and the common law than had been the case over the previous century, and the courts became increasingly willing to create new common law rights. In the surprising decision in Derbyshire County Council v. Times Newspapers Ltd., “the court created a common-law right of free speech that significantly increased protections against libel actions” (Epp, 1998: p.111); in the early 1990s it was clear to many observers, and frankly declared as inevitable by a Cabinet minister, that the court was poised to create a common law right to privacy as well.20

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20 This frankness was brought about during debate as to whether incorporation of the ECHR would lead to a right to privacy, which was the reason that the media in general opposed incorporation. The minister was effectively
This growing judicial activism in supervisory review dovetailed with the development of international norms of human rights and with the hesitant but continued movement of the UK towards the European Economic Community (EEC; later the European Community [EC] and the European Union [EU]). The Labour Party took the lead in ratifying the ECHR in 1951, and in granting the right of individual petition in 1966, but substantial resistance from the opposition, from within their own ranks, and from within British society at large ensured that the Convention would initially not be incorporated into domestic law (Ewing, 1999: p.80). Substantial sections of the Labour Party rejected the notion of a domestic Bill of Rights on the grounds that it would limit the power of Parliament, and would therefore provide a possible check against the socialist, redistributive, and command economy measures they desired. This was especially the case considering the “remarkable conservatism” of British judges (Epp, 1998: p.124). The resistance to incorporation was framed largely in terms of the British constitution and Parliamentary sovereignty.

By the 1970s, however, significant progress towards integration had occurred, with profound effects on the constitutional order in the United Kingdom. Importantly, in 1972 the UK entered the European Community, a process which entailed “the acceptance of the European Community’s laws and institutions as higher authorities than the national parliament with regard to several areas of policy” (Lijphart, 1984: p.15). Not only did this arguably undermine the sovereignty of Parliament, but it allowed for an expanded understanding of judicial review, notably one that included statutory review, by establishing “the right of the courts to rule on the admissibility (in terms of Community law) of future acts of Parliament” (Coombs, cited in Lijphart, 1984: p.15). This was defended on the grounds that by being incorporated, the Treaty became part of the substantive domestic law, and was therefore only valid on the basis of Parliament’s authority.

K.D Ewing argues that “by signing a Treaty [the ECHR] which allows for a right of individual petition and by subsequently recognising the right, earlier Labour governments created a climate whereby incorporation in domestic law [in the 1998 Act] became inevitable, particularly following the successful incorporation of the EC Treaty” (Ewing, 1999: p.84). Although we need not accept the inevitability asserted by Ewing, we can nevertheless appreciate that the sum of the UK moves towards the EC—signing the ECHR, allowing individual petition, the European Communities Act 1972, etc.—contributed greatly to the process that ultimately culminated in the creation of a form of statutory judicial review. Since the right of individual petition was granted in 1966, “there have been more complaints lodged against the U.K. with the [ECHR] than against any other country” (Epp, 1998: p.120). This is a testament to the limitations of judicial review (statutory and supervisory) in the UK, despite the growth in supervisory review during this period, and also to the increasing mobilization of social groups organized in pursuing the expansion of rights through the courts. As discussed, the increased willingness of the courts to review executive actions encouraged social groups to turn to the courts; likewise, the right of individual petition gave these groups the possibility of appealing to the European level in order to bring about an expansion of rights at the UK level.

remarking that regardless of whether the ECHR was incorporated, the judiciary was likely to create such a right on its own and that Parliament was unlikely to intervene.
**Devolution and the Return of the Federal Idea**

Another important development for the emergence of judicial review was the movement towards devolution that began in the 1970s and that was consolidated with the election of a Labour government in 1997. Although devolution in the UK had existed in relation to Ireland and Northern Ireland since the 19th and early 20th century, the movement gained new momentum in the 1970s, when a devolution scheme for Scotland and Wales was proposed by the Labour Party. These schemes were defeated in separate referenda, and led to serious divisions in the Labour Party and its ultimate defeat.

Following the growth of separatist sentiment that accompanied the retrenchment of the welfare state under Thatcher the Labour Party in the 1990s once again committed itself to a programme of devolution. The Northern Ireland Act of 1998 aimed to restore devolved ‘home rule’ that had been suspended following the outbreaks of violence in the 1970s, while the Scotland Act 1998 and the Government of Wales Act 1998 provided devolved legislatures to these regions for the first time since their incorporation into the United Kingdom.

During the debate over devolution, the government explicitly asserted that this did not undermine the constitutional principle of Parliamentary sovereignty and rejected any arguments that they were creating a system of asymmetrical federalism.21 “The doctrine of parliamentary sovereignty cannot co-exist with federalism. Parliamentary sovereignty requires not co-ordinate legislatures, but a superordinate legislature (Westminster) and subordinate ones, that is, devolved legislatures with no exclusive powers and with what powers they do possess vulnerable to unilateral alteration by Westminster” (Hadfield, 2000: p.194-195). This was made explicit throughout the legislative process, with the express intent of ensuring that Parliamentary sovereignty would be maintained so that the judiciary could not claim the various Acts as being ‘written constitutions’ and invalidating future Acts of Parliament that interfered or sought to alter the devolved powers.

In order to appreciate how devolution contributes to a potential expansion of statutory judicial review, one must be sensitive to the political dimension. As the devolved institutions become increasingly entrenched in political practice and expectations in the devolved areas, the cost of interfering or unilaterally altering this relationship increases. When conflicts arise the judiciary will examine whether the devolved legislatures have acted *ultra vires*; if they find that they have not then it is theoretically possible that Parliament would change the relevant Acts. However, the political cost of doing so might become so great that only an imminent and evident catastrophe would justify Parliamentary action (as in the case of Northern Ireland in the 1970s).

Regarding a similar situation—the relation of the Parliament to the Dominions—Lord Sankey observed that “the Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the Statute of Westminster. *But this is theory and has no relation to realities*” (cited in Hadfield, 2000: p.199). That is to say that the political dimension might ultimately reduce Parliamentary sovereignty and provide for a greater role for *de facto* statutory review by the judiciary.

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21 In that each of the units is given differential powers: Northern Ireland is given considerable powers depending on the ability to construct a power-sharing relationship; Scotland is given more power than Wales, and England is given no separate legislature other than the Westminster Parliament, where Scottish and Welsh MPs are still present.
This emphasis on political dynamics is important in understanding the broader process of the expansion of supervisory judicial review and the eventual implementation of statutory review. Such an appreciation for the political dimension emphasizes that “at root, parliamentary sovereignty turns not on the attitudes of Parliament but on those of the courts: ‘the seat of sovereign power is not to be discovered by looking at Acts of Parliament but by looking at the courts and discovering to whom they give their allegiance.’ No statute can establish the rule of law that courts obey Acts of Parliament because no statute can alter or abolish such a rule. Instead, the rule of judicial obedience to statutes is the ultimate political fact on which the constitutional system hangs” (Wade 1955: 196; Bamforth 2000: 121). That is to say that how the judiciary conceptualizes its constitutional role is crucial to understanding the functioning of the constitutional order itself. The historical importance of this conceptualization was argued for by Laws: “it cannot be suggested that all these principles (viz., the modern principles of administrative law in particular, natural justice, improper purposes, the protection of legitimate expectations and Wednesbury unreasonableness), which represent much of the bedrock of modern administrative law, were suddenly interwoven into the legislature’s intentions in the 1960s and 70s and onward, in which period they have been articulated and enforced by the courts. They are, categorically, judicial creations. They owe neither their existence nor their acceptance to the will of the legislature” (Laws, 1995: p.79, cited in Forsyth, 2000: p.34).

It seems plausible, therefore, that in order to understand the rise of judicial review and the eventual development of statutory review, we must pay close attention to the role that the judiciary conceives for itself. The historical evidence provides some support for this suggestion. Ultimately, the judiciary was quite vocal in its support of incorporating the ECHR into British domestic law, and is identified by Hirschl as a key supporting constituency for incorporation. Their support of this is certainly related to a desire to expand their institutional capacity, yet it should also be seen as the product of a new conceptualization of the courts’ role vis-à-vis the other branches of government. The expansion of supervisory judicial review, especially insofar as it went beyond the concept of ultra vires, involved an expanded understanding of the judiciary’s constitutional role, a conception that could be seen as culminating in its support of statutory judicial review.

