Executive Dominance and the British Constitution.

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Thesis Summary

This thesis examines executive dominance within the British constitution. The analysis within this thesis not only explores and defines the concept of executive dominance but also further illustrates the existence of excessive executive dominance. The analysis within this thesis enables the thesis to introduce two novel concepts of executive dominance. The first is natural dominance, which the thesis demonstrates is both a necessary and acceptable level of executive dominance. The second is excessive executive dominance; this is a level of executive dominance that is not necessary for the constitution to function properly. Instead, this dominance hinders the efficient functioning of the British constitution. In differentiating between the two novel concepts, this analysis explores various factors that exist within the British constitution that contribute to executive dominance. To demonstrate the presence of excessive executive dominance within the constitution, the thesis breaks the definition down to create a two-step test. The satisfaction of both steps illustrates the presence of excessive executive dominance.

The thesis applies this two-step test to illustrate the presence of excessive executive dominance and evidence the consequences of the concept within the British constitution. Namely, the undermining of constitutional principles, the changing of constitutional facts and the modifying of parliamentary sovereignty. This application of the test offers an alternative explanation to judicial treatment via case law analysis while also highlighting the presence of excessive executive dominance in the Brexit process and the UK's approach to the Covid-19 pandemic.

This thesis contributes to the existing literature on executive dominance by introducing two novel concepts, a legal yardstick for determining the presence of excessive executive dominance within the British constitution, two case studies that evidence the concept's existence.

Key words: Executive dominance, parliamentary sovereignty, British constitution, constitutional principles, Brexit, Covid-19.

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Contents

Chapter 1: Introduction

1.1 Background

The British constitution is unlike the great majority of constitutions around the world, as it is uncodified. In most countries there exists a written constitutional document, with that constitutional document defining the state organs, their functions, and their limits. The uncodified constitution of the UK is instead set across a range of sources both legal and non-legal, written, and unwritten. They include Acts of Parliament, case law and constitutional conventions. Just because the UK does not have a written, codified constitutional document, does not mean there is no constitution.[1] The lack of constitutional document does however mean that in the UK the nature of the constitutional organs and the relationship that they have is evidently different from those constitutions which do have such a document; this is what ultimately makes the British constitution system so exceptional.[2] The three organs of the state and their relationship are both determined and explained by various constitutional doctrines present within the British constitution. They are parliamentary sovereignty, the rule of law and the separation of powers doctrine. These constitutional doctrines play an important role within the thesis and for that reason are outlined in the following three paragraphs.

Of these constitutional principles, the sovereignty of Parliament is considered the fundamental and defining principle of the British constitution.[3] It has been suggested that the British Constitution can be summed up in eight words: "What the Queen in Parliament enacts is law." This essentially means that Parliament as the legislature can use the power of the Crown to enact law and these laws are not able to be challenged by any individual or body.[4] In a nutshell, the orthodox doctrine is that Parliament can make or unmake any law it wishes. However, the orthodox view is not universally accepted. The orthodox view is questioned in both scholarship and case law, the latter most famously in 2005, when three senior judges in *obiter* stated that if

1 Lady Hale, 'The United Kingdom Constitution on the move' (The Canadian Institute for Advances Legal Studies Cambridge Lectures 2017).
2 John Stanton and Craig Prescott, *Public law* (OUP 2018) 5.
3 AV Dicey, *Introduction to the study of the Constitution* (8th edn, Liberty Fund 1982).
4 Whether such statements are anything more than empty threats is a question that remains unanswered because it has not yet been done.

laws were enacted that offended the most fundamental constitutional principles, the courts may strike down or refuse to apply such laws, thus acting in the face of the orthodox stance.[5] If the UK courts were to adopt such a position it would mean that the British constitution does not have a fundamental constitutional principle which positions parliamentary law above all else. It would radically alter the constitutional landscape. The fact that the British constitution's 'fundamental and defining' principle is subject to academic and judicial dispute illustrates the nature of the British constitution and more importantly the importance of commentary and scholarship. The disputing of the orthodox doctrine also illustrates the ability for alternative explanations of the constitution, with this thesis will provide an alternative explanation and consideration of an aspect of the constitution.

The rule of law is the second of three principles that underpin the British constitution. It fulfils a similar objective as the separation of powers doctrine – it ensures that governmental power is not abused. The rule of law operates as a constraint upon government as a check and control on the misuse of executive power. It has been defined as *all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.*[6] There is a presumption by the UK judiciary that Acts of Parliament are made with the intention of being subject to the rule of law, or without the intention of undermining the doctrine. Should the UK judiciary ever decide to strike down an Act of Parliament for its offending of a fundamental constitutional principle, this would most likely be done in the name of the rule of law or for the protection of said doctrine. Unlike parliamentary sovereignty, which has strong ties with the legislature, the rule of law is most compatible with the judicial organ of the state. This is particularly true when considering the practical effect of the rule of law,

[5] See Lord Hope, Lord Steyn and Baroness Hale in *R (Jackson) v Attorney General* [2005] UKHL 56 [2006] 1 AC 262.

[6] Tom Bingham, *The Rule of Law* (Penguin 2011). He defined 8 principles: 1. The law must be accessible, intelligible, clear and predictable. 2. Questions of legal right and liability should ordinarily be resolved by the exercise of the law and not the exercise of discretion. 3.Laws should apply equally to all. 4. Ministers and public officials must exercise the powers conferred in good faith, fairly, for the purposes for which they were conferred – reasonably and without exceeding the limits of such powers. 5.The law must afford adequate protection of fundamental Human Rights. 6. The state must provide a way of resolving disputes which the parties cannot themselves resolve. 7. The adjudicative procedures provided by the state should be fair. 8. The rule of law requires compliance by the state with its obligations in international as well as national laws.

which is witnessed via various judicial functions including judicial review, powers and requirements under the Human Rights Act 1998 and statutory interpretation. Comparable with parliamentary sovereignty and due to the uncodified constitution, the doctrine is not set in stone, with a definitive definition for the British constitution and is subsequently open to interpretation and conflicting opinions within scholarship and judicial treatment.

The separation of powers doctrine in essence requires the organs of the state (the executive, legislature, and judiciary) to be clearly divided and separate for the protection of citizens' rights and the prevention of tyranny. According to a strict interpretation of the separation of powers doctrine, none of the three organs should exercise the power of the other, nor should any person be a member of more than one of the state organs.[7] The intention is to ensure there is a sufficient check and balance upon the organs of the state and to also prevent there being a concentration of power within any single organ of the state. This in turn prevents tyranny. The British constitution does not operate on a strict version of this doctrine. Overlaps exist, most prominently between the executive and legislature.[8] The British constitution structure is centralised in its nature. This is because the British constitution has a strong fusion of powers between the executive and legislative. For instance, both the executive and legislature sit in Parliament, with the executive made up of MPs from the majority party within the legislature. Alike the other two constitutional principles, the separation of powers doctrine is also subject to conflicting scholarly opinion, particularly around the existence and extent of the doctrine within the British constitution.

The disputing of the British constitution's fundamental principles is owed to one of the defining features of the British uncodified constitution, its flexibility. This flexibility is evident in the British constitution having been modified and reinterpreted to represent the constitution's changing environment.[9] The constitution is malleable to developing circumstances,[10] for instance it has adapted to the introduction of the Human Rights Act 1998, the UK's joining of the European Union and subsequently the UK's leaving

[7] Richard Benwell and Gay Oonagh, 'The Separation of Powers' (Parliament and Constitution Centre 2011).
[8] See chapter 2 on natural dominance and its consideration of the fusion of powers between the executive and legislature.
[9] Andy Williams, *UK Government & Politics* (2nd edn, Heinemann 1998) 12.
[10] Mark Garnett and Phillip Lynch, *Exploring British Politics* (4th edn, Routledge 2016) 128.

of the European Union and devolution. The ability for the constitution to be modified resutling from its flexibility is particuarly evident in the allocation of sovereignty within the British constitution. Over the centuries the allocation of sovereign power, meaning the fundamental source of authority within the constitution, has evolved. This evolution would not have been as easily possible had the British constitution not been flexible and uncodified. Within this evolution the UK Parliament has evolved from its mediaeval role as a body of advisers to the Monarch to become the central source of legal and political authority within the state. The constitution is not set in stone, which is why the distribution of power within the constitution may change and constitutional arrangements may evolve to reflect this. Just as the distribution of power may change so too may the control of such power for example, a shift from political to legal constitutionalism.[11] The consequence of this flexibility however is it encourages continuous discussion and re-evaluation of the key constitutional principles.

Despite the uncodified constitution encouraging literature contributions, there is a sizeable gap within the literature surrounding executive dominance and its impact upon the British constitution. The primary consideration of this thesis is to the existence and role of excessive executive dominance within the British constitution. This can then be subdivided into various smaller considerations for which the current literature does not provide answers. Firstly, the thesis will consider whether executive dominance is necessary for the operation of the British constitution. Once this is considered, attention turns to whether executive dominance is ever unnecessary for the constitution's operation. This consideration offers both a novel approach and concepts, distinguishing between natural dominance which is necessary for the constitutions functioning and excessive executive dominance which hinders the constitutions functioning. The second consideration of this thesis is the consequences of excessive executive dominance focusing on: i) the concepts undermining of constitutional principles ii) the judicial treatment of the concept iii) the modifying of orthodox parliamentary sovereignty accounting for changing constitutional facts due to excessive executive dominance.

[11] Keith Syrett, *Principles and Problems of Power in the British Constitution* (2nd edn, Red Globe Press 2014) 19.

1.2 Existing Literature

The questions raised within this thesis are not sufficiently tackled by the current literature. The absence of a written constitution enriches the literature as we rely on authoritative commentators to inform us of the constitution's character. The unwritten constitution inputs a degree of uncertainty allowing for academic predictions over the relationship between the courts, legislature, and the executive. This reliance on authoritative commentators has given rise to substantial academic rhetoric with conflicting perspectives of the constitution. This enables a confused and nebulous character,[12] a constitution with no solid or unanimously accepted bedrock.[13] This thesis is concerned with the concept of executive dominance and the impact this doctrine has upon the British constitution. Emphasis is placed upon the impact the thesis's novel concept 'excessive executive dominance' has upon parliamentary sovereignty. This is a novel approach that the rest of the literature does not provide.

Both the rule of law and parliamentary sovereignty are themes explored within this thesis. Unlike the existing literature, both are examined from the viewpoint of executive dominance and in particular the impact of excessive executive dominance upon them. The definition provided by Dicey in his seminal work is still clung to today. It is this that has provided the doctrine of parliamentary sovereignty with its "absolute" nature, which in turn limits the literature to an approach in which scholars try to place parliamentary sovereignty or the rule of law as the foundation of the British constitution. Many contemporary scholars are devoted to this notion that parliamentary sovereignty is absolute as Dicey described.[14] This legacy appears impossible for the competing contemporary scholars, advocating the rule of law to shake off, despite great efforts.[15] Ekins[16] for example argues that despite parliamentary sovereignty being accepted as the orthodox Westminster theory, both members of academia and the judiciary have challenged the supremacy of the legislature – with those challenging

[12] Colin Pickington, *The politics today companion to British Constitution* (MUP 1999) 2.
[13] Neil Parpworth, *Constitutional and Administrative Law* (7th edn, OUP 2012) 12.
[14] *'Dicey's conception of legislative supremacy has become so ingrained amongst English lawyers … it is hard to question his doctrine without appearing to lose touch with reality'* (TRS Allan, *Law, liberty, and justice: the legal foundations of British constitutionalism* (OUP 1995)).
[15] Keith Ewing, 'Brexit and Parliamentary Sovereignty' (2017) 80 MLR 711.
[16] Richard Ekins, 'Judicial Supremacy and the Rule of Law' (2003) 133 LQR 525.

it typically pointing to the rule of law as the alternative. Notable challenges have come from Lord Woolf, Sir John Laws and Trevor Allan.[17] They are advocates for "judicial supremacy" which is a constitutional order where the judiciary and not the legislature has the final authority to determine what is and is not law.

There have been some remarkably bold statements by both scholars and the judiciary. Barber argued parliamentary sovereignty was abandoned in *Factortame*.[18] Davis declared Parliament has not been sovereign since the Westminster Act,[19] whilst Lord Neuberger said the UK does not have a constitution and those who think it does are mistaken.[20] The latter comment only spurred further academic dialogue in the field.[21] Dame Sian Elias – 30 years on from her declaration that parliamentary sovereignty was so strong Parliament could not bind itself - states that it is a doctrine that is now diminished. Post *Factortame* and other constitutional reforms in the 1980s and 90s the doctrine is not what it once was.[22] The statements made, however, failed to strike the impact that executive dominance is having upon the British constitution. Both scholars and the judiciary's focus remained on two of the three organs of the state and the doctrines of parliamentary sovereignty and the rule of law. This move away from the orthodox doctrine of parliamentary sovereignty is explored within this thesis and explained with reference to the impact of excessive executive dominance and changing constitutional facts. This thesis focuses on the modifying of the orthodox doctrine of parliamentary sovereignty by the judiciary because of excessive executive dominance.[23]

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[17] Richard Ekins, 'Judicial Supremacy and the Rule of Law' (2003) 133 LQR 525.
[18] Nicholas Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 IJCL 144.
[19] Westminster Act 1931. The contradiction in opinions of Davis and Barber displays the disparities the uncodified constitution creates; both see the doctrine as compromised but for distinctly separate reasons; with the reasons regarding the doctrine compromised some 70 years apart. On Davis's account the doctrine has been compromised for over 80 years; this (if true) makes Barbers *Factortame* argument irrelevant.
[20] Lord Neuberger, 'The British and Europe' (Freshfields Annual Law Lecture 2014).
[21] Mark Elliott, 'Foreword to: The Supreme Court and the Constitution' (UK Supreme Court Review 2015). Elliott stated here that Neuberger believes you cannot have a constitution and Parliamentary Sovereignty.
[22] Sian Elias, 'Another Spin on the Merry-go-Round' (Institute for Comparative and International Law at the University of Melbourne Australia 2003).
[23] Philip Sales, 'Legalism in constitutional law: judging in a democracy' (2018) PL 687, Mark Elliott, 'United Kingdom: Parliamentary Sovereignty under Pressure' (2004) 2 IJCL 545, JAG Griffith, The common law and the political constitution (2001) 117 LQR 42, Hans J Morgenthau, 'Problem of Sovereignty Reconsidered' (1948) 48 CLR 341, HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13 CLJ 172, TRS Allan, *Law Liberty and Justice the legal foundation of British Constitutionalism* (1993, OUP) 10.

Fairclough pinpoints the clash between parliamentary sovereignty and the rule of law as one that surrounds how far the rule of law can overrule legislation. He notes that it is impossible for Parliament to legislate contrary to the rule of law because the rule of law is, by definition, logically prior to Parliament.[24] Whilst Lord Hope[25] instead takes the point that rule of law is the only possible safeguard against unconstitutional actions, he recognises that parliamentary sovereignty is "convincingly" portrayed as the fundamental principle of the British constitution. Lord Hope's input supports this thesis in stating that parliamentary sovereignty is the cornerstone because it has for centuries been accepted as such. He also regards parliamentary sovereignty as weak and unable to prevent executive power grabs. This thesis demonstrates that a modified version of parliamentary sovereignty is somehow able to limit executive power grabs. Whilst executive power grabs are spoken of there is no recognition of the role that executive dominance plays within this sphere and or the impact it has upon these constitutional principles.

The literature's push from parliamentary sovereignty to rule of law has amplified in recent years, an example is Siew Lin Grace,[26] who believes the British constitution is moving towards a legal constitution with a greater scope for the courts. This is a theme explored within this thesis, with an exploration of the constitution's push from political to legal constitutionalism resulting from the presence of excessive executive dominance and the judiciary's treatment of the concept. In contrast to existing literature, this thesis does not position the rule of law as the cornerstone of the constitution. Public law scholarship is not without input from the judiciary who have particularly changed their stance in more recent years, breathing new life into the principle of rule of law.[27] It is more than occasionally now that the judiciary speculate

[24] Thomas Fairclough, 'What's New About the Rule of Law? A Reply to Michal Hain' (UKCLSA, 18 September 2017) <https://ukconstitutionallaw.org/2017/09/18/thomas-fairclough-whats-new-about-the-rule-of-law-a-reply-to-michal-hain/> accessed 12th June 2018.
[25] Lord Hope, 'Is the Rule of Law now the Sovereign Principle' in Richard Rawlings Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (OUP 2013).
[26] Chong Slew Lin Grace, 'Jackson v Attorney General: moving towards a legal constitution' (2007) 10 TCL Rev 60.
[27] *R (Jackson) v Attorney General* [2005] UKHL 56 [107], *R (Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 [73], *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46 [2012], *R (Buckinghamshire County Council and Others) v Secretary of State for Transport* [2013] EWHC 481 (Admin), *Pham v Secretary of State for the Home Department* [2015] UKSC 19.

about the constitution, mostly in extrajudicial lectures with particular reference to the consequences of Parliament doing the unthinkable with regards to the rule of law.[28] Much like the academic discussion in this field the position amongst the judiciary is not in harmony. The constitutional perspective differs between cases and members of the judiciary. This only fuels the academic discourse without any concrete outcomes. What is still missing from both the judicial and academic approach is the acknowledgment that it may not be Parliament but the executive who is to do the unthinkable. It is the executive who benefits from the weakened sovereignty of Parliament.

In concentrating on the rule of law and parliamentary sovereignty, the existing literature unfortunately does not adequately address the influence of executive dominance upon the constitution and particularly upon parliamentary sovereignty. The literature concerning executive dominance does not distinguish between natural and excessive executive dominance. There is no attempt by the literature to conceptualise what might be excessive. The literature does not pay attention to the undermining of constitutional principles nor address the effect of excessive executive dominance on parliamentary sovereignty. This thesis does not advocate for the orthodox doctrine of parliamentary sovereignty. It also does not argue that the rule of law is the foundation of the British constitution. It is instead the aim of this thesis to demonstrate, that there exists excessive executive dominance within the British uncodified constitution. It will be shown that this novel concept of excessive executive dominance results in the modifying of the traditional absolute doctrine of parliamentary sovereignty.