Finally, it should be noted that the doctrine of Parliamentary sovereignty is far from dead in the UK, despite the creation of statutory judicial review. In fact, it was a crucial element in why the Human Rights Act and its construction of statutory review took the form that it did. The vibrant debate as to whether the increasing scope of supervisory and of statutory judicial review is to be founded on the common law, on concepts of ‘natural justice,’ on a general concern with power, or on the doctrine of ultra vires (which, as discussed above, has traditionally been the basis for supervisory review) is an indication of the enduring strength of the doctrine of Parliamentary supremacy. While far from unanimous, most participants in the debate attempt to reconcile whichever foundation they are advancing with the doctrine of Parliamentary supremacy as a central component of the British constitution; that is, they try and argue that there is a tradition of or place for strong judicial review premised on concepts other than that of effectuating legislative intent (and thereby on the idea of Parliamentary supremacy) without directly attacking this aspect of the constitution: “If we respect what little is left of our constitution, it ought not to be left to Whitehall to say how much judicial control they will or will not tolerate. It is just as much
for the judges to say how much abuse of power they will or will not tolerate. This is the part that the constitution assigns to them and they should be allowed to play it, free from threats and accusations and without talk of government by judges” (Wade 1980: 70). The attempts to reconcile Parliamentary sovereignty with a judiciary willing to check the government and enforce notions of human rights and civil liberties have often involved theoretical contortions, and the “labored nature of their theories attests to the difficulty of the enterprise” (Epp, 1998: p.116).

With the 1998 incorporation of the European Human Rights Convention (which will be interpreted by both British and European courts) and the power of declaring a law to be incompatible with the convention, the courts have been granted an explicit ability to review, although not to overturn, legislation passed by Parliament. For this reason, it is often argued that “the sovereignty of Parliament will be preserved both in principle and practice”—as did the government during debate about incorporation (Ewing, 1999: p.99). However, it should also be recognized that the power vested in the judiciary is a political one: by declaring a bill incompatible, they place political pressure behind the demand that the statute be revised.

One finally aspect of the Human Rights Act needs to be emphasized: in drafting the legislation, the UK government studied and referred to the Canadian Charter of Rights and Freedom, the 1990 New Zealand Bill of Rights Act, the new South African Constitution, the Canadian Bill of Rights 1960, as well as documents from a number of other European, Commonwealth, and common law countries. They were explicitly engaged in a process of comparison, facilitated by international networks of experts in human rights and constitutional law, as they sought to construct a means by which statutory judicial review of European human rights provisions could be adapted to the circumstances of a tradition and continued belief in the desirability of Parliamentary sovereignty. The need to do this was perhaps most saliently felt within the Labour Party as those who orchestrated the “Blairite Revolution” diverged from the longstanding Labour distrust of statutory judicial review and the “ageing Marxist[s] decrying the establishment’s conspiracy against the proletariat” (Denning 1982: 330; Ewing 1999: 98). It is possible that the willingness of the Labour leadership to accept statutory review was itself related to the reform of the judiciary that R.H.S Crossman had called for and which had substantially liberalized the judiciary and the Law Lords throughout the 1960s and 70s (Epp, 1998: p.125-130).22

**CANADA**

The first instance of statutory judicial review in Canada dates to 1878, when the newly created Supreme Court (itself a statutory creation) found in *Severn v. The Queen* that an Ontario licensing statute was *ultra vires* as it impinged on the federal jurisdiction of trade and commerce. Statutory judicial review was soon taken up by the Judicial Committee of the Privy Council (JCPC), the appellate court of the Dominions and a Committee in the UK House of Lords, who would employ it vigourously in the late 19th century in shaping federalism in Canada and again

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22 The Law Lords would return to their traditional conservatism under the Thatcher government in the 1980s, however it seems that the liberalization of the judiciary at lower levels continued throughout this period (Epp, 1998: p.125-130).
in the 1930s to overturn the Depression combating measures of Canada’s ‘New Deal.’ In 1982, however, the Canadian government and nine of ten provinces agreed to ‘patriate’ the Canadian constitution, which had been from 1867 onwards the British North America Act, an Act of the British Parliament. Included in this arrangement was a new Charter of Rights and Freedoms, which gave the Supreme Court of Canada—since 1949 the last court of appeal in the country—the explicit authority to review legislation of the provinces and federal government for compatibility with the Charter; if the legislation was not compatible, then the legislation would be of “no force or effect.” Included, however, was a ‘notwithstanding clause,’ which allowed Canadian legislatures to pass laws notwithstanding certain Charter rights for a renewable term of five years. Although the ‘notwithstanding clause’ has been used on occasions, it is increasingly seen as politically undesirable.

Statutory judicial review in Canada is therefore not a new phenomenon, although its reach and use have expanded enormously since the introduction of the Charter, and as early as 1900 A.R Hassard of Osgoode Hall could observe, in his *Canadian Constitutional History and Law*, that “in Canada and the United States the legislature is subordinate to the judiciary, and all the legislation of all legislative bodies in both countries is subject to examination by the Courts” (Hassard 1900: 75). Furthermore, of all the cases considered in this study, Canada is the only one whose chosen form of statutory judicial review closely approximates the ‘strong’ form. It had long been the case that students of Canadian politics and constitutional law were taught that “the practice of judicial review in Canada is less important than it is in the United States” and that this was the case in large part because the Canadian Constitution did not include a bill of rights (Smith 1983: 115). Despite this absence, however, and despite ambiguity as to whether statutory judicial review was intended by the framers of the constitution, the practice of statutory review emerged quickly following Confederation. The right to set aside legislation had been asserted effectively by the judiciary since 1878; the 1982 Charter increased the number of areas in which the judiciary could exercise statutory review, and made this practice explicit, although it provided a means by which Parliament could overrule the judiciary in some areas. What must be examined in the Canadian case, therefore, are these periods in which the foundations for statutory judicial review were laid. Furthermore, in accordance with the *methods of agreement and difference* that underlies the comparisons in this study, it is also necessary to compare these ‘formative’ periods with periods of relative inactivity and stagnancy in regards to statutory review. The narrative of this case will begin by outlining the colonial relationship that was created with the BNA Act in 1867, and will continue by examining some “causal observations” of the potential roots of statutory review in the early post-1867 period, including the role of the JCPC and the doctrine of *ultra vires*. It will discuss the retreat of judicial retreat in the post-Depression/WWII era, and will conclude by examining the origins of the 1982 Charter. It will look at the various foundations and usages of statutory review, as well as the role of the judiciary in constructing a conceptualization of their constitutional role.

23 The ‘notwithstanding clause’ effects only those rights enumerated in the Charter of Rights and Freedoms, and therefore does not effect minority language or religious rights education rights that were included in the BNA Act 1867 (now the Constitution Act 1867), matters relating to the federal division of powers, as well as certain excluded sections of the Charter, notably the equality of men and women and the rights of First Nations.
Canadian jurisprudence dates to the 1774 Quebec Act and the 1791 Constitutional Act which provided for a mixture of civil and common law and limited domestic government, and was greatly expanded by the development of responsible government in 1848 and Confederation in 1867; nevertheless, it remained highly integrated within larger Imperial (namely, British) concepts of constitutional law until well into the 20th century. Until the 1931 Statute of Westminster, the British Parliament could legislate with regard to the ‘dominions’ and its statutes took precedence over ‘dominion’ statutes that were incompatible. Until 1949, the JCPC remained the court of last appeal for Canada. Nevertheless, during this period there were significant divergences, especially in regards statutory judicial review and constitutional law, and these can be considered as reflecting the particular state of judicial review in the UK during the period in which the BNA Act was crafted. As discussed above, over the course of the 19th century the judiciary increasingly retreated from its role in supervisory review, and was overshadowed by an increasingly powerful Parliament. This was reflected in the relationship between the judiciary and the Canadian Parliament as provided for in the BNA Act, which places Parliament in a dominant position; furthermore, the guarantees provided to the British judiciary in the Act of Settlement 1701 are substantially reduced (Smith, 1983: p.120). Against this dominance of the Canadian Parliament, the judiciary was quick to draw on a strategic opportunity to increase its position: the colonial relationship that existed between the Imperial Parliament in Westminster and the dominions.