While this thesis does argue that the orthodox doctrine of parliamentary sovereignty is not fitting within the British constitution, it does so due to the impact of excessive executive dominance and not by virtue of the rule of law - unlike a lot of the literature within this field. This thesis therefore differs to the existing literature in this field, as the existing literature does not account for the impact of executive dominance within the British constitution. It does not account for the role executive dominance has in the displacement of the orthodox parliamentary sovereignty doctrine. Instead, the existing

[28] Tom Mullen, 'Reflection on Jackson v attorney general questioning sovereignty' (2007) 27 LS 1. Mark Elliott, 'Interpretative Bills of Rights and the Mystery of the Unwritten Constitution' (2011) NZL Rev 591.

literature finds itself in a continuous cycle, pitting two of the three organs of the state against one another, and in doing so tries to place either the rule of law or parliamentary sovereignty at the foundation of the British constitution.[29] In summary the current literature in discussing parliamentary sovereignty and its place in the British constitution continuously reiterates and redevelops the ongoing argument between the rule of law and parliamentary sovereignty as the cornerstone of the constitution. The existing literature fails to address the wider issue of executive dominance and its effects upon parliamentary sovereignty.

1.2.1 Executive Dominance

Existing scholarship does not adequately distinguish between natural and excessive executive dominance, nor does the existing scholarship outline the different factors which amount to each concept. The scholarship fails to consider the consequences of excessive executive dominance, including the impact of the concept on constitutional principles and the judiciary's response to excessive executive dominance. This thesis differs from the literature in its intention to look at the relevance and impact of excessive executive dominance upon the constitution.[30]

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[29] Prominent figures exist in both camps, in support of parliamentary sovereignty Goldsworthy, Ekins, Oliver and Forsyth. Jeffrey Goldsworthy, 'Parliamentary Sovereignty and The Constitutional Change in the United Kingdom' in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (OUP 2013), Richard Ekins, 'Legislative freedom in the United Kingdom' 2017 LQR 133 582, Jeffrey Jowell and Dawn Oliver, '*The Changing Constitution'* (7th edn, OUP 2011), Christopher Forsyth, 'Who is the ultimate guardian of the constitution?' (Judicial Power Project 2016). Scholars apposing parliamentary sovereignty, favouring the rule of law include Eleftheriadis, Allan and Elliott. Pavlos Eleftheriadis, 'Two Doctrines of the Unwritten Constitution' (2017) 13 ECLR 525, TRS Allan, *Constitutional justice: A Liberal Theory of the Rule of Law* (OUP 2003) 200-242, Mark Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2002) 22 SLS 340, Mark Elliott, 'Interpretative Bills of Rights and the Mystery of the Unwritten Constitution' (2011) University of Cambridge Faculty of Law Research Paper 51, Mark Elliott, 'Constitutional Legislation, European Union Law and the Nature of the United Kingdoms Contemporary Constitution' (2014) 10 ECLR 379. The displacement of parliamentary sovereignty can also be found in the works of Bodganor, knight and Tucker. Vernon Bogdanor, 'The Sovereignty of Parliament or the Rule of Law?' (Magna Carta Lecture at Royal Holloway, University of London 15 June 2006) http://www.rhul.ac.uk/About/magna-carta/2006-lecture.pdf, Adam Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty' (2011) 31 OJLS 61. Judicially the most notable examples which show the judiciary's changing stance include *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, *R (Jackson) v Attorney General* [2005] UKHL 56, *Pham v Secretary of State for the Home Department,* [2015] UKSC 19, *R (Buckinghamshire County Council and Others) v Secretary of State for Transport* [2013] EWHC 481 (Admin) and *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46. Extrajudicial remarks supporting rule of law can be found in the work of Lord Bingham and Lord Hope.

[30] See chapter 2 on Natural Dominance – which explores the early literature within this field (from the 1920s and 30s).

Although the existing literature does not contribute to the various aspects outlined above, should not be inferred that executive dominance is a matter which no scholar has put forward before. There does exist literature covering executive dominance. The key literature contributions within public law scholarship, have links to the separation of powers doctrine. It is arguable that the constitution's uncodified nature and weak separation of powers does have a considerable influence with regards to executive dominance. The former has resulted in an overlap of the executive and the legislature. This overlap and fusion between the executive and legislature are a fundamental factor which enables the executive to dominate Parliament. This is a theme that exists within this thesis too, however, the fusion of power between the executive and legislature unlike other public law scholarship, is only one of several factors that this thesis illustrates as amounting to executive dominance. Literature tackling executive dominance and its dangers in addition to its connection with delegated powers was rife in the 1920s and 30s. This is recognised by Lord Sankey in his opening of the Donoughmore report where he acknowledges[31] literature from CK Allen,[32] CT Carr,[33] AV Dicey[34] and Lord Hewart.[35] Flinders in his contribution on the shifting of the constitution (from the legislature to the executive) also acknowledged early work in this field.[36]

Lord Hewart in his book "The New Despotism" issued a warning that there was a need to rise up and protect the rule of law against the executive and bureaucracy.[37] The link with the separation of powers doctrine within this contribution is visible in Hewart taking issue in the Cabinet control of Parliament allowing the executive to push through legislation they had drafted which delegated to themselves broad powers.[38] Hewart blamed not the principle of sovereignty but the manipulators of sovereignty (the executive), which again is a nod to the fusion of powers between executive and

[31] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 1.
[32] C K Allen, *Law in the making* (OUP 1927).
[33] C T Carr, *Delegated Legislation* (CUP 1927).
[34] A V Dicey, *Development of administrative law in England* (LQR 1915).
[35] Lord Hewart, *The New Despotism* (Ernest Benn Limited 1929).
[36] Ramsey Muir, *How Britain is Governed* (1930), Sir William Ivor Jennings, *Parliamentary Reform (*Victor Gollancz Limited 1934), Christopher Hollis, *Can Parliament Survive* (Hollis and Carter 1949).
[37] Michael Taggart, 'From 'Parliamentary Powers' to Privatization: the Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 The University of Toronto Law Journal 575.
[38] Lord Hewart, *The New Despotism* (Ernest Benn Limited 1929) 52.

legislature. Hewart also took issue with delegation being done in the name of parliamentary sovereignty therefore, without restriction on the executive's ability to legislate and delegate legislation to others and with no ability for the courts to intervene.[39] Hewart recognises the danger of executive dominance and in particular the dangers of delegated powers. However, unlike Hewart's contribution this thesis goes beyond delegated legislation and considers other factors that amount to this thesis's novel concept of excessive executive dominance. The thesis takes issue with the executive's dominance from a different stance to Hewart. Hewart looks at the issue from the perspective of the common law and the damage to the rule of law. This thesis instead intends to explore the impact of excessive executive dominance, including the undermining of constitutional principles, the courts' reaction to the concept and ultimately the modifying of orthodox parliamentary sovereignty.

The Donoughmore report on Ministers' powers followed Hewart's book. The report was concerned with both delegated legislation and quasi-judicial decisions.[40] The committee hoped to determine the necessary safeguards to cater for delegated legislation whilst remaining a constitution founded on parliamentary sovereignty.[41] The report gave various reasons as to why the delegated powers were necessary and inevitable including parliamentary time, technicality of subject matter, difficulty in foreseeing all contingencies, allowing for constant adaptation and flexibility, permitting experimentation and coping with emergencies. However, they also dealt out various warnings including Henry VIII clauses should "never be used except for the sole purpose of bringing an Act into operation" and even then, should be subject to a one-year sunset clause. The report gives a respectable insight into the powers of delegated legislation at the time and the literature surrounding this field. Although the report made warnings of the dangers of executive powers those warnings have not been followed and more importantly, the report did not address all the issues.

Following Hewart's book and the Donoughmore Committee in 1933, Willis published his book "The Parliamentary Powers of English Government Departments".[42] He

[39] Lord Hewart, *The New Despotism* (Ernest Benn Limited 1929) 20.
[40] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 1.
[41] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 1.
[42] John Willis, *The Parliamentary Powers of English Government Departments* (CUP 1933).

concentrated on extraordinary powers passed via delegation to the executive from 1850 until publication (1933). Both Hewart[43] and Willis agreed that the executive dominated Parliament and was sheltered from judicial scrutiny behind parliamentary sovereignty. Willis saw much less of an issue in the delegation of power unlike Hewart. He stated, "*The practice of delegating this authority to make miniature Acts of Parliament is now so well established that it occasions no controversy, but there are occasional complaints about the inadequacy of the statutory safeguards against its abuse."*[44] Therefore, Willis does not resolve the damage delegated legislation has on parliamentary sovereignty. However, since this spike in the 1920s and 30s there has been a fall in the literature on executive dominance. There is no recognition afforded to the consequence of executive dominance for the constitution, nor is there any recognition of the courts approach to the concept. The contributions by Willis, Hewart and others to the literature in the 1920s and 30s, is now outdated and not reflective of the current constitutional landscape or the political realities of the 21st century.

In more recent times Lord Hope, the Hansard Society and Davis[45] have all made positive contributions to the discourse with regards to executive dominance. Lord Hope states that parliamentary sovereignty is in the hands of the executive. He said when we think of the sovereignty of Parliament, we should really be thinking of what this means about the power that this gives to the executive. This is a clear recognition as to the presence and risk of executive dominance in the constitution. Lord Hope like Davis[46] argues that Parliament cannot enact any law it wishes with reference to influences from rule of law. Despite Lord Hope recognising that *"we can continue to rely on Parliament to control an abuse of its legislative authority by the executive"*[47] he does not go further in examining the issue of executive dominance.

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[43] Michael Taggart, 'From 'Parliamentary Powers' to Privatization: the Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 The University of Toronto Law Journal 575.
[44] John Willis, 'Introduction to Administrative Procedure' in John Willis (eds), *Canadian Boards at Work* (Toronto Macmillan 1941) 120-1.
[45] Fergal Davis, 'Brexit, the Statute of Westminster 1931 and Zombie Parliamentary Sovereignty' (2016) 27 KLJ 344.
[46] Davis has contributed to the more recent discourse he identifies that over time the executive has gained a gradual concentration of power, the power of the crown has been diminished, the House of Lords have been qualified by the 1911 and 49 Acts[46] - all of which empowers Parliament.
[47] Lord Hope, 'Is the Rule of Law now the Sovereign Principle' in Richard Rawlings Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (OUP 2013).

In addition to the academic literature which recognises the dominance of the executive, there are examples to be drawn from case law too. *Ex Parte Fire Brigades Union*[48] exemplifies the powers of the executive in comparison to Parliament and its so-called supreme position. The case saw the Criminal Justice Bill (particularly the compensation element) changed - the government wanted to move to a tariff system, for example, a certain amount for a broken arm, a certain amount for a lost eye etc. However, Parliament did not agree. Parliament insisted against the opposition of the Government to allow compensation to continue to be payable by reference to the victim's actual loss. Parliament succeeded and the Queen assented to the Act (based on it continuing to be compensation for actual loss). However, the Act was not to come into force until the Secretary of State brought it into force. Instead of making a commencement order, the Secretary of State purported to use his powers under the royal prerogative to put in place a tariff scheme by amending the existing scheme. Despite both the Court of Appeal and the House of Lords being divided on whether this was constitutionally or legally allowed – it does demonstrate that the executive can abuse its position and does act in a way to dominate Parliament. For Feldman this case demonstrates the importance of the rule of law. [49] For this thesis *Ex Parte Fire Brigades Union* demonstrates the ability of the executive to abuse its position and powers. It also shows the inability of Parliament to protect itself fully from this notion without judicial support.

1.2.2 Gaps in Existing Literature

The current literature does not account for the impact of executive dominance upon parliamentary sovereignty. There is little linking of executive dominance with the diminishing of the constitution's fundamental principles. Instead of focusing on the impact upon constitutional principles, there is a clear acknowledgement of executive dominance as described by Hailsham as an "elective dictatorship". This dominance is centred around party discipline, the government's majority (often, although not currently, strong) and its control over the legislative programme. Amongst this acceptance, a failure to recognise the dangers in the natural dominance becoming excessive exists. The current literature does not account for excessive executive

[48] *R v Secretary of State for the Home Department, Ex Parte Fire Brigades Union* [1995] UKHL 3.
[49] David Feldman, 'None, One, or Several? Perspectives on the UK's constitution' (2005) 64 CLJ 329.

dominance. There is therefore no clarity or legal yardstick offered as to what might constitute “excessive dominance”. This thesis will explore when natural dominance turns to excessive executive dominance. This thesis considers the impact of this excessive dominance upon constitutional principles and the judicial response to such dominance. The current literature does not address either the undermining of constitutional principles stemming from excessive executive dominance, nor the judicial treatment or modifying of parliamentary sovereignty as a consequence of the concept.

The existing literature offers no yardstick for excessive executive dominance. This thesis distinguishes between two types of executive dominance, one that is acceptable and one that is not. The former is termed natural dominance and the latter excessive executive dominance. The literature also fails to focus on the array of factors which account for executive dominance. These factors will be explored in this thesis. Nor does the literature consider the consequences of excessive executive dominance, these are all gaps within the literature that this thesis will contribute to.

1.3 Thesis structure

The thesis can be split into two parts. The first part, consisting of chapters 2, 3 and 4 deals with signs of executive dominance. Chapter 2 explores the concept of natural dominance, namely, dominance which is necessary and acceptable for the functioning of the British constitution. In this chapter, the background and history of executive dominance is explored before the chapter moves on to considering the various factors which contribute to the concept of natural dominance. Chapter 3 then builds upon chapter 2 in exploring this thesis’s other novel concept of excessive executive dominance. Excessive executive dominance that is not necessary for the functioning of the British constitution and has the opposite effect; it prevents the proper functioning of the constitution. Chapter 3 defines the concept of excessive executive dominance before exploring the various factors which amount to the concept. The final chapter in this section, chapter 4, is concerned with parliamentary sovereignty. Chapter 4 begins by briefly outlining the doctrine of parliamentary sovereignty, with particular emphasis placed upon the orthodox doctrine. Once this is done the chapter considers how

parliamentary sovereignty fits with the concepts of executive dominance, starting with natural dominance, before considering excessive executive dominance. Chapter 4 finishes by considering constitutional facts and how and whether these can change. This is achieved through the lens of parliamentary sovereignty and excessive executive dominance.

The second part of the thesis is made up of chapters 5, 6 and 7. This part is concerned with the consequences of excessive executive dominance and its manifestations. Chapter 5 concerns the failure of political constitutionalism and the push towards legal constitutionalism. The chapter begins by outlining constitutionalism – considering both the failure of political constitutionalism and the push towards legal constitutionalism. It then illustrates the judiciary's use of legal constitutionalism tools to deal with cases concerning executive dominance. The latter part of chapter 5 therefore uses excessive executive dominance to offer an alternative explanation to various cases. The cases in this chapter focus on judicial review, Henry VIII clauses, and ouster clauses. Chapter 5 finishes by reconsidering parliamentary sovereignty and the modified version of the doctrine which the UK judiciary are applying. Chapter 6 is the first of two case studies within the thesis. It is concerned with the coronavirus pandemic. The case study starts by outlining the background of the pandemic before outlining the approach that the UK could have taken to the pandemic, an approach fitting with natural dominance. Once this is outlined the case study moves on to outline the approach that was taken by the UK and how this approach is fitting with excessive executive dominance. The case study illustrates the presence of various excessive executive dominance factors within the UK's legislative approach to the pandemic. The case study finishes by comparing the two approaches, i.e., the approach that could have been taken and the one that was taken. Chapter 7 is the second case study, and concerns Brexit. This case study begins by providing background information to the Brexit process. Once this is done the case study considers the European Union (Withdrawal) Act 2018, the European Union (Withdrawal Agreement) Act 2020 and the European Union (Future Relationships) Act 2020. Each statute is discussed considering excessive executive dominance. For each statute, the case study sets out the various excessive executive dominance factors that are present. The final section of the Brexit case study is concerned with the UKSC's *Miller 2 ; Cherry* decision. The chapter explains this controversial decision against the

background of excessive executive dominance. The case is a validation and affirmation of my research, it is judicial recognition of aspects explored within my thesis.

1.4 Thesis Methodology

This research project makes use of the doctrinal legal research methodology. This methodology was selected because in order to achieve the research aims of the project, namely demonstrate the presence of executive dominance and the impact of its presence within the British constitution, it was necessary for me to gather, organise, explain and rely upon various sources. These included primary and secondary legislation, case law, academic literature and other secondary sources. I utilised the primary and secondary sources, including academic literature and parliamentary reports to provide a descriptive and detailed analysis of the sources, to achieve the project aims. This research project conducts a critical, qualitative analysis of these legal materials, to support the hypothesis that executive dominance and more specifically excessive executive dominance exists within and has consequence for the British constitution.

Chapter 2: Natural Executive dominance

2.1 Introduction

This chapter deals with the concept of executive dominance. The chapter begins by setting out what is meant by the term executive dominance, exploring the background and history of the concept to provide a clear definition. In exploring the history of executive dominance attention is paid to the literature of the 1920s and 30s on this subject. My thesis however splits the concept of executive dominance into two separate novel forms. They are natural dominance and excessive executive dominance. It is the principal aim of this chapter to focus upon natural dominance, clearly establishing what this thesis means by the term natural dominance and evidencing its existence within the British constitution. Once defined the chapter will demonstrate both why and how natural dominance exists within the British constitution via several factors which make up natural dominance. It is the intention of this chapter via these factors to demonstrate why issue should not be taken with this form of executive dominance whilst also substantiating the link between natural dominance and the literature of the 1920s and 30s. This chapter offers an acceptance of the need and reason for a powerful but limited executive within certain aspects of the British constitution; its necessity being evident in the constitutional make up and successful operation of the constitution.

2.2 Background of Executive Dominance

Before considering natural dominance, what is meant by the term and evidencing its existence within the British constitution via multiple factors, it is important to break down the wider concept of executive dominance. The exploration of the wider concept is necessary to gain an understanding of the concept to which the current literature refers.

The term executive dominance refers to the ability for the executive branch of the constitution to possess control over or impede the other branches of the constitution. Namely, the executive's ability to impede the judiciary or control and or impede the legislature. The executive is elevated to such a position, to enjoy such control due to powers it naturally possesses resulting from the UK's constitutional landscape. It is this natural possession of powers which this thesis declares results in natural dominance. The executive's most prominent dominance is found in its control of the legislative branch. The UK's non-standard separation of powers model allows considerable overlaps between the executive and the legislature. Government consequently has an enormous influence on the legislative process.[50] The judiciary however enjoys a much greater degree of independence than the legislature from the executive. This substantiates this thesis's claim of the executive's ability to impede and control the legislature in comparison to its ability to only impede the judiciary.[51]

The existing literature does not distinguish between different forms of executive dominance. The closest appreciation of the executive's dominance comes in the form of Lord Hailsham's 'elective dictatorship'.[52] My definition of executive dominance however goes further than the one offered by Lord Hailsham in his Richard Dimbleby Lecture. At the heart of Hailsham's elective dictatorship was government.[53] He used the phrase 'elective dictatorship' to describe the executive's control over the Commons. He referred to the fact that the legislative programme is determined by the government, with Government Bills almost always passing through the Commons due to the First Past the Post system in which typically strong majorities are returned, in addition to party whips gathering support. Hailsham declared:

> *Until recently, the powers of government within Parliament were largely controlled either by the opposition or by its own backbenchers. It is now largely in the hands of the government machine, so that the government controls Parliament and not Parliament the government. Until recently, debate and*

[50] Alex Brazier Susanna Kalitowski and Gemma Rosenblatt, 'Law in the Making: A discussion paper' (Hansard Society 2007).
[51] Though the ability to impede the judiciary is questionable when considering the case law analysis to follow. It however at least attempts to impede the judiciary with ouster clauses.
[52] Lord Hailsham, *Dilemma of Democracy: Diagnosis and Prescription* (HarperCollins 1978) 155.
[53] Lord Hailsham, *Dilemma of Democracy: Diagnosis and Prescription* (HarperCollins 1978) 155.

argument dominated the parliamentary scene. Now it is the whips and the party caucus.

The phrase describes the UK political system where the government of the day dominates Parliament. under a strong administration the powers of the government are considerably enhanced. Hailsham's approach fits with the definition of 'executive dominance', namely the executive's ability to control the legislature. However, there is no differentiation between the forms of executive dominance or appreciation of its multifaceted nature.

Since 1688 sovereignty within the British constitution has rested with Parliament, a branch described as being able to make or unmake any law whatever.[54] However this orthodox view of parliamentary sovereignty does not account for executive dominance. When considering the executive's position, it is questionable whether Parliament really does possess the ability to make or unmake any law, or whether sovereignty is placed with the executive. A theme to be considered later.[55] It is not backbench MPs but the executive which is empowered within the UK's parliamentary democracy.[56] Hailsham was warning of the dangers of the British constitutional landscape and the ability of the executive to become dominant. Since his contribution, developments within the constitutional landscape mean it is no longer merely a fear. This chapter will focus on the factors within the British constitution which make up natural dominance. The analysis in this chapter therefore develops the 'elective dictatorship' concept further into what this thesis terms natural dominance. The next chapter goes beyond that and considers the extension and combination of these factors and the potential for these factors to undermine constitutional principles, which results in excessive executive dominance.

In extending the approach of Lord Hailsham's elective dictatorship, this chapter focuses on more than the executive's numerical advantage. This is, as discussed in more detail shortly, the executive's ability to control the Commons and push through

[54] AV Dicey, *Introduction to the study of the Constitution* (8th edn, Liberty Fund 1982).
[55] See chapter 4 which explores parliamentary sovereignty.
[56] Andrew Gamble, 'The Constitutional Revolution in the United Kingdom' (2006) 36 The Journal of Federalism 19.

legislation. The numerical advantage only makes up one factor that this chapter considers in evidencing the concept of natural dominance. For completeness, take the 2017-2019 parliamentary session. The executive had no working majority. It entered a confidence and supply agreement with the DUP following the 2017 snap election resulted in a hung Parliament. The numerical advantage that Hailsham spoke of when referring to the executive's control of the legislature is therefore missing. However, the executive's dominant position was not missing for the period of 2017-2019 (as will be evident particularly in the proceeding chapter), corroborating the approach of this thesis in exemplifying executive dominance's multifaced nature.

My thesis also goes beyond that of Hailsham's approach in its consideration of the doctrine of parliamentary sovereignty and the relevance of executive dominance for the doctrine. I have already identified executive dominance as a multifaceted concept. It is for this reason that my thesis breaks down factors of excessive executive dominance and positions them under two different forms of the executive dominance concept. There are factors which are present within the constitution that make up natural dominance – the concept explored within this chapter. Excessive executive dominance is made from a combination and extension of the factors considered shortly. This form will be explored in the proceeding chapter.

Now that some context has been given to the umbrella term 'executive dominance' and it is established that the British constitution possesses a dominant executive, focus is turned to natural dominance. Natural dominance is the natural ability for the executive to control or impede another branch, resulting from powers they naturally possess. These powers are naturally possessed as they are a consequence of the constitutional landscape and therefore justifiable and necessary for the British constitution to work. These are also powers with which this thesis believes the earlier literature took issue. Therefore, this thesis understands the numerical advantage and delegated powers that the early literature took issue with to be factors of 'natural dominance'.

The factors that make up natural dominance include but are not limited to those discussed already by the literature, namely the numerical advantage, as spoken of by Hailsham but considered within this chapter under a broader rubric that focuses on

the fusion of power between the executive and legislature. In understanding why natural dominance exists it is necessary to appreciate the UK's constitutional landscape. This dominance largely though not exclusively exists due to the relationship between the executive and legislature, namely the close fusion of their powers and responsibilities. The British constitution does not operate with a clear-cut distinction between the three organs of the state (the legislature, the executive and the judiciary).[57] In a codified constitution the powers of each branch are defined and the relationship between the organs made clear.[58] Instead the constitutional arrangements of the United Kingdom have evolved to achieve a balance between the three branches of the state.[59] The fusion of powers explored within this chapter considers elements which were not focused upon by the existing literature i.e., the separation of powers doctrine. The UK's uncodified constitution and non-standard separation of powers provides a constitution based on a fusion and overlap between the executive and the legislature.[60] The executive is consequently in a powerful position[61] and it is within this overlap that some natural dominance is facilitated.

This facilitation can be seen in the resulting ability of the executive to pass delegated legislation. This chapter also explores the ability to create delegated legislation (as too was discussed by Hewart[62] and the Donoughmore report[63]) though unlike the existing literature the creation of said legislation is not taken issue with because its necessity is appreciated. Attention will be paid to the lack of parliamentary scrutiny of delegated legislation before considering the influence this legislation has on parliamentary sovereignty. Essentially that which the early literature has termed 'executive dominance', 'despotism' and 'elective dictatorship' this thesis believes to be natural dominance. The thesis will showcase shortly how the early literature criticised elements of the British constitution which are necessary for it to operate effectively

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[57] Gavin Drewry, 'The executive towards accountable government and effective government' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (7th edn, OUP 2011).
[58] Nat Le Roux, 'Elective dictatorship? The democratic mandate concept has become dangerously over-extended' (LSE, 7th August 2014) <http://blogs.lse.ac.uk/politicsandpolicy/elective-dictatorship-democratic-mandate/> accessed 12th March 2019.
[59] *R (Miller) v Prime Minister* [2019] EWHC 2381 (QB) 64.
[60] Sandra Fredman, 'Parliamentary Sovereignty' (Oxford University Human Rights Hub, 25th January 2017) <http://www.ox.ac.uk/news-and-events/oxford-and-brexit/brexit-analysis/parliamentary-sovereignty> accessed 24th March 2019.
[61] Mark Elliott, *Public Law* (3rd edn, OUP 2017) 480.
[62] Lord Hewart, *The New Despotism* (Ernest Benn Limited 1929).
[63] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932).

and expediently. This is in addition to those which did not pose a substantial risk of empowering the executive to a position detrimentally dominant over the constitution (or as this thesis regards it, in the forthcoming chapter 'excessive executive dominance'). The factors that result in natural dominance can in isolation allow for the uncodified constitution of the UK to operate.[64] It is for this reason they form the concept of natural dominance and not excessive dominance. However, when combined and extended they produce the ability for an executive dominance that this thesis regards as excessive executive dominance, a concept to be explored in the next chapter.

2.3 History of Executive Dominance

This section will explore the history of 'executive dominance'. This is the term in its wider context, as the literature on this topic from the 1920s and 30s does not make a distinction between natural and excessive executive dominance. It is the aim of this section of the chapter to focus on certain historical contributions to the field. The writings have been chosen because they offer the most relatable link with the approach this thesis applies to the concept of executive dominance.

The concept of executive dominance received much academic attention in the 1920s and 30s,[65] arguably due to the survival of Parliament's enhanced powers following the First World War and then in the preparation for the Second World War.[66] The interest was captured in the Donoughmore report on Ministers' powers. The report begins by acknowledging the vast array of literature surrounding the topic including works by CK Allen, CT Carr[67] and AV Dicey.[68] This literature predominantly focused upon delegated

[64] With the exception of lacking parliamentary scrutiny. This factor differs from the others in its accepted essence. This will however be explored more shortly when considering the factor of scrutiny.
[65] Arguably due to the post war era with war time being renown for an increase in executive power. A huge increase occurred in the second world war, J D Hayhurst and Peter Wallington, 'The Parliamentary scrutiny of Delegated Legislation' (1998) PL 547.
[66] The interest in this topic became more prominent around the second world war when the interest was sparked by the conferment of unprecedented legislative powers on the government due to the war outbreak - J D Hayhurst and Peter Wallington, 'The Parliamentary scrutiny of Delegated Legislation' (1998) PL 547.
[67] The work by Carr examined 1819-1820 as a time when delegated legislation was not widely used. He found that the British Herring Fishiers Commission could make regulations for payment of bounty. While the Lord Lieutenant could make orders of interest rates on public work loans.
[68] C K Allen, *Law in the making* (OUP 1927), C T Carr, *Delegated Legislation* (CUP 1927), A V Dicey, *Development of administrative law in England* (LQR 1915) John Dickinson, *Administrative justice and the supremacy of the law in the US'* (HUP 1927) Lord Hewart, *The New Despotism* (Ernest Benn Limited 1929),

legislation and the executive's control of the legislature (what this thesis terms its numerical advantage) and the creation of an arbitrary or dominant executive resulting from said control and legislation. The attention however died off and is yet to reignite in a way of targeting executive dominance.[69] There is academic interest however in aspects of the executive's dominance i.e., delegated legislation,[70] prerogative powers[71] and lacking parliamentary scrutiny.[72]

The concept of executive dominance (both natural and excessive) goes beyond the issue of the growing use of delegated legislation, or even the numerical advantage the executive enjoys over the Commons. Delegated legislation and the executive's numerical advantage do feature in the factors that amount to natural dominance. However, they are not the only factors that make up natural dominance. This differentiates the approach of this thesis from that of Lord Hewart, whose book resulted in the Donoughmore report on ministers' powers. The report was primarily concerned with delegated legislation and quasi-judicial decisions.[73] Hewart's book entitled "The New Despotism" suggested the executive was undermining the British constitution. Hewart saw Parliament as under the executive's spell producing whatever legislation they proposed.[74] The 'spell' Hewart spoke of, was with regards to the executive's

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Sir Courtenay Ilbert, *Legislative methods and forms* (Claredon Press 1901), W A Robson, *Justice and Administrative Law* (Macmillian 1928).

[69] See chapter 1 for more on the earlier literature.

[70] Joel Blackwell and Ruth Fox, 'Westminster Lens. Parliament and Delegated Legislation in the 2015-16 session' (Hansard Society 2017). Alex Brazier Susan Kalitowski and Gemma Rosenblatt, 'Law in the Making: A discussion paper' (Hansard Society 2007). Michael Taggart, 'From 'Parliamentary Powers' to Privatization: the Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 The University of Toronto Law Journal 575.

[71] Aris Georgopoulos, 'The Melting of Constitutional "Glaciers": Miller 2 and the Prerogative Powers of Government' (UKCLA, 30 September 2019) <https://ukconstitutionallaw.org/2019/09/30/aris-georgopoulos-the-melting-of-constitutional-glaciers-miller-2-and-the-prerogative-powers-of-government/> accessed 12th October 2019. Paul Craig, 'Miller, structural constitutional review and the limits of prerogative power' (2017) PL 48, Robert Blackburn, 'The prerogative power of dissolution of Parliament: law, practice and reform' (2009) PL 766.

[72] Adam Tucker for instance has written on this area. Some of his work includes: Adam Tucker, 'Parliamentary Scrutiny of Delegated Legislation', in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (Hart 2018). Adam Tucker, 'Tax Credits, Delegated Legislation, and Executive Power' (UKCLA, 5th November 2015) <https://ukconstitutionallaw.org/2015/11/05/adam-tucker-tax-credits-delegated-legislation-and-executive-power/> accessed 12th October 2020, Adam Tucker, 'A First Critical Look at the Scrutiny of Delegated Legislation in the Withdrawal Agreement Bill' (UKCLA, 24th October 2019) <https://ukconstitutionallaw.org/2019/10/24/adam-tucker-a-first-critical-look-at-the-scrutiny-of-delegated-legislation-in-the-withdrawal-agreement-bill/> accessed 12th October 2020.

[73] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 1.

[74] Michael Taggart, 'From 'Parliamentary Powers' to Privatization: the Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 The University of Toronto Law Journal 575.

dominance over Parliament, which, as already discussed almost guaranteed legislative success. If the executive possesses a strong enough majority. Therefore, the New Despotism also appreciates the executive's law-making powers, stemming from its numerical advantage within the Commons. However, this does only amount to one of the factors this chapter considers making up natural dominance. Hewart's work explored the legislation passed 20 years prior to his book, recognising a growth in statutes vesting in the executive legislative or judicial powers,[75] a pattern that has since continued.

Another clear distinction between this thesis and the early 1920s and 30s literature on this topic is the extent of the issue. The early work focuses on delegated legislation yet there was not much of it. The Donoughmore report found only eight modern Acts (between 1888-1929) which give ministers the power to modify the provisions of an Act as far as may appear to be appropriate to them for the purpose of bringing the Act into operation.[76] The report therefore identifies the extent to which delegated powers existed at the time, a point long from where delegated legislation is today. A point explored later in the thesis when looking at delegated legislation and its vast increase in recent years. Despite this the report warns of the dangers of delegated legislation and it formed the key component in declaring the executive as dominant at the time.

This chapter defines executive dominance generally and explores the specific form of natural dominance. Hewart spoke of "despotism", which he defined as placing the government above the sovereignty of Parliament and beyond the jurisdiction of the court.[77] Similarities exist between the two (Hewart's work and this thesis), particularly around the idea of the executive's numerical advantage and the creation of delegated legislation. The New Despotism took issue with the ousting of the judiciary's jurisdiction over the executive's powers. Hewart recognised that although it should be it is not common knowledge that there is in this country a considerable number of statutes that have vested in public officials delegated powers, to the exclusion of the

[75] Lord Hewart, *The New Despotism* (Ernest Benn Limited 1929) 43.
[76] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 36 (They include: Local Governments Act 1894, Juries Act 1922, the Mental Treatment Act 1930, Local Government (Scotland) Act 1929, Patent Designs and Trade Marks Act 1883).
[77] Lord Hewart, *The New Despotism* (Ernest Benn Limited 1929) 14.

jurisdiction of the Courts.[78] The exclusion comes from both the explicit exclusion of the courts[79] and from a strict adherence at the time to the orthodox doctrine of parliamentary sovereignty. Orthodox parliamentary sovereignty is not what it once was, with the judiciary being much more willing than ever to review the executive and its actions,[80] especially where this supports parliamentary sovereignty. In addition to this there is also the judiciaries' approach to interpret 'ouster clauses' which will be considered in chapter 5. For now, it is sufficient to note that the judiciary can be innovative in their approach to such clauses. Hewart recognised a danger for the executive to encroach upon the other organs of the state. The encroachment allows the executive to make the laws that they then govern the country by, particularly when the courts have no capacity to intervene.[81] Hewart saw this delegation of power as a danger for citizen's liberties and democracy.

It is therefore clear that the most relevant aspect of The New Despotism with regards to my own research, is the recognition of the ability for the executive to use its position (which I refer to as its natural executive dominance)[82] to ensure that Parliament pass any legislation it intends it to. This is whilst also not preventing the executive passing delegated legislation, which further empowers the executive at the expense of Parliament.[83] The issue for Hewart was these actions of delegating power to the executive via its dominance of the Commons were not subject to judicial oversight due to the doctrine of parliamentary sovereignty. Despite writing his book nearly 90 years ago much of what Hewart wrote is still of relevance today, more than ever. Essentially Hewart's book accurately described the executive's powers and actions for an event some 90 years later. The European Union (Withdrawal) Act 2018[84] was passed at a time when the executive had a majority (albeit a small one) within the Commons,

[78] Lord Hewart, *The New Despotism* (Ernest Benn Limited 1929) 43.
[79] Which Hewart stated was "…common knowledge that there is in this country a considerable number of statutes, most of them passed during the last twenty years, which have vested in public officials, to the exclusion of the jurisdiction of the Courts of Law, the power of deciding questions of a judicial nature." Lord Hewart, *The New Despotism* (Ernest Benn Limited 1929) 43.
[80] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, *R v Secretary of State for the Home Department, Ex Parte Fire Brigades Union* [1995] UKHL 3, *R (Miller) (Appellant) v The Prime Minister* (Respondent) *Cherry and others (Respondents) v Advocate General for Scotland* (Appellant) (Scotland) [2019] UKSC 41, and *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508.
[81] Lord Hewart, *The New Despotism* (Ernest Benn Limited 1929) 75.
[82] This fits with my fusion of powers exploration. See chapter 2.
[83] Hewart acknowledges the dominance being used by the executive to delegate to itself further powers: Lord Hewart, *The New Despotism* (Ernest Benn Limited 1929) 52.
[84] The European Union (Withdrawal) Act 2018.

allowing them to get the Bill through Parliament (subject to several amendments) whilst containing a number of powers for the executive. These powers relate to the retention of EU law namely the executive's ability to alter retained EU law;[85] and included wide Henry VIII powers that greatly empowered the executive at the expense of Parliament.[86]

The Donoughmore report, resulting from Hewart's work determined what safeguards were necessary or desirable to achieve a constitution securely founded upon parliamentary sovereignty.[87] The report saw the benefits and the convenience in using delegated legislation. However, it also saw the ability for the "convenience to be pushed too far". [88] It is for this reason the report regarded it necessary for certain safeguards to ensure the advantages of the practice are enjoyed without suffering from its inherent dangers.[89] The report states that the delegation of legislative powers is 'legitimate for certain purposes within certain limits on and certain safeguards'. The report outlined criticisms in three principal areas. Firstly, statutory powers conferred on ministers to make regulations, rules, and orders which when made might be held to have been placed outside the purview of the courts by virtue of a provision in the enabling act. Secondly statutory powers to amend existing Acts of Parliament or even the enabling Act itself in order "to remove difficulties" or bring the Act into operation. Finally, the report also considered statutory powers of judicial or quasi-judicial decisions against which there is no appeal.[90] The relevant aspects of the report for this chapter are the first and the second with no attention to be paid to the quasi-judicial aspect of the Donoughmore report.