Although the colonial structure provided for a measure of political independence for the dominions, the legal system remained substantially integrated and hierarchally organized. As noted by Hassard, and quoted above, there were “three great authorities which have power to enact… legislation [in Canada]: 1. The Imperial Parliament, 2. The Canadian Parliament, and 3. The Provincial Legislatures…. The first of these authorities has unlimited powers; while from it the others derive their entire jurisdiction” (Hassard 1900: 68). The unlimited authority of the Imperial Parliament had been confirmed in Re. Goodhue (1872), and the “British North America Act, 1867, has created authorities which are empowered to enact laws; and these laws affect the inhabitants of Canada. But they affect the inhabitants of Canada only in so far as such laws are not repugnant to any Imperial legislation which has the force of law in Canada” (Hassard 1900: 69).

The BNA Act was itself an Act of the Imperial Parliament, and Westminster reserved the right to legislate in all dominion affairs, although this was exercised primarily in regards to foreign affairs and defense. Furthermore, the apex of the Canadian judiciary remained the JCPC in the Westminster House of Lords. Dominion legislation that was incompatible or repugnant to Imperial legislation (being legislation passed by the Westminster Parliament that explicitly extended to the dominions and colonies) could be set aside on the grounds that it was ultra vires. The intent of the BNA Act was to establish a hierarchal relation between the provincial legislature, the Canadian Parliament, and the Imperial Parliament; the Imperial Parliament could legislate with regard to Canadian affairs, and the Canadian Parliament could disallow provincial legislation, and the result was a particularly Imperial form of federalism.

In Judicial Review of Legislation in Canada, B.L Strayer argues that statutory judicial review was not included in the BNA Act, either implicitly or explicitly, nor could it be found in the British common law system that Canada inherited. Instead, statutory review “is a product of
the British colonial system, ‘implicit in the royal instructions, charters, or Imperial statutes creating the colonial legislatures.’ Since these legislatures were bodies of limited power, the colonial charters establishing them typically included clauses prohibiting them from passing laws repugnant to Imperial statutes” (Strayer 1968: 3; Smith 1983: 116). Although there is no evidence that Canadian courts conducted judicial review of colonial legislation prior to 1867, Strayer finds that the judiciary was aware of its power to do so based largely on precedents established by other colonial courts (Smith, 1983: p.116).

In addition to the Imperial structure that allowed “judicial review on the grounds that colonial statutes repugnant to imperial legislation extending *ex proprio vigour* to the colony were *ultra vires* and void,” questions arose during the early to mid-19th century as to whether the common law of England provided an additional check on the powers of the colonial legislatures (Walters 2001: 120). This possibility came to a point of crisis in the Boothby affair, in which “Justice Benjamin Boothby of the South Australian Supreme Court held that a wide range of colonial statutes were void because of their repugnance to English law, in particular English constitutional principles” (Walters 2001: 122). Boothby was in turn condemned by the South Australian Legislative Council for adopting a doctrine of judicial supremacy (Walters 2001: 124) and the matter was taken up for consideration by the law officers of the Empire (Walters 2001: 125). Boothby’s assertion received some initial support from the law officers, who held that certain fundamental laws could serve as a check on the colonial legislatures: “the sorts of principles that might qualify as fundamental were... principles that were ‘equally applicable in the nature of things, to all Her Majesty’s Christian Subjects in every part of the British dominions’” including “the rule that the Crown is sovereign, rules prohibiting slavery and polygamy, the right to practice Christianity, the right not to be punished without trial, and the right of ‘aborigines’ not to be subjected to ‘uncontrolled destruction’” (Walters 2001: 125).

In response to what were seen as overly ambiguous guidelines, the Imperial government adopted in 1865 the Colonial Laws Validity Act, which confirmed that “colonial statutes repugnant to imperial statutes, orders, or regulations were void to the extent of the repugnance” and “which confirmed that this was the *only* ground of invalidity” (Walters 2001: 128): “No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of the Repugnancy to the Law of England, unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order or Regulation as aforesaid” (Walters 2001: 128). The CLVA would later be referred to by A.V. Dicey as the “charter of colonial legislative independence” (cited in Walters 2001: 131). The CLVA, then, closed off the common law of England as a basis for judicial review, but it maintained the doctrine of *ultra vires*.

The Imperial structure that persisted after 1867 allowed the judiciary to conceive of the BNA Act as a piece of primary legislation, and all Canadian and provincial statutes as secondary legislation enacted by a body with delegated powers. Accordingly, the BNA Act was considered to be simply another statute of the British Parliament. Even the first Prime Minister, John A. MacDonald, considered it possible that statutory judicial review might develop from the structure of the Imperial relationship: “Since [the BNA Act] would take the form of a British statute... British courts could supply an answer to the question, ‘Is it legal or not?’” (Smith, 1983: p.121). In this context “British courts” refers to the entire hierarchy of the British legal system as it related to the Dominion of Canada, namely provincially organized courts, federally organized courts, and the JCPC. It should be noted that this conceptualization was neither inevitable nor
explicitly outlined; rather it was constructed based on the different lines of authority, in which the JCPC was the highest court of appeal, in which the Imperial Parliament could legislate in affairs that concerned the dominions, in which the executive function was symbolically vested in a Governor General who represented the British monarch. That the conceptualization of the BNA Act as primary legislation super-ordinate to the secondary legislation of the Canadian legislatures was not inevitable or inherent is demonstrated by the ease with which the JCPC could re-conceptualize this relationship in the 1930s (Craig and Walters 2000: 230).

Starting in 1878, the newly created Supreme Court of Canada began to overturn legislation on the grounds that it was *ultra vires* in regards the Imperial BNA Act. The BNA Act was imbued with a constitution-like significance because the Imperial relationship allowed the judiciary to consider Canadian and provincial statutes as secondary legislation. As was discussed above in regards to Britain, the doctrine of *ultra vires* was a mechanism by which the judiciary could review administrative acts and secondary legislation in such a way as to reinforce Parliamentary sovereignty. Conceived on an Imperial scale it served the same function vis-à-vis the dominions; it reinforced the sovereignty of the Imperial Parliament, but in doing so provided grounds for local judiciary (who were entitled to decide cases upon the basis of an integrated Imperial jurisprudence) to engage in statutory judicial review of locally enacted statutes (Strayer, 1968). As the Imperial bonds loosened in the 20th century, the power of statutory review persisted, despite the increasing irrelevance of one of its initial theoretical foundations.

**Federalism**

Another key factor in the emergence of statutory judicial review in Canada was federalism. As recognized by many observers, there is a strong correlation between federalism and the existence of statutory judicial review, in that although there are numerous non-federal regimes with statutory review, there are comparably few federal regimes without it (Lijphart 1984: 195; Elazar 1987: 182-3). Nevertheless, Lijphart finds that there are instances in which federalism exists without any mechanism of statutory judicial review (1984: p.196). It is by no means inevitable that federal regimes will develop statutory review, but it is frequently used as a method of “maintaining the federal principle”: “Constitutional courts [with the power of judicial review]… are permanent institutions in many federal systems, serving as devices for maintaining both union and noncentralization (Elazar 1987: 183). Other methods of “maintaining the federal principle” include referendum, as seen in Switzerland, while other federal countries have courts that have not asserted a power of judicial review (Elazar 1987: 183). The association between federalism and judicial review, while empirically strong, is nevertheless not automatic. How it is constructed and asserted will vary in different countries, with potential results for the strength and form of review that is adopted.

In Canada, federalism was not originally conceived as necessitating statutory judicial review, and in fact federalism in Canada was organized in such a way that the Fathers of Confederation believed would remove any need for statutory review. This was believed to have been secured by two aspects: first, by what was believed to be a comprehensive delineation of jurisdictions that would not lead to dispute, and second, by situating the federal government in a superior position relative to the provinces. Although in 1864 the principal framer John A. Macdonald had recognized the possibility, and perhaps even desirability of statutory judicial review, when he defended the Act in the Canadian Parliament he had largely changed his mind.
By this point he had come to see it as undesirable, as “a flaw in constitutional arrangements… that [the BNA Act], happily, had been designed to avoid” (Smith, 1983: p.122). As has been noted by many scholars, Macdonald was greatly influenced in his conception of federalism by what he saw as the flaws in the American system, which was so poorly arranged that it had provoked jurisdictional disputes and civil war (Smith, 1983: p.122-123). One of the problems with American federalism, in the mind of Macdonald, was that it vested far too much power in the States; by contrast, he sought to construct a clearly hierarchal scheme of government, with the provinces at the base, the Canadian Parliament above them, and the Imperial Parliament at the apex. The key means by which the federal government was to secure control over the provinces and resolve disputes without recourse to statutory review was through the power of disallowance, which allowed Governor General acting on the advice of the federal cabinet to disallow provincial legislation.