The criticisms and recognition of the need for safeguards by the Donoughmore Report verge on an acknowledgment of the damage that executive dominance can have upon the doctrine of parliamentary sovereignty. One of the safeguards the report

[85] These powers are found in S8 of the European Union (Withdrawal) Act 2018. They state that a Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate (a)any failure of retained EU law to operate effectively, or (b)any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU.
[86] S8, S8(5), S9, S9(2) of the European Union (Withdrawal) Act 2018.
[87] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 1.
[88] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 14.
[89] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 5.
[90] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 2.

recommends is the avoidance of using Henry VIII clauses unless absolutely necessary. This is to ensure that delegated powers do not go too far and therefore can be enjoyed. It also recommends that when they are used, they should be "justified to the hilt" and contain a maximum time limit of one year.[91] The clauses should never be used except for the sole purpose of bringing an Act into operation. The report recommends that should a year be too short then the government should return to Parliament to have it extended. The success of these recommendations very much depends on the success of political constitutionalism i.e., a strong political grasp of the executive to prevent abuse, a grasp which according to my thesis, particularly identified in chapter 5, political constitutionalism is failing. The report also recommended that when administering delegated powers Parliament should ensure that it is within the jurisdiction of the court of law to decide whether in any purported exercise of those functions the minister has acted within the limits of his delegated power. Other than the exception of emergency legislation, the report does not acknowledge another instance that is so exceptional it prohibits the possibility of judicial challenge altogether. This finding and recommendation of the report is at odds with the reality of the constitution today, for instance ouster clauses which this thesis will explore in chapter 5. The report also suggests that the limits of the law-making power delegated to ministers should be expressly defined in clear language by the statute that confers it.

According to the report[92] even though it may be admitted that Parliament itself has conferred these powers upon ministers, and must be presumed to have done so with the knowledge of what it was doing, it cannot but be regarded as inconsistent with the principles of parliamentary government.[93] The report found that poor drafting of secondary legislation 'probably results in the making of regulations or orders which are probably *ultra vires*'.[94] Therefore arguably in order to diminish the dangers surrounding the use of delegated legislation (particularly wide delegated powers), the drafting of them was a preventative measure, to ensure good drafting could prevent

[91] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 65.
[92] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 59.
[93] Namely the ability for Parliament to hold the executive accountable, a principle somewhat hindered by the use of delegated powers.
[94] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 10.

the wide and open ended powers in the regulations.[95] It was consequently understood that the system of delegated legislation is both legitimate and constitutionally desirable for certain purposes, within certain limits, and under certain safeguards.[96]

The similarity of this thesis and that of the Donoughmore report lies in the acknowledgement of what this thesis defines as natural dominance, with the report stating it believed Parliament was right to delegate powers to Ministers. However, it too like my thesis saw dangers surrounding the use of delegated legislation. For the report as noted above the dangers centred around the executive encroaching on the role of Parliament in a manner unbecoming, enabling the executive's dominance becoming too substantial. Therefore, delegated powers should be used in a way necessary and appropriate for the constitution. There was emphasis placed upon Parliament, requesting they had effective control over the powers which the executive exercises. However, the control Parliament has is weakened by numerous factors. It is due to this weakness that we find ourselves beyond the point of natural dominance which is most relatable to the position in the 1920s and 30s and at a point of excessive.

Whilst the report saw the practice of delegating legislative powers as acceptable if constrained and subject to safeguards, the safeguards they recommended have either not been implemented or have failed.[97] Furthermore, in chapter 5, the failure of political constitutionalism is explored which seriously weakens the report's stance that the practice is acceptable so long as Parliament has effective oversight. This thesis goes further than simply recommending parliamentary oversight, as it recognises the inability for a strong parliamentary oversight due to the impact of executive dominance upon the doctrine of parliamentary sovereignty.

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[95] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 50.

[96] Those limitations varying from - Every bill containing delegated legislation should be referred to a Committee and the Committee would then consider the proposal and as soon as possible report to the house on its considerations of the Bill with the Committee considering - Whether the precise limits of the power are set out / defined, Whether there was any proposal to legislate on a matter of principle or impose a tax, Whether any power to modify the provision of the bill or any existing statute are evident, Whether there was any intention to propose immunity from challenges – if so if there was a period when a challenge could be brought, Whether there was anything exceptional about the proposal and If the proposals were in line with the memorandum which accompanied the bill.

[97] The safeguards the report recommends in order to ensure that delegated powers do not go too far and therefore can be enjoyed including: the avoidance of using Henry VIII clauses unless absolutely necessary. When they are used, they should be "justified to the hilt" and contain a maximum time limit of one year. The clauses should never be used except for the sole purpose of bringing an Act into operation.

The 1920s and 30s literature did not appreciate this failure of political constitutionalism, arguably due to the presence and strength of orthodox parliamentary sovereignty at the time. In recognising the failure of political constitutionalism, attention shifts to the judiciary and legal remedies to curb executive dominance. In later chapters this is demonstrated via case law analysis evidencing the courts' limiting of executive power and protection of parliamentary sovereignty. This approach does more justice to the multifaced nature of executive dominance, than for instance Hewart's focus on delegated powers alone (be that legislative or quasi-judicial powers). This chapter will look at the other factors in addition to this that make up natural dominance, the proceeding chapter will look at additional, extended, and combined factors which make up excessive executive dominance.

The interest in the executive's dominance did not stop in the 1920s and 30s, whilst the issue itself has grown. The executive has become more powerful and dominant since this time. The scholarship seemed to die down after the 1930s with no real explanation as to why. However, the dominance of the executive did not. For instance, since the Second World War[98] the Government's role has increased significantly via the broadening of the state. The introduction of the welfare state[99] has also seen the government's responsibilities grow, more parts of citizens' lives have become regulated and controlled by the executive. In addition to this growth, the relevance of executive dominance after the 1920s and 30s can be seen in the string of cases concerning ouster clauses.[100] These cases are able to be linked with the literature produced in the 1920s and 30s, which mentioned attempts of ousting the judiciary's jurisdiction and the importance of limited executive power.

Hewart referenced the ousting of the judiciary in his work. One example he gave was comments made in *Ex Parte Ringer,*[101] Hewart referenced Mr Justice Jelf who said:

[98] Which came to an end in 1945.
[99] The welfare state is a system whereby the state undertakes to protect the health and well-being of its citizens, especially those in financial or social need, by means of grants, pensions, and other benefits. The foundations for the modern welfare state in the UK were laid by the Beveridge Report of 1942; proposals such as the establishment of a National Health Service and the National Insurance Scheme were implemented by the Labour administration in 1948.
[100] See chapter 5 and the exploration of ouster clauses.
[101] *Ex parte Ringer* (1909) 25 TLR 718.

> *the case presented an illustration of the length to which Parliament had the right to go in ousting the powers and jurisdiction of Courts of Law… the jurisdiction of the Courts of Law, in matters in which some people might think it was desirable that even Government departments should be under control of the Courts, was nevertheless ousted, and the Court had no power to interfere with the decision of the department.*

Since this time other cases have come before the courts concerning the ousting of the judiciary. They include but are not limited to: *Smith,*[102] *Anisminic,*[103] *Ostler*[104] and *Privacy international.*[105] Ouster clauses will be examined in a later chapter 5. In addition to this there have also been judicial comments regarding the executive's position, evidencing that the executive's dominance is not a resolved matter. Take for example Lord Mustill in the *FBU* case[106] which will be explored in more detail in chapter 5. He describes not only the failure of political constitutionalism but also the presence of executive dominance:

> *In recent years, however, the employment in practice of these specifically Parliamentary remedies has on occasion been perceived as falling short, and sometimes well short, of what was needed to bring the performance of the executive into line with the law…*

This begins to demonstrate the notion that executive dominance was not just something of the 1920s and 30s but has continued to be relevant since then. The cases above begin to demonstrate the concept still exists within the British constitution. More examples of the executive's dominant position exist post 1920s and 30s including for instance the run up to the 1997 election when there was support for far-reaching parliamentary reform, targeting the rebalancing of power between the

[102] *Smith v East Elloe Rural District Council* [1956] UKHL 2.
[103] *Anisminic Ltd v Foreign Compensation Committee* [1968] UKHL 6.
[104] *R v Secretary of State for the Environment, Ex Parte Ostler* [1976] EWCA Civ 6 [1977] 1 QB 122.
[105] *R (on the application of Privacy International) v Investigatory Powers Tribunal and* others [2019] UKSC 22.
[106] *R v Secretary of State for the Home Department Ex Parte Fire Brigades* [1995] UKHL 3.

executive and Parliament.[107] The idea was to improve the capacity of the Commons. Ann Taylor the then Shadow Leader of the House stated that New Labour would create a new Parliament, re-establishing the proper balance between Parliament and the executive.[108] Both Hewart and the Donoughmore report raised the issue that an appropriate balance between the executive and the legislature within Parliament was missing,[109] with the latter attempting to recommend improvements (as discussed above) of how to improve said balance. These recommendations however have not been implemented and the effectiveness of political constitutionalism has only demised since, evident in the chapter 5 covering political constitutionalism. Therefore, the required rebalancing is still yet to occur. However, the judiciary has begun to change its approach to executive dominance as will be explored in chapter 5, which is arguably a move to shift said balance.

2.4 Factors of Natural Executive Dominance

In considering the history of executive dominance the chapter illustrates the position that existed in the early literature and the elements of the constitution the early literature took issue with. The various factors to now be considered will illustrate what this thesis considers amounts to natural dominance, some of which were considered in the early literature. These factors are not limited to those this early literature contemplated as will also become apparent. Since the history of executive dominance has been explored and the premise of the chapter made clear. Focus is now placed upon the various factors which this chapter believes to contribute to the UK executive's natural dominance.

2.4.1 Fusion of Powers

[107] See, Lucinda Maer, 'Modernisation of the House of Commons 1997- 2005' (Research paper 05/46, Parliament and Constitution Centre 2005).
[108] Ann Taylor, 'New politics, new Parliament' (Speech to the Charter 88 seminar on the reform of Parliament, 1996).
[109] A missing balance which fits with the constitutional principle of parliamentary accountability, as discussed further in chapter 3 concerning excessive executive dominance and chapter 5 concerning the consequences of excessive executive dominance.

This section is to focus on the fusion of powers between the executive and legislature. The term 'fusion of powers' is an umbrella term covering two of the factors that this thesis regards as contributing to natural dominance. The first of those is the non-standard form of separation of powers and the second is the numerical advantage of the executive in the Commons. The fusion of powers between the executive and legislature is a result of the of the non-standard separation of powers model within the British constitution. The numerical advantage that the executive enjoys within the Commons is owing to the UK's electoral system (the First Past the Post system). These two factors are distinguishable and not the same. The non-standard separation of powers model allows the fusion of the executive and legislature. It does not however guarantee or produce a numerical advantage.[110] It is on that basis that the numerical advantage and non-standard separation of powers model are regarded as separate factors. They are dealt with separately, but under a broader umbrella term of "fusion of powers". The remainder of this section is therefore split, with the non-standard separation of powers model and numerical advantage being dealt with independently.

2.4.1.1Non-Standard Separation of Powers Doctrine

The executive and legislature within the UK are intermingled, operating based on an almost complete fusion of powers.[111] The intertwining of the two branches of the state results from the non-standard separation of powers model, which places a greater importance upon the checks and balances within the British constitution. This is rather than a strict focus on personnel or function. The doctrine of separation of powers requires that the organs of the state i.e., the legislature, executive and judiciary are divided and operate their own distinct functions. This is to protect liberties and prevent tyranny.[112] One of the most notable statements on this doctrine were given by Montesquieu:

> *'When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty... there is no liberty if*

[110] Nor does the First Past the Post system.
[111] Bagehot, *The English Constitution* (Chapman & Hall 1867) 67–68.
[112] Richard Benwell and Oonagh Gay, 'The Separation of Powers' (Parliament and Constitution Centre, 2011).

> *the powers of judging is not separated from the legislative and executive... there would be an end to everything, if the same man or the same body... were to exercise those three powers.'* [113]

The UK like many countries do not adhere to a strict version of separation of powers and instead choose a compromised or alternative version.[114] Such a compromise can be seen in the UK with the close union of power between the executive and the legislature, for instance the crossover between the executive and legislature in the appointment of ministers in addition to the numerical advantage the executive enjoys because of the First Past the Post system. Walter Bagehot described this close union as the "efficient secret" of the English Constitution.[115] There is a convenience of such a fusion, which as this chapter appreciates forms part of natural executive dominance and is therefore not only convenient but also necessary for the effective operation of the constitution.[116] However, such a fusion can be problematic. Hewart recognised the problem with such a fusion:

> *It is the role of the executive to govern the country whilst it is the task of Parliament to make the laws that the executive governs the country in accordance with. Is it not precisely because it is the task of the executive to govern the country that it is so dangerous to hand over to the executive the power of making laws as well, and of making them in ways which, while a kind of formal homage is paid to the Sovereignty of Parliament, have the effect of employing the Sovereignty of Parliament to oust the jurisdiction of the Courts?*[117]

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[113] Montesquieu, *The spirit of the laws* translated and edited by Anne M Cohler Basia Carolyn Miller and Harold Samuel Stone (CUP 1989).
[114] An example of a stricter adherence to the separation of powers doctrine can be found in the United States Constitution. Article I grant powers to the legislature, Article II grants executive power to the President and Article III creates an independent judiciary. Unlike the UK there is not the intermingling of the executive and the legislature, Congress is elected separately from the President, who does not sit as part of the legislature. There is also the presence of constitutional supremacy in the US as opposed to parliamentary sovereignty within the UK. This means that the US Supreme Court can declare the acts of both Congress and President to be unconstitutional. See, Richard Benwell and Oonagh Gay, 'The Separation of Powers' (Parliament and Constitution Centre 2011).
[115] Walter Bagehot, *The English Constitution* (Chapman & Hall 1867) 67–68.
[116] This is with reference to the legislature and the executive.
[117] Quoted directly from Hewart's book. Lord Hewart, *The New Despotism* (Ernest Benn Limited 1929) 75.

It is due to this version of separation of powers within the British constitution that there exists a greater importance upon the checks and balance system. The importance stems from the danger of tyranny, a consequence of the compromised non-standard model. Due to the overlap between the executive and the legislature (examples of which are discussed shortly) within the British constitution there exists a real ability for the executive to be dominant in its position, particularly when considering the facilitation of executive dominance via the weak checks available and the doctrine of parliamentary sovereignty. The latter is relevant when considering that the doctrine means there is no constitutional limit for the legislature, a dangerous prospect when said legislature is dominated by the executive. The weakness of the checks available will be explored in the chapter 5 on the consequence of excessive executive dominance, which considers the failure of political constitutionalism.

The British uncodified constitution does not possess written definitive lines determining the power of each branch like the US constitution.[118] Its non-standard model fits with the flexibility that the British constitution famously possesses because of its uncodified nature. The fusion of powers that this non-standard model creates allows the constitution to operate effectively.[119] However, the lack of written rules means that the Supreme Court is accused of 'meddling' and 'overstepping' the judicial role when taking important constitutional decisions. This is particularly true when such decisions are contrary to those of the executive, for instance as witnessed in both *Miller*[120] decisions.[121] If the UK had written rules regarding each branch's role such criticism would be less likely. The lacking separation of power, the fusion of powers and the non-standard model are components of the British constitution. These all allow for the executive to be in a more dominant position than it would, should they not exist. However, they do serve a purpose and enable the constitutional cogs of the UK to

[118] The Constitution of the United States: A Transcription (National Archives) https://www.archives.gov/founding-docs/constitution-transcript

[119] The close union between the executive and legislature, referred to as the efficient secret of the British constitution, it is a characteristic of the British uncodified constitution which enables legislation to be passed effectively and therefore the constitution to operate effectively.

[120] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. *R (Miller) (Appellant) v The Prime Minister* (Respondent) *Cherry and others (Respondents) v Advocate General for Scotland* (Appellant) (Scotland) [2019] UKSC 41.

[121] In both cases the UKSC decided against the executive. In *Miller 2017* this was concerning their intention to use prerogative powers to trigger art 50 TEU and in *Miller 2019* the UKSC decided the governments prorogation of Parliament was unlawful.

turn, for instance, the fusion of powers between the executive and legislature prevent deadlock, enable an ease of legislating for the government and enables mandates[122] to be honoured easier. Therefore, this thesis believes them to be an element of natural dominance. These overlaps exemplify the way the constitutional landscape naturally positions the executive within a dominant position – this is without the forthcoming exploration of the numerical advantage the executive enjoys due to the political system. The necessity of natural dominance can be seen in the fusion of power between the executive and legislature, as although it may place the executive in a more prominent position it also enables the British constitution to operate. There is also the clear benefit of preventing a deadlock between the two branches (the executive and legislature). This can be linked with the forthcoming numerical advantage that the executive enjoys within Parliament, as together they allow for the successful passing of legislation which the electorate arguably desired the government to pass in voting for their local MPs.