It was as a result of problems with disallowance that the federal government acted upon the provision in the BNA Act giving them the authority to create a Supreme Court, albeit a court that would not be the court of last appeal. In Elazar’s terms, disallowance was intended to be the mechanism for “maintaining the federal principle.” Initially the problem with disallowance was that “the government was required daily to ‘interfere’ with provincial legislation considered ultra vires the provinces’ jurisdiction, and it was falling behind in the task. The result was that the statute books were filled with ‘an enormous mass of legislation’” that were of dubious legitimacy vis-à-vis the BNA Act (Smith, 1983: p.127). Disallowance required too lengthy a process of review within the justice department, one that could be transferred to the jurisdiction of a Supreme Court and thereby free the bureaucratic and political resources of the government. Initially, it was argued that a Supreme Court would not impair Parliamentary sovereignty, because although it would have the power to review legislation it was not believed to have a power to set aside legislation, at least not at the federal level; rather, it would serve as an advisor, “the conscience” of the federal government, and provide a “moral weight” to the government’s decisions to disallow legislation (Smith, 1983: p.128).

Although federalism in Canada did not lead inevitably to statutory review, federalism almost certainly leads inevitably to jurisdictional disputes requiring a formal mechanism of resolution. The abandonment of disallowance and its replacement with a Supreme Court that could enforce the hierarchal relations of imperialism was effectively an invitation for statutory review. Federalism therefore provided an institutional context for the development of statutory judicial review, with the goal of establishing the federal government as supreme vis-à-vis the provinces.

The court was designed to be an institute of centralization, one that would serve this political purpose under the cover of law, by strengthening the ability of the federal government to disallow provincial legislation. However, the Supreme Court quickly seized upon the opportunity of jurisdictional disputes that federalism provided and its conceptualization of its role as a British court enforcing British and Imperial statutes to claim for itself a power of statutory review. That its early decisions favoured the federal government is likely a reason that the Canadian Parliament did not intervene to correct what had largely been considered an avoidable and undesirable flaw in constitutional arrangements. However, the political compromises required to secure passage of the Supreme Court Act (Smith, 1983: p.123), as well as the dictates of imperialism ensured that the JCPC, instead of the federally appointed Supreme
Court, would remain the court of last appeal. The result of this would be a radical shift away from the centralizing intentions of the Fathers of Confederation in the direction of decentralization.

Using the doctrine of *ultra vires* and arguing that the BNA Act should be considered a primary British statute to which the Canadian and provincial statutes were subordinate, the Law Lords would block all attempts at centralization and would dismantle the Canadian ‘New Deal’ before ultimately changing course in the 1930s. From 1930 on, the BNA Act would be considered a constitutional document, and would be interpreted as a ‘living tree’ (*Edwards v. Attorney General for Canada* AC 124 at 136-137 [1930]). This would have little effect, however, on statutory judicial review as practiced in Canada. The precedents set by the JCPC were well established and employed by the Canadian judiciary, and the power of disallowance had effectively atrophied. The BNA Act had not included statutory judicial review, and there is certainly evidence to support the claim that it was unintended and believed to have been avoided by the Framers; nevertheless, it developed quickly as the structure of imperialism allowed for an odd marriage of Parliamentary sovereignty at the Imperial level with statutory review at the local level, and as the federal arrangement of Canada provided for jurisdictional disputes that were not being effectively resolved by the costly mechanism of disallowance. The Imperial structure provided the conceptual resources for the judiciary to define its role not as a subordinate branch of the Canadian state but as the arm of the Imperial state, while the federal structure and the problems of disallowance provided the institutional context in which they could develop a power of statutory review that had been thought to have been avoided.

**Minority Rights**

With the CLVA and the foreclosure of the English common law as a basis upon which statutes could be invalidated, the position of minorities in Canada was legally tenuous. The BNA Act, however, was not limited to the arrangement of the Imperial and federal structures in that it included some enumerated rights for linguistic groups and for public religious education for various denominations. Having claimed a power of statutory review based upon the BNA Act, it seems plausible that the judiciary would have used this power in relation to the rights enshrined within. These rights were very weakly enforced by the judiciary—as witnessed by the refusal to overturn the Manitoba Schools Act that removed public funding for Catholic education and removed French as an official language in the province—and any respect accorded to these rights was secured primarily through political means.

The judiciary was largely silent in regards to the rights guaranteed by the BNA Act, a fact that contributed to the decision of the Conservative government in 1960 to pass the Canadian Bill of Rights. This bill, which later would be influential in the UK during the process of drafting the Human Rights Act 1998, attempted to incorporate a sensitivity to rights into the legislative process by requiring the Justice Minister to declare in Parliament if an Act was not in compliance with the Bill of Rights.\(^\text{24}\)

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\(^{24}\) It should also be noted that there was a substantial international dimension to the justification for the Bill of Rights, as noted by Prime Minister Diefenbaker in his introduction to the Bill in the House of Commons: “This measure that I introduce is the first step on the part of Canada to carry out the acceptance either of the international declaration of human rights or of the principles that actuated those who produced that noble document” (Canada 1982: 1).
Nevertheless, the court quickly declined to use this potential power, and from the first case in constructed a narrow interpretation of the Bill. Instead of expanding statutory judicial review to include rights based reviews, the judiciary chose to limit their reviews primarily to matters of federalism. Ultimately it was the unwillingness of the courts to exercise their potential muscle of judicial review in regards to minority rights that led many Canadians to consider the possibility of ‘entrenching’ a bill of rights that would explicitly allow for strong statutory review. However, political considerations were critical in the push for and the implementation of the constitutional changes in 1982 that would formally establish the right of statutory review and that would explicitly expand this to include rights based reviews.

**Charter of Rights and Freedoms**

The 1982 Charter of Rights and Freedoms brought with it a vast expansion of the authority of judicial review, explicitly grounding statutory review in the constitutional text and expanding its subject matter to include numerous rights that had been excluded from the BNA Act; it is widely recognized by its detractors and supporters as having radically altered the constitutional relationship between the judiciary and the legislatures (Epp 1998: ; Morton and Knopff 2000: ; Roach 2001). It should be noted, however, that the Charter was considered to be a mechanism by which certain political objectives could be achieved. Specifically, it was conceived as a means by which Québécois separatism could be countered, and was widely perceived as the fulfillment of a promise made by Prime Minister Trudeau on the eve of the 1980 referendum on separation to reform the constitution. This was to be accomplished by creating a direct, rights-based relationship between the Canadian state and its citizens and thereby countering the centrifugal forces in Canadian society (Epp, 1998: Morton and Knopff, 2000), as well as by providing for greater security for the francophone minority in Canada.

Similarly, the notwithstanding clause, while quickly reframed as a coherent aspect of a Charter that combines strong judicial review with a tradition of Parliamentary sovereignty, was at the time widely considered to be an unfortunate political compromise required to ensure adequate provincial support. Concern with rights was certainly genuine, but it is impossible to extricate the Charter from the broader political concerns of a disintegrating Canadian federalism.

**NEW ZEALAND**

The history of judicial review in New Zealand is the least complex of the three cases; as noted by Lijphart, New Zealand had long been a virtually perfect example of majoritarian Westminster democracy, with unquestioned Parliamentary sovereignty, without a written constitution, and without the international engagements with integrating supra-national organizations (such as the EC) that were so important in the UK. Unlike Canada, New Zealand has retained the JCPC as the court of last resort, although recourse to this court has decreased and it is likely that it will be abolished in coming years (Palmer and Palmer 2004). However, closer analysis finds that there are substantial grounds for ‘positive’ comparisons of New Zealand.

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25 The pre-Charter case of *Calder v. The Attorney-General of British Columbia* (1973) should not be neglected in this context. This decision recognized that there is a common law right to aboriginal title, and was a major decision that led the federal government to engage in a sweeping attempt to settle all unresolved land claims.
Zealand with both Canada and the United Kingdom.\textsuperscript{26} Like Canada, New Zealand has a history of federalism, although brief and one that took a markedly different path, and it also was situated in a similar structural relationship with the Imperial Parliament. Like the UK, the New Zealand judiciary had a limited conception of judicial review, one that was entirely focused on supervisory review based largely on the doctrine of \textit{ultra vires} until different foundations such as the common law and natural justice were asserted in the 1960s. New Zealand therefore constitutes an important case for comparison as it incorporates at different points different features of the other two cases: early federalism did not result in statutory review, nor, it seems, did the Imperial relationship, and the ultimate form of review that was established was influenced and restricted by the concept of Parliamentary sovereignty to an even greater degree than was the case in the UK.

\textbf{Judicial Review?}

It is debatable whether or not this constitutes judicial review: it is certainly not ‘strong’ review as considered in this paper, and it is unclear whether it should even be considered ‘weak’ statutory review. The BORA outlines a set of mostly ‘negative’ rights (Hirschl 2000), which serve as the basis for judicial interpretation and review in two ways: 1) judicial ‘preview’ in which the Attorney General must declare whether proposed legislation is incompatible with the BORA. It is important to recognize that responsibility is vested in the Attorney-General and not the Justice Minister; although the Attorney General generally sits in Parliament and attends Cabinet, she is less bound by the doctrine of cabinet solidarity than the Justice Minister, and correspondingly, has denounced legislation as being contrary to the BORA with some frequency; 2) requires that the judiciary interpret legislation so as to be compatible with the BORA; where they could not reasonably interpret legislation so as to be compatible, they were to remain silent, without the power to declare a law incompatible nor to set it aside. It is this aspect that has provoked some debate as to whether the BORA should be considered as having established a form of statutory review at all. The Treaty of Waitangi, the basis for New Zealand-Maori relations, was originally included with the enumerated rights, but this was dropped prior to final reading of the bill.

On one side of the debate as to whether it constituted statutory review at the outset are individuals such as Sir Ivor Richardson of the New Zealand Court of Appeal, who asserted that “future historians may recognize the Bill of Rights as one of the most important statutes ever enacted in New Zealand” (cited in Hirschl 2000: p.1067) and Ran Hirschl, who argues that the BORA was intended to “empower New Zealand’s judiciary by transferring policy-making authority from parliament to the Court of Appeal,” a transfer which ultimately has resulted in the demise of the “last Westminster system” (Hirschl 2000: p.1066). On the other side are observers such as former Prime Minister Geoffrey Palmer, who has noted that the BORA, which he advocated and his government enacted, does not by itself provide for statutory review, of either the strong or the weak variety (Palmer and Palmer, 2004). Palmer, however, has also noted that the political dynamics of the 1990 BORA have encouraged the judiciary to assert a right of weak

\footnote{\textsuperscript{26} ‘Positive’ in the sense that New Zealand shares many features in common with the other countries beyond the common British inheritance of a Westminster system, the common-law, similar experiences post-1945, etc.}
review where none was initially provided, and that this assertion was later codified and included in the 2001 amendments to BORA.

Although it is unclear whether the 1990 Act provided for statutory judicial review, the 2000 decision by the Court of Appeal in Moonen v Film & Literature Board of Review (2 NZLR 9 [2000]) and the 2001 amendments to BORA have certainly established a limited and weak form of statutory review in addition to the relatively strong provisions and political enforcement of ‘judicial preview’ that were established in the original Act.

**Early Federalism and Empire**

In order to understand the emergence of statutory review in New Zealand, we must explain both its emergence in 1990 and its particular form that combined very weak (if present at all) statutory review with a comparatively strong form of judicial ‘preview’; furthermore, as in the other cases, the long run political dynamics are of crucial importance to understanding how the very limited form at the outset has expanded and potentially could continue to expand.

The Constitution Act 1852 provided New Zealand with a similar federal structure and situated the dominion in a similar position relative to the Imperial Parliament as the BNA Act 1867 would provide for Canada. Despite the sections in the Constitution Act securing the general government as superior to the provinces, “in practice the General Assembly, especially in the fifties and early sixties, left a wide field of legislation exclusively to the Provincial Councils, and their powers, relatively to the size of the country, were quite comparable to those exercised by the Canadian provinces under the British North America Act” (Morrell 1932: 56). On the basis of the Imperial legal system, in which the New Zealand courts—similarly to the Canadian courts—considered themselves to be British courts interpreting British and Imperial law, the judiciary reviewed and struck down provincial legislation (conceived as secondary legislation) on the grounds that it was *ultra vires* the Imperial statute. In the case of *Sinclair v. Bagge* (1 NZCA 50, [1867]) the Court of Appeal “definitely established the principle that *ultra vires* clauses of provincial law were illegal notwithstanding the confirmation of the law by the Governor (Morrell 1932: 55).

In the brief period of New Zealand federalism, therefore, the judiciary quickly constructed a power of strong statutory review using the doctrine of *ultra vires* to affirm the sovereignty of the Imperial Parliament. It should be noted that in response to the decision in *Sinclair v. Bagge*, the General Assembly passed the Provincial Acts Validation Act, which legalized more than 70 Provincial Ordinances (Morrell, 1932: p.55). This is important to note because it speaks to the different dynamic of federalism in New Zealand compared with Canada; in Canada the country was initially divided into one province that desired a unitary government, another that strongly desired a decentralized federation, and two that were internally divided between those who desired no union at all and those who accepted some form of federal arrangement. Despite the centralizing objectives of the dominant faction within the Parliament and the agenda-setters in the constitutional conferences, the support constituencies for jealously decentralizing provincial governments and decentralizing political coalitions were too numerous and well organized to be able to effectively accomplish the centralizing aims. The strength of the strong provincial autonomy coalition was such that the BNA Act ultimately included fewer provisions for centralization than the Constitution Act 1852 in New Zealand. As noted by Morrell, federalism in New Zealand was secured by convenience and not by law or politics: “so
long as the people of New Zealand were, so to speak, federally minded, the constitution could be worked as a federal constitution. But the only safeguards of the federal element were opinion and convenience: there was no safeguard in law” (Morrell, 1932: p.56).

During the Maori War, the New Zealand settlers developed a new sense of nationhood that would ultimately turn opinion against the provincial governments that had impeded effective fighting of the war; furthermore, the provinces had increasing financial difficulties, with many arguing that they had already lost their financial independence (Morrell, 1932: p.142). The result of this formative period was an increasing disillusionment and abandonment of a federal system, and in 1868 the General Assembly requested and received from the Imperial Parliament amendments to the Constitution Act 1852 that gave the Assembly the right of “abolishing any province heretofore or hereafter to be established in New Zealand” (Morrell, 1932: p.56).

By the 1870s the provinces had been abolished and New Zealand was a unitary state. With the abolishment of federalism, an important context for statutory judicial review was removed; furthermore, without an institutional apparatus to block constitutional reforms and due to the vagueness of the provisions in the Constitution Act 1852, the General Assembly gained the power to enact substantial changes to the constitutional order without recourse to amending the document itself. Instead, a number of statutory provisions and legal conventions developed that would be the central features of New Zealand’s unwritten constitution. Although statutory review was occasionally exercised with regard to Imperial relations, this ceased following the Statute of Westminster 1931; the power of statutory review that had been exercised early by the New Zealand judiciary fell into abeyance.

**Supervisory Review, BORA, and Judges in the Constitutional Order**

The history of supervisory judicial review in New Zealand largely paralleled that of the UK, with a retrenchment in the 19th and early 20th century followed by an increased willingness on the part of the judiciary to engage in supervisory review. The basis upon which the New Zealand judiciary began to re-assert its power of supervisory review was through the Judicature Amendment Act of 1972, which gave wide powers of supervisory review to the decisions of any body that has been given a statutory power under an Act of Parliament or rules of incorporation “(a) make any regulation, rule, bylaw, or order, or to give any notice or direction having force as subordinate legislation; or (b) To exercise a statutory power of decision; or (c) To require any person to do or refrain from doing any act or thing that, but for such requirement, he would not be required by law to do or refrain from doing; or (d) To do any act or thing that would, but for such power or right, be a breach of the legal rights of any person; or (e) To make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person” (Judicature Amendment Act 1972: Part 1, Section 3).