This fusion of powers resulting from the non-standard separation of powers can also be seen in the executive's control over the legislative process. The executive is responsible for the business of Parliament, evident in Standing Order 14[123] ("government business shall have precedence at every sitting"). This precedence is effective irrespective of the executive's numerical advantage. Though the numerical advantage of the executive in the Commons allows it to wield considerable influence over parliamentary business, the Standing Order demonstrates that even if the executive does not possess a majority, the executive still typically controls the Commons. The government therefore in merely holding office decides the everyday agenda of the Commons. With that said this is not a hard and fast rule, a recent example demonstrates this. On the 25th March 2019 Parliament voted to take control of the parliamentary schedule.[124] They did so to hold indicative votes on a way forward with the Brexit negotiations that may secure a majority. Parliament approved the Sir Oliver Letwin amendment, withholding approval of the Brexit deal until legislation to

[122] In essence the fusion of powers between the two organs allows for the executive to honour the mandate for which the electorate elected it.
[123] 'Save as provided in this order, government business shall have precedence at every sitting.' Save as provided in this order, government business shall have precedence at every sitting. House of Commons Publications, 'Standing Orders of the House of Commons' (Session 2017-19).
[124] Parliament suspended Standing Order 14, to allow the House to hold indicative votes on Wednesday 27 March 2019.

enact it was passed. This triggered the 'Benn Act'[125] forcing the Prime Minister (Boris Johnson) to request an extension until January 31st, 2021. This does demonstrate the clout a majority for the government has. Had the majority been that what it is in the current session (2019-2024) the amendment would have been unlikely to pass and Parliament would not have taken control of parliamentary business. However, typically by virtue of this Standing Order coupled with the numerical advantage the executive not only has control of the legislative process i.e., the business of Parliament but also the outcomes of that process. What this means is in controlling the business of Parliament the executive can give priority to its aims as the executive initiates and drafts most legislation.[126] In controlling the business of Parliament they can afford time on the floor of the House for Government Bills whilst via their numerical advantage enjoys the ability to push said legislation through Parliament. These are separate abilities, which again can be seen in the recent 2017-19 parliamentary session. Though Standing Order 14 meant the executive controlled parliamentary business for this session, the lacking numerical advantage meant it was unable to pass legislation as it would have liked.[127]

The strength of the executive is corroborated by the fact that Government Bills constitute the majority of all Bills passed by Parliament. This is not uncommon or controversial, it is a reasonable way for the governing party to achieve the mandate upon which it was elected. It is obviously convenient for the executive to be active and well represented within Parliament to ensure the successful passage of the business it desires.[128] This fusion and dominance of the executive therefore allows for the successful implementing of legislation for which the electorate elected the governing party. It again demonstrates the need within the British constitution for a certain degree of dominance. A degree that is regarded as natural dominance. However, the executive's dominance over Parliament is contentious when considering the

[125] European Union (Withdrawal) (No. 2) Act 2019 - The aim of the Act is to prevent no deal Brexit on the 31st October and therefore require the prime minister to ask the EU for an extension to the Article 50 negotiating period should no deal be secured before the 31st October 2019.
[126] Alex Brazier Susanna Kalitowski and Gemma Rosenblatt, 'Law in the Making: A discussion paper' (Hansard Society 2007).
[127] For instance, take the three "meaningful" votes that Theresa May tried to get through the Commons. She failed on each and every instance.
[128] Barry Winetrobe, 'Shifting Control? Aspects of the Executive-Parliament Relationship' (Research paper 00/92, Parliament and Constitution Centre 2000).

implications this has upon the doctrine of parliamentary sovereignty, a theme that will be considered in later chapters.

Another example of the executive's dominance is prerogative powers.[129] These powers exist for the executive regardless of its numerical advantage. They are subject to criticism, often forming around the fact that Parliament finds it increasingly difficult to hold ministers to account surrounding decisions taken using prerogative powers.[130] There is also a lack of transparency that makes it problematic in terms of judicial review too - as the judiciary are wary in reviewing the exercise of these powers.[131] An obvious response to criticism of prerogative power is that Parliament could, if it wished, abolish any prerogative powers it regarded as objectionable or challenging.[132] This is of course following the orthodox approach to parliamentary sovereignty. However, Parliament is dominated by the executive, the organ of the state which uses the prerogative powers, and therefore it is unlikely for prerogative powers to be abolished. The existence of prerogative powers like the lack of separation of powers, forms part of the uncodified constitution. It is again for this reason that prerogative powers too can be regarded as a natural dominance, a dominance consequential of our constitutional landscape and arguably necessary for the constitution's successful operation.

2.4.1.2Numerical Advantage

The fusion between the executive and legislature stemming from the non-standard separation of powers is enhanced by the fact that the Government is typically formed by the party that gains the most seats in the House of Commons at a General Election.[133] This means that within the Commons the executive has a significant presence and subsequently influence. This thesis will refer to said influence and

[129] Powers held by the Monarch or by Government ministers that may be used without the consent of the Commons or Lords.
[130] Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament' (HC 2003–04 422).
[131] Again, this is owing to their unwritten nature and the fact so many have ceded to exist. A case example being *R v Secretary of State for Foreign and Commonwealth Affairs, Ex Parte Bancoult (No 2)* [2008] UKHL 61.
[132] Mark Elliott, *Public Law* (3rd edn, OUP 2017) 157.
[133] Parliament, 'Government Definition' (Parliament Glossary) <https://www.parliament.uk/site-information/glossary/government/> accessed 16th April 2020.

presence as a 'numerical advantage'. This majority then allows them an advantage when government is formed over the Commons as a whole – particularly when considering gaining support to push its Bills through Parliament. There are justifications for this presence and influence, pertaining to this chapter's natural dominance affiliation. These justifications will be considered shortly.

It is necessary to consider why and how the executive manages to secure a numerical advantage within the Commons. It is a result of the UK's electoral system. The UK follows the First-Past-the-Post system. The UK uses this system for the election of MPs to the Commons. The system allows the electorate to cast a single vote, this is a vote for one candidate running in their constituency. The candidate who wins the most votes in each constituency is elected.[134] All other votes which were not for the winning candidate are disregarded. The system arguably suffers a lack of democratic legitimacy. The lacking legitimacy is found in the ability for an MP to be elected in a particular constituency where there is a majority of votes cast for alternative candidates.[135] To illustrate this point, the Belfast South seat, in 2015 was won by a candidate who only secured 9,560 votes, or 24.5% of the total vote, a record low. The more candidates with a chance of getting elected, the fewer votes the winner needs.[136] There are 650 constituencies within the UK[137] and not every constituency will have the same parties running for the seat.[138] The system can result in Governments being elected with considerably low support, for instance, a record low was in 2005 when Labour was elected with only 35% of the vote.

[134] Lizzy Buchan, 'First past the post: What is the UK's voting system and how does it work?' *The Independent* (London, 12 November 2018).
[135] Electoral Reform Society, 'First Past the Post' <https://www.electoral-reform.org.uk/voting-systems/types-of-voting-system/first-past-the-post/> accessed 21st October 2019.
[136] Electoral Reform Society, 'First Past the Post' <https://www.electoral-reform.org.uk/voting-systems/types-of-voting-system/first-past-the-post/> accessed 21st October 2019.
[137] 554 in England, 59 in Scotland, 40 in Wales and 18 in Northern Ireland. Neil Park, 'Electoral Statistics, UK 2017' (Office of National Statistics, 22 March 2018) <https://www.ons.gov.uk/peoplepopulationandcommunity/elections/electoralregistration/bulletins/electoralstatisticsforuk/2017> accessed 25st October 2019.
[138] This is because certain parties may be geographical i.e., DUP, the SNP and Plaid Cyrmru it may also be as a result of election pacts as seen in the recent December 2019 election between the Conservatives and the Brexit party.

The First-Past-the-Post system tends to generate two large parties (Labour and the Conservatives).[139] This is due to the fact the UK operates a "two-party system' meaning there are two major political parties within the UK political sphere.[140] Smaller parties without a geographical base[141] find it hard to win seats.[142] As a result of the two-party system, that lacks geographical bases for smaller parties, and the disregarding of all non-winning votes, the system will often produce strong majorities for a single party. This system is different from most countries within the world who follow a "proportional voting system".[143] This system will see a party win half the seats in Parliament even if they win less than half of the votes from the electorate.

Within the UK an indirectly elected Prime Minister heads a parliamentary executive granted office by virtue of its legislative majority.[144] Convention holds that ministers are drawn from either the House of Commons or the House of Lords,[145] therefore an overlap naturally ensues as it is those Houses which make up the legislature. Numerically this means that more than half the Commons is made up of the leading political party (or parties in a coalition instance) that forms the Government. This however is not taken issue with and fits with the form of natural dominance as the party with the majority of seats has been elected to execute a mandate. It therefore possesses democratic legitimacy for its position. The resulting dominance is therefore a consequence of the constitutional landscape, particularly the voting system. In addition to the democratic legitimacy, the process is not dissimilar to other constitutions such as Germany's and Spain's. Both countries have a President/Prime

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[139] For further exploration of the First Past the Post system see chapter 3 on excessive executive dominance.
[140] Though it has to be recognised that this is less true today than it was in the early 20th century. There has been the emergence of smaller parties i.e., Lib Dems, Green, Brexit Party and UKIP. Not to mention those parties within Wales, Northern Ireland and Scotland which include but is not exclusively SNP, Plaid Cymru and the DUP.
[141] Parties with a geographical base would be parties such as SNP, Plaid Cmyru and Sein Fein. These parties, unlike the Brexit party, UKIP and Liberal Democrats have voters concentrated in a particular area. To illustrate this point, in 2015 UKIP received 12.6% of the votes and only secured one seat in Parliament – while the SNP had only 4.7% of the vote yet secured 56 seats.
[142] Electoral Reform Society, 'First Past the Post' <https://www.electoral-reform.org.uk/voting-systems/types-of-voting-system/first-past-the-post/> accessed 21st October 2019.
[143] See Parliament, 'proportional representation' <https://www.parliament.uk/site-information/glossary/proportional-representation/> accessed 21st October 2019.
[144] Richard Heffernan and Paul Webb, 'The British Prime Minister: Much More Than 'First Among Equals' in Thomas Poguntke and Paul Webb (eds), *The presidentialization of politics: a comparative study of modern democracies* (OUP 2005).
[145] Richard Kelly, 'Ministers in the House of Lords' (Briefing Paper 05226, 22 April 2020).

Minister who is the head of the winning party at an election, both then form their cabinets from their legislatures. This only further supports the notion of natural dominance i.e., a dominance necessary for the effective functioning of the constitution. Therefore, this is not a dominance with which issue should be taken.

The British system of Parliament and Government means the Government can rely upon its numerical advantage and party support to achieve legislative success.[146] The size of the government's majority has a huge impact upon the legislative process,[147] therefore when a government has a clear majority it possesses considerable power enabling it to push through legislation.[148] This majority when coupled with party whips, MP's party loyalty, "the payroll vote" and the executive's control independent of its numerical advantage (standing orders, fusion of powers and prerogative powers for instance) demonstrates just why the executive has full authority. Take the payroll vote alone: according to legislation there can be no more than 95 ministers in the Commons,[149] with the purpose of preventing the executive from unduly dominating the House of Commons.[150] With ministers extremely unlikely to vote against the government, the vote of said members of the Commons is almost guaranteed.[151] This only covers cabinet ministers for which all 95 paid ministers will not be members. However, the executive avoids this limitation by appointing unpaid government posts, these are parliamentary private secretaries. In 2012 there were 95 MPs in paid government positions and 43 MPs acting as unpaid Parliamentary Private Secretary, a total of 138 MPs or 21% of all MPs, and they therefore formed part of the government.[152] The winner takes all in this system.[153]

[146] Mark Elliott, *Public Law* (3rd edn, OUP 2017) 112.
[147] Alex Brazier Susanna Kalitowski and Gemma Rosenblatt, 'Law in the Making: A discussion paper' (Hansard Society 2007) 14.
[148] An example being the Investigatory Powers Act 2015.
[149] Disqualification Act 1975 s2(1).
[150] Mark Elliott, *Public Law* (3rd edn, OUP 2017) 121.
[151] Take collective ministerial accountability for instance. A constitutional convention in Parliamentary systems that members of the cabinet must publicly support all governmental decisions made in Cabinet, even if they do not privately agree with them.
[152] Mark Elliott, *Public Law* (3rd edn, OUP 2017) 121.
[153] Andrew Gamble, 'The Constitutional Revolution in the United Kingdom' (2006) 36 The Journal of Federalism 19.

The concept of natural dominance enables government to secure the mandate for which the electorate elected them.[154] Decisions attributable to political parties are the only means by which the electorate can exercise its control over the Commons. Natural dominance is therefore arguably needed for the political system to work.[155] The electorate will vote for an MP standing in their constituency belonging to a particular party. Generally speaking, they elect this MP based on the mandate of the party to which they belong. The control therefore that the electorate has over the Commons would be to differentiate their vote at the next election as a response to the failure of that party to act on their mandate. Natural dominance is therefore accepted based on its link to "democratic legitimacy", meaning the accepted right to exercise and use power due to it being achieved through a democratic route and used for a necessary/appropriate constitutional requirement. It is a power conferred by the people and through the accepted political framework of the constitution.[156] The democratic legitimacy in this form of natural dominance lies in providing the electorate with manifesto promises at election for which the party can be held accountable against at the next election.

Whilst it has been clearly established that the fusion of powers and the dominance it creates for the executive is both natural and justified for the constitution to operate, it does not come without criticisms. It may be argued that it hinders the constitution and the role which branches of the constitution (namely the legislature) must play.[157] Consider the ability of Parliament to hold government to account for instance. It is a cardinal principle of the constitution that the Government is accountable to Parliament.[158] There is a constitutional importance of ministerial accountability to Parliament.[159] When holding the executive to account it would not be unwise to expect the maximum degree of separation between the body doing the scrutinising and the

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[154] Alex Brazier Susanna Kalitowski and Gemma Rosenblatt, 'Law in the Making: A discussion paper' (Hansard Society 2007) 11.
[155] Lord Hailsham, *Dilemma of Democracy: Diagnosis and Prescription* (HarperCollins 1978) 128.
[156] Nat Le Roux, 'Elective dictatorship? The democratic mandate concept has become dangerously over-extended' (LSE, 7th August 2014) <http://blogs.lse.ac.uk/politicsandpolicy/elective-dictatorship-democratic-mandate/> accessed 28th November 2020.
[157] These constitutional principles are explored in a chapter 4 and 5.
[158] For instance, parliamentary accountability and ministerial accountability.
[159] *Cherry and others (Respondents) v Advocate General for Scotland* (Appellant) (Scotland) [2019] UKSC 41.

body being scrutinised.[160] The overlaps between these two branches resulting from the non-standard model tip the balance of power in favour of the executive at the expense of Parliament. The problematic nature stems from the fact that the legislature is not capable of properly enforcing the checks and balances it has over the executive when the executive dominates the legislative branch. This is a theme that will be explored more in the proceeding chapter, particularly when focusing on the combination and extension of the natural dominance factors to amount to excessive dominance.

2.4.2 Delegated Legislation

The next factor to be considered as a contribution to the natural dominance that the executive enjoys in the British constitution is the ability to create delegated legislation. This similarly contributes to natural dominance, much like the fusion of powers explored previously, as it is a consequence of the British constitutional landscape and is a reasonable and necessary way for the constitution to operate effectively. The fusion of powers and non-standard separation of powers model allows the executive to carry out legislative functions via delegated legislation. This allows for a convenient and expedient legislative process. Delegated (or secondary) legislation for the purposes of this chapter is law created by ministers (or other bodies).[161] It involves the bestowing of powers by Parliament on the executive, enabling the executive to legislate free of the procedural requirements involved in creating statute.[162] Subordinate legislation therefore consists of legislation made by members of the executive, almost always pursuant to an authority given by Parliament in primary legislation.[163]

There is no standard delegated power. Some are for technical powers, some administrative, some are very specific or limited and others are wide ill-defined powers.

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[160] Barry Winetrobe, 'Shifting Control? Aspects of the Executive-Parliament Relationship' (Research Paper 00/92, Parliament and Constitution Centre 2000).
[161] Parliament, 'Delegated Legislation' (Parliament Glossary) <https://www.parliament.uk/site-information/glossary/delegated-or-secondary-legislation/> accessed 21st October 2020.
[162] Peter Davis, 'The significance of parliamentary procedures in control of the Executive: a case study: the passage of Part 1 of the Legislative and Regulatory Reform Act 2006' (2007) PL 677.
[163] *R (The Public Law Project) v Lord Chancellor* [2016] UKSC 39 [21].

[164] Reasons for the creation of such powers vary. They include: volume of legislation required each year, technology developments, society's fast pace,[165] adjusting figures (for penalty amounts or inflation etc.), bringing legislation up to date with current events,[166] expansion of the state, social security, emergencies[167] and expertise.[168] Examples of these details may include the providing of a date for an Act to come into effect, or even the updating of an existing law like the Misuse of Drugs Act 1971.[169] Delegated legislation would allow this Act to be updated with new banned substances. The ability for things such as this to be done by delegated rather than primary legislation is of a great convenience for Parliament, it offers a logical and time efficient alternative to primary legislation enabling attention and time to be spent on much more pressing issues. Another reason for the use of delegated legislation may be that each time a new government is elected it finds itself respecting laws created by its predecessor with which it may not agree. It is therefore typical for a new government to want to change the legislation to suit its own mandate. The legislature does not have the time to do this, which is where delegated legislative powers come in.[170]

Delegated legislation did not previously invoke as much attention as it does currently. The practice of delegated legislation can be traced back at least to Tudor times, the Statute of Sewers 1531 being generally regarded as the first significant example of enabling legislation.[171] Much of the media attention surrounded the Withdrawal Act[172] and the powers that the Act granted ministers. The Act houses broad delegated powers extending beyond the 'filling in detail' for which Parliament regards delegated

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[164] Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014) 48.
[165] Tanisha Aggarwal, 'War or terrorist attacks Statutory Instruments – where do I begin?' (ABI, 14 July 2017) <https://www.abi.org.uk/news/blog-articles/statutory-instruments--where-do-i-begin/> accessed 29th November 2020.
[166] The Coalition Government for instance used delegated legislation to add new substances to the list of drugs banned under the Misuse of Drugs Act 1971. Parliament, 'Secondary legislation' (Parliament Glossary) <https://www.parliament.uk/business/bills-and-legislation/secondary-legislation/> accessed 21st October 2020.
167 The Health Protection (Coronavirus) Regulations 2020.
[168] Ruth Fox and Joel Blackwell, 'The Devil is in the Detail: Parliament and Delegated Legislation' (2014) Hansard Society 98.
[169] Parliament, 'Secondary Legislation' (Parliament Glossary) <https://www.parliament.uk/about/how/laws/secondary-legislation/> accessed 21st October 2020.
[170] Peter Davis, 'The significance of parliamentary procedures in control of the Executive: a case study: the passage of Part 1 of the Legislative and Regulatory Reform Act 2006' (2007) PL 677.
[171] J D Hayhurst and Peter Wallington 'The Parliamentary Scrutiny of Delegated Legislation' (1998) PL 547.
[172] The European Union (Withdrawal) Act 2018.

legislation is required.[173] The Act has become somewhat known for its Henry VIII powers. These powers will feature in the following chapter on excessive executive dominance. The Withdrawal Act[174] originally (in its Bill form) included powers (Henry VIII) to amend the Act itself; these however were subsequently removed by amendment.[175] The use of such powers (Henry VIII) is more fitting with what this thesis terms excessive executive dominance. Analysis of them and their ability to amount to excessive executive dominance will feature in chapter 3 on excessive executive dominance.