By the 1980s supervisory review had extended well beyond the Parliamentary sovereignty affirming doctrine of *ultra vires* to include the common law, natural justice, as well as a growing concern with rights based jurisprudence (Palmer and Palmer, 2004: p.291). It should be noted that in adopting rules of proportionality in supervisory review, the New Zealand judiciary was explicitly drawing upon developments in English law; there is an international, or transnational, diffusion of constitutional ideas, especially within the Commonwealth, that the judiciary was drawing upon in their construction of new foundations and tools of supervisory review.
Throughout this period the judiciary re-conceptualized their constitutional role vis-à-vis the legislature and the executive, similar to what occurred in the UK; they expanded the grounds on which they could review administrative actions, and shifted the foundations away from *ultra vires*, with its implication of a subordinate relationship to the legislature, to notions of common law and natural justice that allow for a much more independent policy making stance. It is plausible that this re-conceptualization culminated in the very active and expansive reading that the judiciary has given to the 1990 BORA. As noted by Palmer and Palmer, “the manner in which the courts have gone about interpreting it in hundreds of cases indicates that it has already become an important plank in our constitutional jurisprudence” (Palmer and Palmer, 2004: p.324; emphasis added). The original drafts for a Bill of Rights put forward by Palmer as a Labour Minister and as Prime Minister included an entrenchment of the document as well as a mechanism of strong statutory review in which the judiciary could set aside legislation that was contrary to this Bill. Political compromises, however, required that the stronger elements proposed be dropped from the final document, and a very weak form of statutory review, if it could even be called such, was the final outcome of the legislative process.

Nevertheless, the judiciary quickly began to give an expansive reading of the BORA, culminating in the 2000 case *Moonen v Film & Literature Board of Review* in which the Court of Appeal asserted that “it has the power, and occasionally the duty, to indicate that, although a specific provision in a statute must be enforced according to its proper meaning, if that provision constitutes a limitation on a right or freedom in the Bill of Rights Act the court may declare that it cannot be demonstrably justified in a free and democratic society. It will do that by making a declaration on inconsistency or incompatibility” (Palmer and Palmer, 2004: p.318). This is a power that was not originally granted to the judiciary, one that it claimed for itself and for which it explicitly drew upon the UK Human Rights Act 1998. Only after this assertion of judicial power did the New Zealand Parliament amend the BORA to expressly recognize the right of the judiciary to do this.

What needs to be stressed is that this expansion, which effectively guarantees that the BORA includes a power of statutory review, however weak, was the result of judicial construction and assertion. It is certainly plausible then that the expansion of statutory review was informed by the decades long re-conceptualization by the judiciary of their constitutional role vis-à-vis the other branches of government. In fact, Palmer is of the opinion and hope that the judiciary will be able to expand upon this power so as to achieve that which he was unable to achieve through the political process, namely a ‘strong’ form of statutory review. Having discussed the role of the judiciary in expanding the power of statutory review in the 2000 *Moonen v. Film & Literature Board*, Palmer goes on to state “we may at last come to the position where the courts will get the power to strike down statutes incompatible with the Bill of Rights Act. That was the original intention of the policy when the measure was introduced in 1986” (Palmer and Palmer, 2004: p.318).

Finally, we must consider the factors that were directly relevant to the enactment of the BORA, both those that contributed to its enactment and the obstacles that impeded the government from achieving the strong statutory review that was desired. The main concerns with

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27 The Preamble to the BORA draws heavily on the 1982 Canadian Charter, most notably in regards to the right of the government to limit rights based on exigencies that must be demonstrably justified as being necessary and consistent with a free and democratic society.
strong statutory review were that it would undermine Parliamentary sovereignty and thereby limit the ability of the government to engage in redistributive and command economy measures (Palmer and Palmer, 2004: p.320-321). New Zealand had been the most centralized and controlled economy, with the most developed welfare provisions, in the Western World (Hirschl 2004: p.84). Another source of opposition to the BORA as originally drafted came from the Maori, who believed that the incorporation of the Treaty of Waitangi in the BORA would limit their ability to press for future claims. Both of these concerns would be met in the political compromises required to secure passage, by substantially weakening the statutory review in which the judiciary could engage, by the Maori victory in the Lands case (New Zealand Maori Council v. Attorney General 1 NZLR 641 [1987]), which ensured that Maori claims would find support in the judiciary, and by the ultimate removal of the Treaty of Waitangi from the BORA.

The main arguments in its favour were the increased pluralism of New Zealand society, the “high-handed and repressive” tactics of the Muldoon government, and an increased unease amongst the middle class concerning the power of government. The international dimension was relevant here as well: “it is important to realize that New Zealand’s international obligations, solemnly undertaken, require it to observe in its domestic law certain fundamental guarantees and protections” (Palmer and Palmer, 2004: p.323). Palmer even went so far as to state, in regards to the exclusion of property rights from the BORA, that unless better attention was paid “to the taking of property, international law issues could arise that could have serious consequences. Furthermore, the effects on the investment climate is not likely to be favourable” (cited in Hirschl, 2004: p.88).

As noted by Hirschl, the BORA was advocated by the same political coalitions that had brought about the deregularization and liberalization of the controlled New Zealand economy in the 1980s (Hirschl, 2004: p.87). Hirschl places the BORA in a larger “nexus of laws that restricted the government’s ability to intervene in the economy and in the private sphere more generally,” and within a larger context of the breakdown of the overwhelmingly dominant cultural and economic relation with the UK as Britain cut back its favoured position for Commonwealth states and integrated with Europe (Hirschl, 2004: p.84). The resulting increase in immigration, the loss of white hegemony as the Maori increased their activism and made greater demands for both autonomy and greater inclusion, and the opening up of domestic markets to foreign influences brought substantial changes to the New Zealand political, economic, and cultural order. Hirschl argues that judicial review was a mechanism by which the elite could take advantage of the break-down of the welfare state/white hegemony consensus to consolidate their position and interests. By transferring power to the judiciary, the scope of Parliamentary action was thus curtailed, with the purpose of limiting the possibility for redistributive programmes (Hirschl, 2004).

Ultimately, it was concerns about the loss of Parliamentary sovereignty and the negative effects of this on redistributive policies that determined the weak outcome of the legislative process; the weak form of statutory review was the result of opposition from the left-wing of the Labour Party and Maori (Hirschl, 2004: p.88). It should be noted that the subsequent expansion of statutory review was a product of judicial interpretation and a generous construction of the powers allotted to them by the bill (Palmer and Palmer, 2004: p.320-323).
Conclusion

The early foreclosure of most common law review in Canada, through the CLVA, substantially limited the possibilities of minorities within or under the control of the Canadian state to achieve redress for the injustices imposed upon them. Nevertheless, there were other grounds by which these subordinated groups could seek judicial review of statutes (treaties with the Crown, the Royal Proclamation). The development of judicial review of primary legislation within an Imperial structure that insulated the law lords from the dominant coalitions in Canada (in contrast to the US experience) meant that this was a potential mechanism for these groups to influence policy. The results of this were: 1) a change in the priorities of organized minorities, as they responded to the incentives to seek judicial redress of their claims; and 2) the development of a full control regime (Lustick 1979, 1980: ; see also McGarry and O'Leary 1993: ; Noel 1993) over First Nations peoples in the context of an effort to appeal to the JCPC. This control regime would only be deconstructed after the removal of the JCPC as the court of last appeal.

During the 1920s, the Squamish band of British Columbia, under the leadership of Chief Joe Capilano and Andrew Paull and with the assistance and advice of controversial lawyer and cleric Rev. Arthur O'Meara, sought to use the courts as a mechanism for forcing the federal and provincial governments to recognize native title to much of the territory of British Columbia, and thereby force them to engage in treaty negotiations. The Squamish leadership organized the Allied Tribes of British Columbia in pursuit of this objective. Most of the land in British Columbia had never been ceded by treaty or by purchase; rather, the B.C government had unilaterally begun a process of establishing and securing the native peoples on reserves as the pace of white settlement increased. Much of this occurred prior to B.C. entrance into confederation in 1871, but the federal government continued this earlier policy. The British Columbia natives were consequently well-suited to press their land claims in courts, as the colonial, provincial, and federal governments had acted in clear violation of the 1763 Royal Proclamation. In 1906 the Squamish had presented a petition to King Edward VII, and in the 1920s they sought to continue this strategy of bypassing the provincial and federal governments by appealing directly to the Imperial authorities.