Delegated powers are frequently included in the Bills presented to Parliament by the Government.[176] Statutory instruments are the most used delegated powers. [177] Their accepted place within the British constitution can be found in the essential role they play. These powers allow ministers to use delegated legislation to do things which would have otherwise required the creation of a whole other Bill/Act. Delegated legislation provides practical measures that enable the law to be enforced and operate in daily life.

Though delegated legislation is time efficient, accepted and understandably necessary for the constitution to operate it still demonstrates the executive carrying out a role to which the legislature is more suited naturally. It is therefore because of this, that the executive is naturally enhanced in its powers to control or impede another branch. This however is a result of the constitutional landscape and constitutional need; therefore, it forms natural dominance. This is particularly true when considering the expanding need for supplementary legislation because of an expanding state.[178] It is therefore an accepted form of dominance by the executive over the legislature, aligning it with natural dominance. Parliament does claim the powers are often

[173] When considering the definition above given by Parliament itself being for administrative changes.
[174] The European Union (Withdrawal) Act 2018.
[175] Stephen Tierney, 'The Legislative Supremacy of Government' (UKCLA, 3 July 2018) <https://ukconstitutionallaw.org/2018/07/03/stephen-tierney-the-legislative-supremacy-of-government/ > accessed 28th November 2019.
[176] With statistics showing that delegated powers are passed at a rate of 100 to 1 primary act, it is unquestionable that they are not frequently found within government bills. Especially when considering the fact majority of primary legislation passed is government bills – see the earlier section on numerical advantage.
[177] Ryan Murphy and Frances Burton, *English Legal System* (Taylor & Francis 2020) 30.
[178] S A De Smith, 'Delegated Legislation in England' (1949) 2 Western Political Quarterly 514.

practical and sensible,[179] as an alternative to primary legislation, cementing the stance of this chapter on the necessary role of delegated legislation however, the reality of those claims is debateable. It is convenient to entrust *minor*[180] legislative and judicial functions to executive authorities.[181] It is for that reason these delegated powers are a factor for natural dominance.

It is argued that the system of delegated legislation is both legitimate and constitutionally desirable for certain purposes, within certain limits, and subject to certain safeguards.[182] This is because Parliament nowadays passes so many laws every year, that it lacks the time to shape all the legislative details. Presently, Acts of Parliament will provide a framework for which the bulk of the detail will be added to through delegated legislation.[183] The executive is much better equipped via these delegated powers to deal with matters speedily in comparison to Parliament,[184] with delegated legislation reducing the procedural requirements of primary legislation. The use of delegated powers also allows external expertise to be sought to shape policy.

Delegated legislation therefore provides a logical alternative to Parliament legislating. There is also a need for flexibility in legislating when considering the rate at which the society, politics and economics can change.[185] Much of the law affects people's lives so closely that flexibility is an essential criterion. It is for instance illogical to pass an Act of Parliament to effectively control an epidemic of measles or an outbreak of foot and mouth disease. The time requirement alone of dealing with these examples through primary legislation render it futile. However, as will be demonstrated in the coronavirus case study in chapter 6, there does exist legislation to effectively deal with an array of emergencies, in a manner that utilises delegated legislation whilst instilling

[179] UK Parliament, 'Delegated Powers and Regulatory Reform Committee - Role of the Committee' <https://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/role/> accessed 28th October 2020.
[180] I emphasise this reference to minor powers for two reasons. Firstly, it fits with the notion of natural dominance and the ability for delegated legislation to be accepted as necessary and justified. However, I also place emphasis on minor for the forthcoming chapter on excessive executive dominance when it will be shown that the powers, we have today are far from this "minor" classification.
[181] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932).
[182] This is according to the Donoughmore Report (see history of executive dominance above).
[183] Ruth Fox and Joel Blackwell, 'The Devil is in the Detail: Parliament and Delegated Legislation' (2014) Hansard Society 98.
[184] Mark Elliott, *Public Law* (3rd edn, OUP 2017) 139.
[185] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 23.

sufficient safeguards against misuse. One example the Donoughmore Report used to exemplify this kind of legislation, in which delegated legislation is quite rightly demonstrated as both necessary and accepted was the Road Traffic Act 1930[186] in which section 10 of this Act prescribes the rate of speed to be observed by the various classes and descriptions of motor vehicles.

The size and complexity of today's society makes delegated legislation a necessity. It is impractical for Parliament to govern alone.[187] It has become customary today for Parliament to delegate minor legislative powers to subordinate authorities and bodies.[188] The use of this form of legislation is as a result rising,[189] with most of the UK's legislation now coming in the form of subordinate legislation.[190] Today roughly 3000 delegated powers are passed each year at a rate of 100 to 1 in comparison to primary Acts.[191] The truth is that if Parliament were unwilling to delegate law-making powers to the executive then Parliament would not be able to pass the quantity of legislation that is necessary for a modern society.[192] This further reiterates the need and acceptance of this form of legislation and subsequently strengthens the argument of this chapter in declaring it a factor of natural dominance.

Delegated legislation once represented powers that were infrequent, administrative or technical, such as those spoken of by Carr.[193] These powers are short of those we see today though. Delegated legislation now permeates every aspect of citizens' lives from the NHS, data retention and fracking to compensation for crime victims.[194] The Donoughmore Report states that, "*it is customary today to delegate minor legislative powers to subordinate authorities and bodies*".[195] This again exemplifies how

[186] The Road Traffic Act 1930.
[187] Rt Hon Lord Newton of Braintree, *The Challenge for Parliament: Making Government Accountable* (Vacher Dod 2001).
[188] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932).
[189] Nicholas Barber and Alison Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' (2003) PL 113.
[190] Vyara Apostolova, 'Acts and Statutory Instruments: the volume of UK legislation 1950 to 2016' (CBP 7438, House of Commons Library 2017).
[191] Vyara Apostolova, 'Acts and Statutory Instruments: the volume of UK legislation 1950 to 2016' (CBP 7438, House of Commons Library 2017).
[192] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932).
[193] C T Carr, *Delegated Legislation* (CUP 1927).
[194] Ruth Fox and Joel Blackwell, 'The Devil is in the Detail: Parliament and Delegated Legislation' (2014) Hansard Society 23.
[195] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 4.

delegated legislation and in turn executive dominance has advanced. The legislative powers delegated today are not so easily described as “minor”; examples of wider delegated powers will follow in the proceeding chapter on excessive executive dominance.

Furthermore, the executive can delay / prevent debates on instruments (forms of delegated legislation) as it controls Parliament’s business (see fusion of powers section above). This demonstrates the relevance of each individual factor coming together to create an instance of natural dominance where the executive is placed in a dominant position, resulting from the constitutional landscape enabling it to carry out its constitutional role. Whilst the government of the day holding a majority in the Commons and therefore having a natural dominance is widely accepted, so too is the use of delegated legislation for suitable and intended reasons. What becomes an issue and therefore should not be so easily accepted is that the natural dominance flowing from the numerical advantage because of the non-standard model and political system allows for delegated powers outside the typical “minor or administrative tasks”. The ‘minor’ changes become questionable when considering major areas of public policy such as immigration and the social security system[196] being altered via delegated legislation. This will be discussed further in the next chapter on excessive executive dominance.

In summary the need for delegated legislation in limited circumstances stems from the various points raised above i.e., the need for flexibility, the sheer amount of legislation required each year, the ability to make frequent and minor changes, the speed, the growing state and the continually changing society. The use of these powers therefore is justifiable as serving a legitimate purpose to ensure the constitution of the UK operates effectively and for that reason is seen as a factor for the presence of natural dominance.

2.4.3 Scrutiny of Delegated Legislation

[196] Joel Blackworth and Ruth Fox, ‘Westminster Lens. Parliament and Delegated Legislation in the 2015-16 session’ (Hansard Society 2017).

The lacking scrutiny of the delegated legislation by Parliament forms a factor of natural dominance. This natural dominance factor exists due to the constitutional landscape and the various factors explored above in addition to the characteristics and of delegated legislation. The lacking scrutiny plays a role within the requirement and necessity of secondary legislation i.e., the convenience and speed it has over primary legislation, advantages that would be lost should it be subject to the same level of scrutiny. Therefore, it can on this footing be argued that a lacking scrutiny of the executive effectively fits with the notion of natural dominance on the basis that Parliament's inability is due to the constitutional landscape more broadly. I will argue in the next chapter on excessive executive dominance that the scrutiny of delegated legislation is insufficient and is incapable of preventing the executive from reaching a dominance of an excessive nature, therefore it is a factor of excessive executive dominance. However, for now attention is to be paid to how lacking scrutiny of delegated legislation fits with natural dominance.

Within a representative democracy like the UK, Parliament performs a unique role.[197] Parliament has two key (yet contradictory) functions as touched on earlier in this chapter when considering the UK's fusion of powers. The earlier discussion focused on the role of Parliament to give assent to the legislative programme, however, Parliament is also responsible for the scrutinising of legislation and holding the executive to account. It is this role on which this section will focus. It is Parliament's scrutiny role which it does not fulfil as effectively. This is owing to the same very reason it carries out the first of its function so well; namely that the executive's numerical advantage over the legislature resulting from the UK's constitutional landscape - the electoral system, non-standard separation of powers model and fusion of power between the two branches. The executive's natural dominance is therefore a double-edged sword in this regard. It secures assent to Government Bills and allows for an effective working of the constitution, but this very dominance of the executive is also an obstacle for accountability. The two are contrary to one another.

[197] Rt Hon Lord Newton of Braintree, *The Challenge for Parliament: Making Government Accountable* (Vacher Dod 2001).

Delegated legislation is by no means subject to the same level of scrutiny as primary legislation, this is for obvious reasons i.e., the benefits of delegated legislation.[198] It is for this reason that the focus of this section is to produce a link between the lacking scrutiny and natural dominance. When talking of scrutiny this chapter is referring to the checks that the UK Parliament places upon the UK executive with regards to the scrutiny of secondary legislation. As this chapter is concerned with natural dominance, the focus is primarily on the way the executive is held to account and whether that accountability is sufficient to prevent the executive from controlling or impeding other branches of the constitution, other than what is necessary for or a natural consequence of the constitution's operation.

Before considering the scrutiny of delegated legislation in detail, let us first consider the role of Parliament in holding the executive branch to account more generally. The accountability to which Parliament holds the executive is the principal means of placing checks upon the executive between elections.[199] The accountability of the executive to Parliament is a constitutional principle, a principle referred to throughout the thesis but particularly in chapter 3 on excessive executive dominance and chapter 5 on failure of political constitutionalism and push to legal constitutionalism. The scrutiny of government is any activity which involves the examining or challenging of governments' expenditure, administration or policies.[200] In holding the executive to account Parliament, questions and challenges the executive's policies and actions. Parliament also requires ministers and senior officials to account publicly for their decisions.[201] There is an exhaustive process for Parliament in the passing of legislation, including second and third readings, report stage – which allows for amendments to be made, potentially the involvement of committee amendments and pre legislative scrutiny. This is all without the House of Lords and its similar process.[202] Therefore it is safe to say that when creating primary legislation there is a potentially

[198] For instance, the speed delegated legislation, it is much quicker than passing an Act of Parliament, it is therefore as a result better suited to certain matters i.e., emergencies and technical changes.
[199] Rt Hon Lord Newton of Braintree, *The Challenge for Parliament: Making Government Accountable* (Vacher Dod 2001).
[200] Hannah White, 'Parliamentary scrutiny of Government' (Institute for Government, 22 January 2015).
[201] House of Lords, *Report of the Leader's Group on Working Practices* (HL 2010-12, 136).
[202] Brit Politics, 'What are the UK Parliament methods of scrutiny?' <https://www.britpolitics.co.uk/a-level-uk-parliament-british-politics-scrutiny/> accessed 12th January 2020.

lengthy process prior to Royal Assent being given. A process that is not necessary for the use of delegated legislation and a process which means delegated legislation is a better option in certain circumstances.[203]

Lack of parliamentary scrutiny is discussed within this chapter on natural dominance because whilst it is recognised that a lack of parliamentary scrutiny exists it can be mitigated when looking at the need for such scrutiny, particularly surrounding the ability to create delegated legislation. Some of the key advantages to using delegated legislation as opposed to primary, are speed and flexibility. These advantages would surely be lost if there was as much scrutiny of delegated legislation as there is of primary legislation. In addition to this the intended purpose of delegated legislation was to make minor or administrative changes to the law, as was stated in the early literature discussed above.[204] This again questions the need for heightened scrutiny of such measures and the system allows for different sorts of scrutiny.

This chapter recognises a lack of parliamentary scrutiny as a form of natural dominance particularly in relation to delegated legislation. The natural dominance link is due to the ability for the executive to operate as is needed by the constitution. The lacking parliamentary scrutiny over delegated legislation enables the legislation to serve its intended purpose i.e., be convenient and time efficient. The delegated powers that were described in the 1920s and 30s literature were describing a dominance which this thesis regards as natural dominance. These delegated powers were infrequent, minor and administrative, for specified purposes, with time limits and necessary for the constitution to function.[205] Therefore when considering these characteristics, the idea of a less stringent form of scrutiny is not too surprising and is arguably necessary. However, this stance may alter should the rate or material scope of these powers change – as will be seen in the proceeding chapter on excessive executive dominance.

[203] For instance, in emergencies and or when making technical changes. Delegated legislation can make a better alternative to an Act of Parliament.
[204] See section on the history of executive dominance in chapter 2.
[205] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 4.

Delegated legislation is subject to varying degrees of scrutiny. To simplify the procedures there are four types that include: no parliamentary scrutiny at all,[206] negative (after a 40-day period if the instrument is not disproved then it becomes law), positive (required to be approved within 40-day period) and super-affirmative (subject to representation and scrutiny with a 60-day period).[207] Very little time is made for the scrutiny and debate on statutory instruments in the Commons. Affirmative resolution instruments are often referred to Standing Committees, instead of being debated on the House floor.

The majority of instruments are subject to either affirmative or negative procedures;[208] around 75 per cent of all SIs laid before Parliament are subject to the negative procedure[209] (the least stringent of them all). Negative instruments are not subject to a routine scrutiny formula. They are only debated if a prayer motion is tabled and even when a negative instrument has been prayed against only a minority are referred to a standing committee.[210] Of the roughly 3,000 SIs produced each year only around 1,200 are subject to parliamentary scrutiny.[211]

In addition to these varying scrutiny measures there is also the use of committees in Parliament to scrutinise delegated legislation.[212] Delegated Legislation Committees are responsible for scrutinising the majority of secondary legislation within the Commons. They have the responsibility of looking at the substance, merit and policy which underlines a piece of secondary legislation. The use of committees means that the time of Parliament is not taken up with scrutinising this form of legislation (at least

[206] Either laid before Parliament with no subsequent procedure or not laid at all (Secondary Legislation Scrutiny Committee, *Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation* (HL 2015-16, 128)).
[207] Mark Elliott, *Public Law* (3rd edn, OUP 2017) 149.
[208] Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review* (HL 2015-16, 116).
[209] Hansard society, 'In the Rush to prepare for Brexit – Parliamentary Scrutiny will suffer' (Hansard Society 2019)
[210] Referral is dependent upon the agreement of the party whips. (Royal Commission, *A house for the future* (CM 4534, 2000)).
[211] Royal Commission, *A house for the future* (CM 4534, 2000).
[212] The scrutiny of secondary legislation is of paramount importance, particularly Parliament's involvement in such scrutiny, without which there is a loss of the democratic element – disconnecting the electorate from the creation of delegated legislation. The democratic element is important for legislation as without it there would be a lack of legitimacy.

not on the floor of the House) – one of the key advantages of its use. Committees also ensure that Parliament is keeping a check on the executive – one of its core roles.[213]

This lacking scrutiny has enabled the use of the powers for their intended purposes, one example being minor administrative changes of policy which enable speed and convenience in legislating. It is when the powers fall outside of this that the lack of scrutiny becomes problematic with regards to the executive's dominance as will be explored.

Natural dominance is seen by this thesis as consequences or factors within the constitution which are necessary. With regards to delegated legislation, the primary focus for this section is that the use of said legislation has a necessary role. If the scrutiny of delegated legislation was heightened to the same as that of primary legislation it would nullify the purpose of secondary legislation. It is for this reason that a lacking parliamentary scrutiny for delegated legislation is considered as another natural dominance factor.

2.5 Conclusion

The principal aim of this chapter has been to evidence natural dominance within the British constitution. This has been done through the exploration of a range of factors, that this thesis believe makes up natural dominance. These factors are present within the UK; however, they are not taken issue with and nor is the concept of natural dominance. This is because these factors are either consequential or necessary because of the UK's constitutional landscape. Issue is taken with the executive's position when there is an accumulation and extension of the factors creating what this thesis terms excessive executive dominance. This however will be explored later in the thesis.

It has been the intention of this chapter to explore, define and give context to the concept of executive dominance generally before turning attention to natural dominance. In turning to natural dominance, the factors considered include a fusion of

[213] The committees that scrutinise this legislation include: The Joint Committee on Statutory Instruments, Departmental Select Committees, Delegated Legislation Committees and House of Lords Secondary Legislation Committee.

powers – including separation of powers and the executive's numerical advantage in the Commons, the ability to create delegated legislation and the lack of parliamentary scrutiny. Some of these factors were present in the early literature on this subject, though unlike the early literature this chapter does not take issue with them.

To summarise the arguments, the fusion of power between the executive and legislature is the result of the non-standard separation of powers model, therefore a naturally occurring consequence of the British constitution. It is within the fusion that the executive obtains a numerical advantage over the legislature (or at least has the capacity to do so). This numerical advantage then links with delegated legislation via the ability of the government to pass legislation which encompasses the delegated powers. Concerning the scrutiny of delegated legislation, it was demonstrated within this chapter how the lacking scrutiny of delegated legislation is necessary due to the characteristics of delegated legislation. Therefore, the lack of scrutiny offered to such legislation can be understood when considering the intended purpose and benefit of said legislation. This legislation when used for its intended purpose falls within natural dominance as it is justifiable and necessary for the constitution to operate. It is only when there is an extension of these factors or a combination of them in which the executive's acts outside of what is necessary for the functioning of the constitution that issue is taken, this will be seen in the next chapter when considering excessive executive dominance.

Chapter 3: Excessive Executive Dominance

3.1 Introduction

The chapter begins by defining what is meant by the term excessive executive dominance, distinguishing it from the concept of natural dominance. In defining excessive executive dominance, the first section of this chapter outlines a two-step test. It is necessary for both steps to be fulfilled for there to be excessive executive dominance. This chapter demonstrates the existence of excessive executive dominance, within the British constitution. The chapter will demonstrate both why and how excessive executive dominance exists within the British constitution. Through the exploration of various factors, the possibility for excessive executive dominance will be demonstrated. This chapter will focus instead on the combination and extension of factors within the UK constitution, which can result in the notion of excessive executive dominance. In doing so this chapter narrows the focus from the umbrella term of executive dominance. Like natural dominance, excessive executive dominance is a multifaceted concept. It incorporates numerous factors which together can amount to an excessively dominant executive. The chapter will also demonstrate why these factors are not necessary and therefore prove problematic for the British constitution. The factors explored within this chapter are wide delegated powers, Henry VIII clauses and inadequate parliamentary scrutiny. Unlike natural dominance, these factors are not merely consequential or necessary for the working of the UK's constitutional landscape. These factors are often extensions of those discussed in the natural dominance chapter,[214] which, when combined, can place the executive in an excessively dominant position. The presence of these factors will satisfy step one of the two-step test for establishing excessive executive dominance. The second step of the test is concerned with these factors undermining constitutional principles. The focus in this chapter is to outline factors and therefore fulfil step one of the two step test. The second steps analysis of whether these factors undermine constitutional principles is concerned with whether they tip the balance of power in favour of the executive at the expense of another organ of the state and if they do, they will

[214] See chapter 2.

consequently result in excessive executive dominance. Through its exploration of a range of factors, this chapter not only intends on showing the existence of excessive executive dominance but also demonstrates its problematic nature.

3.2 Definition of Excessive Executive Dominance

Executive dominance is the ability for the executive branch of the constitution to possess control over or impede the other branches of the constitution. While natural dominance relates to powers that the executive naturally possesses, which are necessary for the constitution to operate, excessive executive dominance is the possession of powers not necessary or justifiable for the constitution to operate. Excessive executive dominance is a position of dominance the executive is placed in by a combination and importantly 'extension' of many factors within the UK constitutional landscape, which are consequential. This combination and extension disproportionately enhance the executive's position and power, consequently tipping the balance of power between the executive and legislature, in favour of the former, at the expense of the latter. By its very definition 'excessive executive dominance' is executive dominance that is more or higher than is necessary.[215] The key difference, therefore, between natural and excessive executive dominance is that natural dominance is necessary for the constitution's efficient operation. In contrast, excessive dominance hinders the efficient functioning of the constitution, undermining constitutional principles and or preventing other branches performing their constitutional role. This is particularly problematic when considering the disproportionate controlling power of the executive over other branches of the constitution.

In determining the presence of excessive executive dominance within the constitution, this definition has been broken down into a two-step test. It is necessary for both steps to be fulfilled for there to be excessive executive dominance. The first of the two steps concern the various excessive executive dominance factors. This step essentially requires a combination / extension of natural dominance factors (this could be a single factor or multiple). The second step of the two-step test concerns the

[215] Collins Dictionary <https://www.collinsdictionary.com/dictionary/english/excessive> accessed 30th November 2020.

combination/extension of the factors in step one, hindering the efficient functioning of the constitution by undermining constitutional principles or preventing another branch of the state performing their constitutional role. The second step on this test is explored more in the second part of this thesis concentrating on the consequences of excessive executive dominance. This chapter primarily focuses on the first step exploring the various factors of excessive executive dominance.

3.3 Delegated Legislation

While delegated legislation formed a factor in Chapter 2 on natural dominance, this section focuses on the extension of this factor and its contribution to the presence of excessive executive dominance, namely in the fulfilling the first step in the two-step test to determine excessive executive dominance. The growth in the amount of delegated legislation in recent years,[216] represents a substantial shift of legislative power being taken away from Parliament and towards the executive.[217] Convenience has become the overriding concern,[218] evident in the expansion of delegated legislation.[219] The UK has a whole system that permits the production of these powers.[220] The powers now affect every part of citizens' lives with so much law delegated, with powers covering an array of areas including rubbish bin collections, legal aid, food labelling, rail passenger regulations, the organisation of the NHS and data retention.[221] Delegated powers are becoming broader, more frequent and more ill-defined. There is an increasing tendency for governments to use delegated legislation for policy rather than mere detail.[222] The Constitution Committee expressed concern with the executive's approach to delegated legislation stating:

[216] If you consider that in 1932 the Donoughmore report identified only 8 Henry VIII clauses, the extent to which the use of delegated legislation has increased in recent years is striking.
[217] Royal Commission, *A house for the future* (CM 4534, 2000).
[218] Joel Blackwood and Ruth Fox, 'Westminster Lens Parliament and Delegated Legislation in the 2015-16 session' (Hansard Society 2017).
[219] Alex Brazier Susanna Kalitowski and Gemma Rosenblatt, 'Law in the Making: A discussion paper' (Hansard Society 2007).
[220] Lord Hewart, *The New Despotism* (Ernest Benn Limited 1929) 15.
[221] Joel Blackwood and Ruth Fox, 'Westminster Lens Parliament and Delegated Legislation in the 2015-16 session' (Hansard Society 2017).
[222] Edward Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (Bloomsbury Publishing 2001) 25.

We do not accept that there is a "high threshold" for the inclusion of delegated powers in bills and it is unacceptable that the delegation of power is seen by at least some in the Government as a matter of what powers they can get past Parliament. [223]

Although theoretically it is for Parliament to decide which powers to confer on the executive and on what terms, pragmatically, the executive is strongly positioned to get Parliament to confer upon it the power it wants and the terms it wants them on.[224] While the previous chapter explored this and the factors of natural dominance were demonstrated as necessary for the efficient working of the constitution, the ability of the executive to control the legislature and pass these delegated powers so quickly becomes problematic when considering the extent and width of these powers. It is within this section that this problematic nature is investigated, in considering the extension of the executive's ability to make delegated legislation – exploring wide delegated powers and Henry VIII Clauses to illustrate the ability of excessive executive dominance within the British constitution.

3.3.1 Wide Delegated Powers

Wide delegated powers are powers which are broad or worded vaguely – leaving considerable discretion to ministers. Delegated legislation is used to fill out, update, or sometimes even amend existing primary legislation without Parliament having to pass a new Act.[225] The focus of this chapter is not the ability to fill out and update primary legislation, it is looking at powers granted to the executive that are wide in their scope, alongside the transferring of typically legislative duties and decisions to the executive. The use of delegated legislation to make provision for minor and technical matters is a necessary part of the legislative process. However, it is essential that primary legislation is used to legislate for policy and other major objectives.[226] It is now the case in practice that delegated legislation will be used for a broad range of substantive

[223] Select Committee on the Constitution, The Legislative Process: The Delegation of Powers (HL 2017-19 225) [15].
[224] Mark Elliott, *Public Law* (3rd edn, OUP 2017) 140.
[225] Joel Blackwood and Ruth Fox, 'Westminster Lens Parliament and Delegated Legislation in the 2015-16 session' (Hansard Society 2017).
[226] Constitution Committee, *Brexit Legislation: constitutional issues* (HL 2019-21, 71) [25].

issues. It is no longer constrained to technical and administrative matters.[227] Lord Neuberger stated that *"statutory provisions sometimes permit more substantive issues to be covered by subordinate legislation".*[228] Any distinguishing line between legislative principle and detail has long been obscured, and convenience all too often overrides good practice. The ability to make changes to primary legislation, however, is not something dealt with in this section. The focus here is instead on wide delegated powers.

The most significant attention brought to SIs in recent years (excluding Brexit and the Coronavirus pandemic) was in 2015 when Peers declined to consider an approved motion for an SI relating to tax credits.[229] The refusal subsequently resulted in the Strathclyde review, considering the role and powers of the House of Lords in relation to SIs. The Hansard Society stated that the review demonstrated the lack of data about the delegated legislation process. However, the lack of scrutiny and attention that this legislation gets (or got) is perhaps one of the reasons there has been both an expansion in its use and an expansion in its scope. It is safe to say that delegated legislation has expanded from what was its original intended purpose. It is no longer solely used to fill in the technical, administrative, or procedural elements of law. Powers today exceed this purpose. It is now indefensible in comparison to the earlier intended purposes of this legislation. They no longer serve the purpose of aiding the constitution's operation, i.e., in allowing for flexibility, reacting to a developing society, and inputting administrative or technical details (to name a few purposes). Instead, they can hinder the functioning of the constitution by allowing the executive to circumvent adequate scrutiny. The hindering of the constitution and the undermining of constitutional principles as is necessary for the second step of the test to be satisfied, will be illustrated throughout the various examples that form part of this section and the next section on the consequences of excessive executive dominance. One key constitutional principle that can be undermined by the use of wide delegated legislation is parliamentary accountability.

[227] Daniel Greenberg, 'The Broader power, the narrower the power' (2016) SLR 37.
[228] *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39 [24].
[229] HL Deb 26 October 2015 vol 765.

The use, creation and existence of wide delegated powers is contentious when considering that the process in which delegated legislation is created lacks transparency and accountability. Therefore, wide delegated powers can undermine the constitutional principle of parliamentary accountability. Parliamentary accountability is the accountability of the executive government to Parliament. The principle is a product of the UK's parliamentary democracy, in which the government is not directly elected by, but instead formed from Parliament and the executive is accountable to the body it is formed from. The principle has been described as no less fundamental to the constitution than parliamentary sovereignty.[230] Wide delegated powers and Henry VIII clauses have the potential to undermine this doctrine due to the ability for an avoidance of and subsequently lack of parliamentary scrutiny and oversight of delegated powers. Where a lack of scrutiny and oversight exist, so does an undermining of parliamentary accountability, if Parliament is not scrutinising the powers and has no oversight, the executive cannot be regarded as accountable to Parliament in the use of said powers.

There have been warnings against the scope of delegated legislation, with the House of Lords warning against the use of wide discretionary powers and Henry VIII clauses.[231] The Hansard Society has also noted the trend, observed by the House of Lords Constitutional Committee:[232]

> *the use of delegated legislation by successive governments has increasingly drifted into areas of principle and policy rather than the regulation of administrative procedures and technical areas of operational details … It is used extensively, for example, in areas such as the criminal law.*[233]

Chapter 2 defended the use of this legislation as necessary in a constitutional landscape where society is fast-paced, and the law is required to change quickly. That chapter also stated that if delegated legislation were to be subjected to the same level of scrutiny as primary legislation, it would defeat its purpose and benefits and therefore

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[230] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [249].
[231] Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review* (HL 2015-16, 116) [37].
[232] Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review* (HL 2015-16, 116).
[233] Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014).

render its use and benefits futile. However, the powers explored within this chapter are not defendable on the same grounds. Where a power is wide and excessive, it cannot be defended on the grounds of being necessary and cannot be subject to little or in some cases no scrutiny. Questions are raised whether the balance between primary and secondary legislation has tipped too far in favour of the latter.[234] As with the Commons, the executive also dominates the process of passing delegated legislation. Ministers decide how much of the Bill will be dealt with in the face of the Bill and how much will be filled in post assent.[235]

The use of skeleton bills for instance, "where broad delegated powers are sought to fill in policy details at a later date",[236] inhibit parliamentary scrutiny, with the House of Lords stating they find it difficult to envisage any circumstances in which their use is acceptable. Various examples exist, [237] including the Childcare Bill 2015-16, which the Delegated Powers and Regulatory Reform Committee (hereafter, DPRRC) stated it contained virtually nothing of substance beyond the vague 'mission statement' in clause 1(1).[238] The Climate Change Act 2008[239] is a skeleton Act offering the executive "a blank cheque on climate change" and permitting the executive to fill out the detail away from parliamentary oversight. [240] Another example is the Agriculture Bill 2017-19 which was described as containing delegated powers so wide they were "ominous" and that "it cannot even be said that the devil is in the detail, because the Bill contains so little detail".[241] These skeleton Bills/Acts make it harder for parliamentary control and scrutiny preventing the executive's misuse of these powers. Maintaining effective oversight of the powers given to ministers is a major challenge for Parliament.[242]

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[234] Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014) 32.
[235] Essentially Ministers decide what goes into primary and what goes into secondary legislation. Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014) 55.
[236] Constitution Committee, *The Legislative Process: The Delegation of Powers* (HL 2017-19, 225) [51].
[237] Energy Bill 2013-14, Water Bill 2013-14, Education and Adaption Bill 2015-16.
[238] Delegated Powers and Regulatory Reform Committee, *Childcare Bill, Regulation of Political Opinion Polling Bill, Airports Act 1986 (Amendment) Bill, Cities and Government Devolution Bill: Government response, Draft Legislative Reform (Duchy of Lancaster) Order 2015* (HL 2015–16, 12) [1–13].
[239] The Climate Change Act 2008.
[240] Henry Porter, 'Labour's attack on Parliament invokes Henry VIII' *The Guardian* (London, 14th January 2009).
[241] Delegated Powers and Regulatory Reform Committee, *Agriculture Bill* (HL 2017–19, 194).
[242] Tanisha Aggarwal, 'War or terrorist attacks Statutory Instruments – where do I begin?' (ABI, 14th July 2017) <https://www.abi.org.uk/news/blog-articles/statutory-instruments--where-do-i-begin/> accessed 14th March 2019.

The Legislative and Regulatory Reform Act 2006 demonstrates to just what extent the executive will go in order to obtain their mandate. It demonstrates wide delegated powers, indicative of excessive executive dominance. The Act provided the executive with vast powers. The Act's intention was to 'cut the red tape'.[243] It was introduced as:

> *An Act to enable provision to be made for the purpose of removing or reducing burdens resulting from legislation and promoting regulatory principles; to make provision about the exercise of regulatory functions; to make provision about the interpretation of legislation relating to the European Communities and the European Economic Area; to make provision relating to section 2(2) of the European Communities Act 1972; and for connected purposes.*[244]

Part 1 of the Act[245] grants a Minister the power to make provisions for the purpose of removing or reducing any burden, or the overall burdens resulting directly or indirectly for any person from any legislation.[246] This clearly illustrates the point being made in this section of the chapter – namely that powers granted via delegated legislation are now more extensive than they were previously. In unpicking the wording of this section, "any burden" offers little to no restriction on the Minister. Additionally, the wording of "directly or indirectly" and "any person from any legislation" indicates the breadth of the powers. The meaning of "burden" within the legislation is equally as wide as the powers granted.[247] This goes well beyond the filling in of detail or necessary legislation changes. The 2006 Act[248] also gives the power to amend both past and future Acts – again demonstrating the extension of power from those discussed for the factor amounting to natural dominance.

[243] Richard Harries and Kat Sawyer, 'How to run a country the burden of regulation' (Reform 2014).
[244] Legislative and Regulatory Reform Act 2006, introduction.
[245] Legislative and Regulatory Reform Act 2006, ss1–2.
[246] Legislative and Regulatory Reform Act 2006, s2.
[247] s1(3) In this section "burden" means any of the following—(a)a financial cost;(b) an administrative inconvenience;(c) an obstacle to efficiency, productivity or profitability; or (d) a sanction, criminal or otherwise, which affects the carrying on of any lawful activity.
[248] Legislative and Regulatory Reform Act 2006.

The 2006 Act was a revised version of the original Bill. The Government had initially cast their net extremely wide with regards to the powers the Bill granted ministers, and the scrutiny process for these powers was not as stringent. The Bill was dubbed the "abolish of Parliament" Bill,[249] with it intended to allow ministers to "reform legislation". The Bill came at a time of declining support for the Labour party[250] (2006 – with Tony Blair resigning and a leadership campaign in 2007) with the party rebelling.[251] The Labour Party's turmoil in 2006, therefore, shone light on the potential influence of the Bill – with declining support, delegated legislation offered an alternative to primary legislation. An alternative that did not require the same democratic safeguards as primary legislation. The wide powers offered by the original Bill would have allowed the executive to make sweeping changes to UK legislation without adequate oversight or scrutiny by Parliament. The Bill illustrates how numerous factors of executive dominance can come together.

The Bill would have allowed for Ministers (the executive) to repeal, replace and amend legislation without consulting Parliament. This demonstrates how the factors of executive dominance can result in the undermining of constitutional principles. They would also be able to create new offences with penalties up to 2 years imprisonment – this would all be achieved without any democratic scrutiny.