Rev. O’Meara “believed that going to the Judicial Committee of the Privy Council [JCPC]” was the best way to force the Canadian governments to recognize their title (Patterson 1976: 66). The courts in Canada had been hesitant in asserting any power of judicial review, and the BNA Act quite clearly gave exclusive jurisdiction to the federal government, thereby limiting the grounds on which the B.C. natives could appeal their case. Canada remained, however, a dominion of the British Empire, and the JCPC remained the court of last appeal. The strategy was deemed threatening by the Canadian government due to a 1921 ruling by the JCPC on a case arising from Nigeria, in which Viscount Haldane affirmed that aboriginal title was a pre-existing right “that must be presumed to have continued unless the contrary is established by the context of the circumstances” (Tennant, 1990: 101, citing Viscount Haldane in Tijani v. The Secretary, Southern Provinces (1921)). As British Columbia, along with the Maritimes, Québec, and much

28 It should be noted, however, that the Allied Tribes consisted almost exclusively of Andrew Paull and the (Haida) Rev. Peter Kelly: “tribal groups as such do not appear to have been important elements within the Allied Tribes, nor do the bands and communities seem to have played any active part. Undoubtedly, most Indians endorsed the goals of the organization, but for practical purposes Kelly, Paull, and O’Meara were the organization” (Tennant 1990: 102-3).
of the North West Territories had not been surrendered through treaty, the danger of successful land claims was very real.

Department officials were greatly concerned about the potential of the Squamish band to use the JCPC as a point of access to the policymaking apparatus of the Dominion state, and thereby force a favourable recognition of native title to land; they sought originally to impede the progress of this movement, to change its focus, and would later move to more coercive tactics. The Squamish band and the Allied Tribes were heavily dependent upon the federal government for their capacity to organize: in 1922 Paull proposed that “government money be granted to the Allied Tribes to make it possible for them to pursue their investigations of the British Columbia land claims,” a request that was considered to be unacceptable to the Department of Indian Affairs (Patterson 1976: 68-69). When the Squamish and the Allied Tribes were able to secure funding for their project from the Euro-Canadian organization ‘The Friends of the Indian,’ the federal government convened a special Committee of the Senate and House of Commons to delay any possible move by the Squamish to the JCPC. When the recommendations of the committee did not placate native demands, the government passed legislation that “made it illegal to raise money to continue the land claim” (Patterson 1976: 70). From 1927 onwards, it was illegal for natives to attempt to organize in pursuit of land claims and Euro-Canadians could be fined for contributing money to such a cause.29 Significantly, the restrictions on political organizing and using the courts to press land claims were only removed three years after the recommendations of the SJC, and two years after the Judicial Committee of the Privy Council ceased to be the highest appeal court in Canada; the institutional change in Canada’s Dominion status meant that Canadian judges, who had shown much less willingness to engage in judicial review, would now decide on any case involving native land claims (Tennant, 1990: 122).

There exist multiple points of access for interested groups to influence policymaking, and the institution of judicial review has become an increasingly important mechanism by which these groups can seek to achieve change. This openness of the state should be considered a quasi-parameter (Greif and Laitin, 2004); it can be loosened, tightened, and in some cases closed altogether. Some of the channels for accessing policymaking are more difficult to change than others because of the constraints of the institutional framework of the state polity; nevertheless, even the more entrenched channels of access can be ‘closed,’ through the use of ideologies of tutelage, the legal construction of membership, or through the imposition of control regimes that inhibit the controlled peoples from taking advantage of those openings that do exist. Well-positioned actors have used all of these mechanisms to restrict access by indigenous and minority populations and organizations to policymaking. The ‘openness’ of the state has been a parameter of the institutional framework that has greatly concerned the policymakers of ‘indigenous policy’; rarely, however, has it been considered so fixed a parameter that it has not been subject to attempts by these policymakers to reposition the parameter to suit their objectives.

29 The details of the control regime imposed upon the First Nations peoples of Canada— elements of which applied to “every person,” whether they were of Indian status or not, and which stipulated that without the minister’s approval no person “could now request or receive from any registered Indian any fee for legal or other services or any money for postage, travel, advertising, hall rental, refreshments, research expenses, legal fees or court costs” (Tennant, 1990: 112)—are far too extensive to give adequate coverage in this paper. As noted by Tennant, “[t]he amendment quite simply made it impossible for any organization to exist if pursuing the land claim was one of its objectives” (Tennant 1990: 112).
Ultimately, my interest is in how access to the policymaking apparatuses of the state—through judicial review, amongst other means—have been historically constructed. This access has in some instances been a boon for oppressed minorities, but it is crucial to recognize that as an avenue of access it has been restricted when it was deemed as threatening to dominant coalitions.

The narratives presented here suggest that important variations in the mobilization patterns of indigenous peoples and minority groups, as well as the forms of exclusion and integration practiced by the state in relation to these populations, will be structured in part as a result of the ‘openness’ of the state enabled by judicial review. This relationship, however, may be the inverse of that which is often presumed to be the case. The relatively weak system of control imposed upon the Māori (relative to that imposed upon other controlled indigenous peoples in Canada, the United States, South Africa, Australia, etc.) in New Zealand is in part attributable to the 1877 decision by Chief Justice Prendergast in *Wi Parata v. Bishop of Wellington*, which rejected the Treaty of Waitangi as a justiciable fundamental—constitutional—law that would be capable of invalidating colonial legislation. By declaring, contrary to earlier treaties and the stated positions of the colonial secretary, that “Māori people were not capable as a sovereign nation to enter into a treaty, and because there is no statute in New Zealand law to give effect to the Treaty, the Treaty was a nullity” (*Wi Parata v. Bishop of Wellington* 2 NZLR 72), the Judiciary of New Zealand declared their unwillingness to recognize Māori-Crown treaties as providing a basis for the justiciable protection of Māori rights. The Māoris during the late 19th and early 20th century were to use “some of the money raised by extralegal taxation to test in court whether the land laws passed by Parliament were in conflict with the Treaty of Waitangi… [b]ut increasingly they found that the only practical course was to shift their goals until they found something that Parliament would accept” (Williams 1969: 66). The long-run result of this decision, which the New Zealand Courts would re-assert contrary to JCPC decisions in the early 20th century, was a change in the mobilization of strategies of Māori

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30 In 1839 the colonial secretary in London, Lord Normanby, wrote to the British officer sent to extend British sovereignty, Captain Hobson, that the Parliament recognized that commercial exploitation of the islands would result in a “calamity to a numerous and inoffensive people whose title to the soil and to sovereignty of New Zealand is indisputable” (Armitage 1995: 139). Lord Normanby continued: “The Queen… disclaims for herself and her subjects every pretension to seize on the Islands of New Zealand unless the free consent of the native, expressed according to their established usages, shall first be obtained” (Armitage 1995: 140). That the Treaty was still considered to be an operative document by the Imperial officers can be seen in the debate in the British House of Commons when the Member for Blackpool, Mr. Ashley, raised the question of the Māori Land Settlement Act of 1905, and “ask[ed] whether, in view of the guarantees of the Treaty of Waitangi, it ought to be disallowed. Winston Churchill replied that the act had been carefully scrutinized and appeared to involve no infraction of the Treaty of Waitangi, it ought to be disallowed. Winston Churchill replied that the fact had been carefully scrutinized and appeared to involve no infraction of the Treaty of Waitangi, and that the act had gone through the New Zealand Parliament without opposition from the Maori Members” (Williams 1969: 135).

31 See the decisions in *Nireaha Tamaki v Baker* (1901) NZPCC 371 and *Wallis v Attorney-General* (1903) AC 173. The former decision “considered the 1841 Ordinance declaring the title of the Crown subject to ‘the rightful and necessary occupation of (the Maori) a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi.’ Other instructions from the Colonial Office and Imperial Acts of the British Government, including the New Zealand Constitution Act 1852, were considered to acknowledge the Maori right to hold land and administer their own affairs in accordance with custom. In the Privy Council's view *Wi Parata* ‘went too far and it was ‘rather late in the day’ not to take cognizance of aboriginal and customary rights’ (*"Report of the Waitangi Tribunal on the Orakei Claim (WAI-9)" 1987: Section 4.6). The latter decision offered a strong criticism of the New Zealand Court of Appeal, prompting a “formal Protest of Bench and Bar (1903) (1840-1938) NZPCC 370, implying that the right of appeal to the Privy Council should be done away with” from the New Zealand Courts (*"Report of the Waitangi Tribunal on the Orakei Claim (WAI-9)" 1987: Section 4.6). As the
leaders, who started to abandon the strategy of using the courts or appealing directly to Britain, and an increased acceptance of the right of the New Zealand Parliament to legislate in matters of Māori land, provided that a more protective policy could be achieved (Williams 1969).

A few conclusions as to the historical development of judicial review can here be offered: The JCPC and Supreme Court invocation of judicial review in Canada was successful because 1) the nature of the political coalitions during the crucial periods of consolidation—the political parties had both national and provincial wings and would be internally split by the decentralizing decisions; 2) because of the CLVA and the clear continuation of this after the BNA Act, the common law of England would not be the basis for the use of the repugnancy doctrine in invalidating legislations. The supremacy of the legislatures was therefore maintained. In this way the structures of federalism and empire facilitated a limited but sustained space for judges to engage in judicial review, by ensuring that their power would be exercised largely within issue areas that would likely split the dominant coalitions between their provincial and federal wings.

By contrast, the near unanimous protest that followed the early invalidation of legislation in New Zealand helped to constrain the judiciary at an early stage of its development. The abandonment of federalism meant that the opportunities for review that would not be counter-majoritarian (in that they would not split the dominant coalitions evenly) were accordingly limited. The Imperial structure therefore provided an early opportunity for New Zealand’s judiciary, which they briefly and rather clumsily exercised during the federal period. The usage, however, was entirely opposite that which the American literature highlights about Chief Justice Marshall (see Graber 1993; 1998). It did not assert the power while avoiding aggravating the dominant coalition, but rather it asserted the power while aggravating. The subsequent rejection of its decisions was not surprising and greatly undermined the willingness of the judiciary to engage in review, lest it compromise its institutional capacity. As a result, supervisory review and the consequent development of concepts amongst the judiciary of their role in the constitutional order were more important in the eventual establishment of judicial review. When they used BORA to assert a greater review power than had been given, they were able to find a more receptive political coalition.

In the case of both Canada and New Zealand, federalism provided a very important context for the development of statutory review, although this was framed in a manner that the Imperial structure allowed to be consistent with Parliamentary supremacy. The strong correlation between federalism and statutory review is not surprising, but the particular methods by which it was constructed are intriguing; if these countries had been Westminster democracies but no
longer in an Imperial system, would statutory review have developed? The lacklustre record of the Canadian judiciary in enforcing constitutionally entrenched rights after the Statute of Westminster and the ending of appeals to the JCPC shows that there was little effort to expand statutory review from the focus on federalism that had been established in the formative years. This could imply that statutory judicial review might not have developed had the power of disallowance been more effectively utilized, although it also underscores the fact that federalism provides a much stronger context for statutory review than do rights, even if these are entrenched. Likewise, provincial and federal governments have an enormous pool or resources and legal leverage to draw upon in pursuing legal action, resources that developed comparatively late for those concerned with protecting minority and civic rights.

Supervisory review was most important in the UK, which was the apex of the Empire and thus not subordinate to the decisions of other legislatures. It would likely have become so had attempts to constitutionally entrench Imperial Federalism been successful. Through supervisory review, judges became more assertive and began to develop a particular conception of their role in the constitutional order. They were advocates of entry in Europe and the development of judicial review. What is evident in all of these cases is the crucial role played by the judiciary in the long-term construction of statutory and supervisory review. Their attitude in regards to the latter also likely shaped their potential attitudes towards the former, making the judicial construction and support of statutory review more likely where their attitudes towards supervisory review indicate a conception of their constitutional role as involving a powerful check on both the executive and judiciary. As noted by Hirschl, “judicial power does not fall from the sky; it is politically constructed” (Hirschl, 2004: p.49); likewise, the conceptions of judges as to their role in the constitutional order is in part the result of the institutional space that they inhabit, an institutional space that has been historically constructed.

What patterns emerge from the narratives presented? Statutory judicial review is a flexible institutional mechanism that can be used to resolve different political and institutional problems. In Canada it was originally developed as a means to strengthen or replace the bureaucratically and politically problematic mechanism of disallowance; as such it was intended, insofar as it was intended at all, to be an instrument of centralization. Political compromises and the structure of imperialism, however, diverted the intended course of Canadian federalism by allowing the JCPC to re-construct it along a different orientation through the process of statutory review (Eaton 1958). In New Zealand it appears to have been constructed at least in part in order to aid an elite in deconstructing the welfare state and in securing their positions (Hirschl, 2004). Support for statutory review as a mechanism by which an elite can consolidate power has also been provided in the context of new democracies in Asia (Ginsburg 2003). In the UK, judicial review has been incorporated as part of a broader movement towards international integration in the EU.

For the most part, this is not a punctuated equilibrium path; although there are critical junctures in which institutions are radically restructured, bringing about a new equilibrium within the system, what emerges from these narratives is the importance of long-run processes in which judicial review is constructed, reconstructed, advances, and recedes. An appreciation for the long-run dynamics involved in its construction is crucial to tracing the development of judicial review as well as assessing its likely importance within each polity. As is noted by
Hadfield, at some point theory must give way to reality; the political dynamics of processes such as devolution (in the UK case) are likely to expand the position of judicial review and strengthen the position of the judiciary despite the explicit attempts to avoid this by the British government. This is likewise the case for the New Zealand BORA, which has been given an expansive reading to the Bill and constructed an increasingly strong form of statutory review. The long-term effects of the three crucial junctures discussed in this paper have not yet unfolded, but it should be clear from the discussed waxing and waning of judicial review that these will be effected by diffuse, complex, and interacting political dynamics.

The consequences of judicial review are varied; it is a mechanism that has been used for purposes that include centralization, decentralization, supervision of the welfare state, the dismemberment of the welfare state, etc. As argued by Sunkin (1994), Richardson (2004), and Sossin (2004), increased judicial review can also result in a greater sensitivity to the threat of review within the bureaucracy with the unintended result that bureaucratic decision-making is tailored so as to meet the rigours of review; the objective of the bureaucracy in this is not to substantively change the process, but to ensure that it matches the expectations of the judiciary and is thus removed from its supervision. The net effect of this is a loss of transparency.

Because the particular functioning and consequences of judicial review is dependent upon the political and social context, it is unlikely that it is advocated by the same coalitions for the same purpose in each case; rather, its wide dissemination is the result of its ability to reshape or secure a diverse set of power relations, whatever these entail. It is therefore likely to be a tool of elite securing their position during a period of transition (Ginsburg 2003; Hirschl 2004), but it can also be the result of the strengthened position of minority groups who threaten the stability of the existing regime, or of the efforts of the judiciary to expand its own institutional power.

A tentative argument suggested by the narratives is that the form of statutory review adopted will be stronger if it is the result of endogenous stresses that are able to effectively subsume opposition by creating a new domestic equilibrium for resolving disputes. In the Canadian case, strong statutory review was successfully established because it 1) fit with the legal structure of the Empire and popular conceptions of Imperial federalism, and 2) was originally seen as a mechanism of centralization but was later transformed into a mechanism of decentralization. The potential of statutory review to serve either centralizing or decentralizing agendas was a key component in its broad acceptance. Where the pressures are exogenous, and where these do not provide for an acceptable equilibrium for the dominant political forces, a much weaker form is likely to be instituted. By the 1990s, imperialism in New Zealand no longer existed and Parliamentary sovereignty meant the sovereignty of the New Zealand Parliament; there was therefore no means by which Parliamentary sovereignty and strong statutory review could be easily joined. Likewise, there was much less endogenous stress such as conflict between different orders of government or the threat of minority separation, and so a proposal of strong statutory review was much less suited for uniting the disparate political factions. As a result, the form of statutory review in New Zealand was much weaker than that which developed in Canada.

As mentioned in the introduction, this research stems from a larger concern with the mechanisms by which minority groups and indigenous peoples have been incorporated and excluded by different states. As judicial review of statutory legislation involves a particularly powerful, and increasingly practiced, mechanism for non-majoritarian and non-electoral
influence over the policymaking apparatus, it has often been a key avenue by which minority groups and indigenous peoples have sought to protect or ensure recognition of their rights. Understanding the genesis of an institution, however, is only the first step. What must follow is an exploration of how the institution, in its various guises and historical moments, has shaped political behaviour and thereby influenced the lives of peoples. As suggested by this conclusion, the next step will be to understand the different means by which access to the courts—the *sine qua non* of using judicial review to effect the policymaking process—has been restricted or facilitated for indigenous peoples and minority groups in the different states under consideration.
Bibliography