The use of delegated legislation allows for the removal or mitigation of certain restrictions placed upon the executive when trying to pass Government Bills. These constraints could be as faced by the Labour Government above (declining party support) in addition to constraints such as time. There are no constitutional restrictions on what may be delegated,[252] as set out in the natural dominance chapter, delegated

[249] Hansard Society, 'The European Union (Withdrawal) Bill – initial reflections on the Bill's delegated powers and delegated legislation' (Hansard Society 2017), Caroline Lucas, 'The abolition of Parliament Bill' *The Guardian* (London, 23 March 2006), David Howarth, 'Who wants the Abolition of Parliament Bill' *The Times* (London, 21 February 2006), Joel Blackwell, 'Will the Great Repeal Bill be another 'Abolish Parliament' Bill?' (Hansard Society 2016).
[250] Julian Glover, 'Labour support at lowest level since Thatcher's last election victory' *The Guardian* (London, 25 October 2006).
[251] 'The rise and fall of New Labour' The BBC (London, 3 August 2010). There were attempts at a backbench coup which resulted in Blair's resignation – showing the party's turmoil at the time.
[252] Considering Dicey's orthodox version of Parliamentary sovereignty and the fact there is the ability for Parliament to make or unmake any law whatsoever. AV Dicey, *Introduction to the study of the Constitution* (8th edn, Liberty Fund 1982).

legislation merely involves the bestowing by Parliament, by statute, on the executive of such powers as the statute specifies, to enable the executive to legislate free of the procedural complications involved in a statute.[253] The Bill, therefore, placed more emphasis on delegated legislation than primary legislation, diminishing the ability for scrutiny and full parliamentary oversight. This therefore moves power to the executive away from Parliament, removing the ability for rebels from the Labour party or any other party to prevent the executive from securing its mandate. This cannot be justified as necessary and rather than supporting the constitution it may hinder it.

When the executive puts forward wide delegated powers, should they have a strong majority which supports the government, then it is unlikely amendments are going to be made. A telling example of the impact a strong supporting majority can have upon the content of a Bill / Act is seen in the comparison between the EUWA[254] and the EUWAA[255] which will be focused on more thoroughly in chapter 7 on Brexit. The Labour Government at the time of the Legislative and Regulatory Bill had declined support from within its party.[256] This may have had an impact upon the scaling back of the Bill's powers. There were areas regarded as off-limits,[257] a restriction upon the further delegation of powers,[258] a veto[259] and an extension to the scrutiny procedure from 21 to 30 days.[260] Had there not been declining support then the Bill's content may have been significantly different and arguably much wider. This demonstrates the ability of natural dominance factors to enable when extended and combined with other factors to potentially produce an executive who is excessive in its power.

[253] Peter Davis, 'The significance of parliamentary procedures in control of the Executive: a case study: the passage of Part 1 of the Legislative and Regulatory Reform Act 2006' (2006) PL 677.
[254] European Union (Withdrawal) Act 2018.
[255] European Union (Withdrawal Agreement) Act 2020.
[256] Which links with the fusion of powers factor explored in chapter 2.
[257] Met by a combination of the ring fencing of the enabling power (ss1-2), the protection of Pt 1 of the Act and the Human Rights Act 1998 (s8), and the requirement not to include provision thought by the introducing minister to be constitutionally significant (s3(2)(f)).
[258] Met by restricting potential new delegated powers to ministers (required to be subject to parliamentary procedures) and to "any person on or to whom functions are conferred or have been transferred by an enactment" or "a body which, or a holder of an office which, is created by the order"--s.4(1)(b) and (c).
[259] Met by the grant of an unconstrained, but significantly time limited, veto power to each House or to its responsible committee (unless overruled by the House) ss16-18.
[260] Met by (ss16-17) which mean that negative, affirmative and super affirmative procedure now have a 30-day period.

Another example of wide delegated powers is found in the Sanctions and Anti-Money Laundering Bill (now Act), which contained broad delegated powers, which allowed ministers to implement new sanction regimes with limited parliamentary oversight.[261] The Lords[262] and DPRRC regarded the powers to make new sanctions within the Bill constitutionally inappropriate,[263] objecting to the powers the Bill intended to bestow. Broad powers are still found throughout the Act[264] though, there has been limitation placed upon the powers granted to Ministers under the Act.[265] The Government following the Lords and DPRRC criticisms, clawed back the powers the Bill granted to Ministers. However, the Bill does still demonstrate the existence of (in the powers retained in the Act) and intention for broad delegated powers within the UK constitution. Also, the Act exemplifies the use of delegated powers beyond technical and administrative details. The Act allows for sanctions to be created, resulting in up to 10-years imprisonment,[266] this power was kept despite concerns raised by the Lords,[267] which stated they were *deeply concerned that the power in clause 16 may be used to create an offence for which a sentence of imprisonment for up to 10 years may be imposed*.[268] While the House of Lords agreed amendments to constrain these broad provisions, the House of Commons reinstated them[269] and they subsequently formed part of the Act.

Delegated powers should only be used when they can be clearly anticipated and defined. They should not be used in a manner that uses illustrative language that does not meaningfully constrain broad powers; this is inappropriate and should not be allowed.[270] In circumstances where broad powers are necessary, they should be used in a way that is as constrained as far as possible with sufficient safeguards to prevent

[261] Constitution Committee, *Brexit Legislation: constitutional issues* (HL 2019-21, 71) [26].
[262] Constitution Committee, *Sanctions and Anti-Money Laundering Bill* [HL] (HL 2017– 19, 39) [11].
[263] Delegated Powers and Regulatory Reform Committee, *Seventh Report* (HL 2017–19, 38).
[264] For instance, ss 1, 2(2), 14(6), 42.
[265] For instance, ss 2(2), 4, 18(2).
[266] S17(5) of the Act.
[267] Constitution Committee, *Brexit Legislation: constitutional issues* (HL 2019-21, 71) [27].
[268] Constitution Committee, *Sanctions and Anti-Money Laundering Bill* [HL] (HL 2017– 19, 39) [21].
[269] Constitution Committee, *Brexit Legislation: constitutional issues* (HL 2019-21, 71) [27].
[270] Constitution Committee, *Brexit Legislation: constitutional issues* (HL 2019-21, 71) [35].

their misuse. Safeguards recommended[271] include the sifting process[272] and the use of sunset clauses. This section has demonstrated through the numerous examples explored the existence of wide delegated legislation within the British constitution. It has also illustrated the problematic nature of said legislation.

3.4 Henry VIII Clauses

I will establish how Henry VIII clauses are an extension of the executive's ability to create delegated legislation, a natural dominance factor considered in chapter 2. In demonstrating the extension of this factor, the 1920s and 30s position[273] will be reconsidered, illustrating how the clauses contentious nature has not only remained but grown. In exhibiting Henry VIII clauses as a factor of excessive executive dominance, I will consider both prospective and retrospective Henry VIII clauses.

Henry VIII clauses are a form of delegated legislation. They differ from ordinary delegated powers, which create a mechanism by which primary legislation is supplemented.[274] Henry VIII clauses go further than supplementing primary legislation, and it is for that reason they are dealt with independently of delegated legislation in this chapter. It is the ability of more than supplementing primary legislation that has resulted in my considering these clauses a factor of excessive executive dominance. Henry VIII clauses are defined as clauses within a Bill that enable ministers to amend or repeal provisions in an Act of Parliament using secondary legislation.[275] Therefore in adding a Henry VIII clause to a Bill the Government are enabling themselves the power to repeal or amend primary legislation after it has become an Act of Parliament. It is the ability to amend or repeal primary legislation that set these clauses apart from general delegated legislation. According to Forsyth,[276] Henry VIII clauses have been justified in three ways. Firstly, technical

[271] Constitution Committee, *Brexit Legislation: constitutional issues* (HL 2019-21, 71) [36].
[272] See Chapter 7 (section 7.4.3).
[273] As explored in chapter 2.
[274] Nicholas Barber and Alison Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' (2003) PL 113.
[275] Parliament, 'Henry VIII Clauses Definition' <http://www.parliament.uk/site-information/glossary/henry-viii-clauses/> accessed 23rd December 2020.
[276] Christopher Forsyth and Elizabeth Kong, 'The Constitution and Prospective Henry VIII Clauses' (2004) 9 JR 17.

complexity - the clause is found in a statute for which the area of law might be so complex that it is extremely difficult to set out all the variations in the original statute. Secondly, the requisite period of adjustment, occurring where the executive may want or need to change the details of legislation. Often because at the time of enactment, the legislation was novel, needing experimentation to decide its effects. Once said effects were known a changed course of action could be pursued. Lastly, he regarded speed as a justification - the need of urgency may come from technological advances, financial changes or human rights infringements. Henry VIII clauses have however grown exponentially in recent times,[277] meaning there is an unprecedented rise in the ability of bodies other than Parliament to change statutes.[278]

Like delegated powers generally, the subject matter of a Henry VIII clause can vary. The clauses granted in an empowering Act can be broad[279] or narrow.[280] The Civil Contingency Act 2004[281] demonstrates the extent to which Henry VIII clauses can exist. This Act allows ministers to make any provision which they are satisfied is appropriate for preventing, controlling, or mitigating an aspect or effect of the emergency in respect of which the regulations are made.[282] The Civil Contingency Act 2004 forms a central part of the analysis in Chapter 6, a case study of the Coronavirus pandemic. Delegated powers are becoming broad and ill-defined allowing provisions to reform legislation,[283] repeal legislation deemed no longer practical[284], and retrospectively make provisions ministers consider necessary or desirable.[285] The clauses' temporal dimension (the reach of the clause) can cover past Acts[286], the empowering Act, future Acts or even a combination. Henry VIII clauses can have a

[277] Richard Gordon QC, 'Why Henry VIII Clauses should be consigned to the dustbin of history' (Public Law Project 2015).
[278] Nicholas Barber and Alison Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' (2003) PL 113.
[279] Public Bodies Act 2011 (s1 and s11) Smart Meters Act 2018 s9(1-3).
[280] S1(12) of Offensive Weapons Act 2019.
[281] The Civil Contingency Act 2004.
[282] See The Civil Contingency Act 2004, s22 in particular.
[283] Legislative and Regulatory Reform Bill 2006.
[284] Deregulation Bill 2013.
[285] Banking Act 2009.
[286] This is typical of Retrospective Henry VIII Clauses.

lifespan though it is not a requirement,[287] a characteristic that sets today's Henry VIII clauses apart from those considered in the earlier literature.[288]

There are concerns raised, over, their use – particularly on a democratic and executive dominance viewpoint. The cost to Parliament is due to the clauses' ability to take away efficient parliamentary oversight. This type of delegated legislation, therefore, places the executive in a position where it can control or possess a duty for which it is not naturally intended to have. The result of which would hinder the constitution's functioning. This begins to demonstrate how Henry VIII clauses as a factor of excessive executive dominance fit with the general definition that this thesis gives to excessive executive dominance.

The empowerment that Henry VIII clauses offer places the executive in a position where it can amend primary legislation, legislation created by the democratically elected and supposedly supreme branch of the constitution. It was believed that nobody (not even the monarch) should have the power to amend, repeal or create primary legislation without Parliament.[289] Despite this, today we find ministers empowered to do just that. Even though this empowerment comes from Parliament, it remains problematic when considering the numerical advantage factor considered in chapter 2. The executive's numerical advantage over the Commons means that although 'Parliament' has empowered the executive via Henry VIII clauses, it is, in fact, the executive at times who are empowering themselves. This is particularly evident when comparing a government who do not have a strong majority within the Commons with one that does. The Government with a strong majority is much better placed to push legislation through the Commons, legislation that sometimes reduces the legislature's power and enhances the executives', via its housing of wide delegated powers/Henry VIII clauses. However, where a weak majority exists, the numerical advantage is diminished and so is the executive's position too and Parliament is therefore much stronger because of the weak numerical advantage. This begins to

[287] Nicholas Barber and Alison Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' (2003) PL 113.
[288] In the Donoughmore report it was suggested that Henry VIII powers should have a lifespan of no more than 1 year, should they require to be longer than this then another debate on their extension should be before Parliament.
[289] Joelle Grogan, 'Rights for the chop: how a Henry VIII clause in the Great Repeal Bill will undermine democracy' (LSE, 30th November 2016) <http://blogs.lse.ac.uk/brexit/2016/11/30/rights-for-the-chop-how-a-henry-viii-clause-in-the-great-repeal-bill-will-undermine-democracy/ > accessed 16th March 2019.

illustrate the relevance of the 'combination' of factors when considering a position of excessive executive dominance. While Henry VIII clauses are an extension of the earlier considered factor delegated legislation, its practical use is also somewhat dependent upon the combination of other factors. Where the Government has a strong majority (numerical advantage) the successful passing of Bills that include Henry VIII clauses and wide delegated powers is increased. It is within this combination of the factors that the executive's position could be described as excessive.

There is a link, therefore, to be draw between wide delegated powers and those previously explored in chapter 2 on natural dominance. Statistically[290] speaking the empowering or parent Act is likely to have been a Government Bill. The passage of Government Bills is facilitated by the Government's majority (natural dominance). An executive who has a strong majority, therefore, can push through legislation that encompasses these clauses. The inclusion of such clauses in said Bills further empowers the executive at the expense of Parliament. This further empowerment goes beyond what is necessary and naturally consequential, unlike the factors explored in chapter 2 exploring natural dominance. These clauses also limit parliamentary scrutiny,[291] while strengthening the executive (putting it in a position of control over the constitution). This can impede (subject to step two) the constitutional role of Parliament and undermines the constitutional principle of parliamentary accountability, a principle recognised by the UKSC in *Miller 2; Cherry*.[292] This ability to hinder parliamentary scrutiny and the strengthening of the executive goes beyond that what is necessary. It demonstrates how excessive executive dominance can hinder rather than enable the functioning of the constitution. This also further demonstrates how excessive executive dominance can result from a combination and extension of the multiple factors already explored when establishing natural dominance. The combination is as explained above, encompassing the numerical advantage of the executive, enabling the passing of legislation housing Henry VIII clauses. The extension of the natural dominance factor is in the nature of Henry VIII

[290] In the 2015-16 Parliament session, 26 Government bills were considered, 23 of which gained assent. In the same session 118 Private Members Bills were considered and only 6 were given assent. (Vyara Apostolova, 'Acts and Statutory Instruments: the volume of U.K. legislation 1950 to 2016' (CBP 7438, House of Commons Library 2017)).

[291] The use of these clauses, cause issues for Parliament with regards to how said clauses can be properly scrutinised. This is According to Forysth (Christopher Forsyth Elizabeth Kong, 'The Constitution and Prospective Henry VIII Clauses' (2004) 9 JR 17).

[292] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41.

clauses, i.e., their ability to amend primary legislation. They are therefore much more extensive in their scope and subsequently an extension of the ordinary delegated powers, and it is due to this that Henry VIII clauses which are not subject to sufficient safeguards are a factor of excessive executive dominance.

The literature of the 1920s and 30s exemplifies this thesis's position that Henry VIII clauses are an extension of ordinary delegated legislation and apt to be described as excessive. Arguably the most famous report on delegated powers and indeed Henry VIII powers is the Donoughmore Committee in 1932.[293] This report was discussed in more detail in chapter 2 on natural dominance. However, its relevance to this chapter is in its approach to Henry VII clauses.

The Donoughmore Committee did not agree with some critics of delegated legislation, who stated the whole practice is bad. The Committee did, however, sternly warn against the use of Henry VIII clauses, conceding that:

> *The use of the so-called Henry VIII clause conferring power and administer to modify the provisions of Acts of Parliament should be abandoned in all but the most exceptional cases and should not be permitted by Parliament except upon special grounds stated in the ministerial memorandum attached to the bill.*

The Committee took a realistic view of delegated legislation, stating that whether the use of secondary legislation is good or bad, it is inevitable and permitted when subject to safeguards that protect constitutional principles. A viewed shared by this thesis, as the presence of Henry VIII clauses does not amount to excessive executive dominance. They merely fulfil the first step of the two-step test determining excessive executive dominance. To amount to excessive executive dominance, they must satisfy the second step and therefore undermine constitutional principles and or prevent another organ performing their constitutional role. The Donoughmore report outlined various safeguards which included limiting the maximum time limit of one year for the operation of the powers, after which the powers should lapse, unless Parliament approves an extension. They should only be used for the sole purpose of bringing an

[293] Committee on Ministers' Powers (Donoughmore Report) (Cmd 4060, 1932).

Act into operation, and ministers' actions under such clauses should be justified and approved by Parliament.

The report found at the time of its publication that only 8 Henry VIII clauses existed.[294] Therefore the threat they posed to is questionable, particularly in comparison to now. Henry VIII powers are now so common as to be almost a banality of modern legislation.[295] Despite the low numbers that were in existence at the time the report still clearly warned against the use of the clauses. The committee was not alone in their warnings.[296] Lord Hewart also warned against the use of these (then limited) powers.[297] Henry VIII clauses that exist today are far greater than those that concerned the likes of Hewart and the Donoughmore Committee. If there were such stark warnings at a time when the clauses were used in a minimal way, then we are far past that point now. For instance, the report states that the powers should be limited to a maximum life span of one year. Compare this with the idea of unlimited lifetimes and even the existence today of prospective Henry VIII clauses[298] (which will be discussed in detail shortly). The powers are wider, more frequent, and therefore more problematic. Concerns were expressed over the restriction that the provisions place on the political power of Parliament. The powers are worrying as they allow the executive to be in such a position it can overturn actions of the legislature, who is democratically elected and supposedly supreme.[299] This only further supports the analysis of this chapter regarding the use of such clauses as potentially creating an excessively dominant executive. Not only are Henry VIII clauses an extension of delegated legislation, modern Henry VIII clauses are also an extension of those spoken of in the report. Rather than empowering the executive on the odd occasion, with clear limitations and boundaries, the Henry VIII clauses in existence today are largely wide, unlimited, and subsequently could be constitutionally damaging – particularly for parliamentary sovereignty. They do not enable the constitution to

[294] Including the Juries Act 1922, Local Government (Scotland) Act 1929 and Patent Designs and Trademarks Act 1883.
[295] Stephen Tierney, 'The Legislative Supremacy of Government' (Centre of constitutional change, 2018) <https://www.centreonconstitutionalchange.ac.uk/opinions/legislative-supremacy-government > accessed 24th October 2020.
[296] Including C K Allen, *Law in the making* (OUP 1927), A V Dicey, *Development of administrative law in England* (LQR 1915) and C T Carr, *Delegated Legislation* (CUP 1927).
[297] Lord Hewart, *The New Despotism* (Ernest Benn Limited, 1929).
[298] Clauses which can amend Acts of Parliament which have not yet been enacted.
[299] Nicholas Barber and Alison Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' (2003) PL 113.

function (like the natural dominance factors) but instead can hinder the proper functioning of the constitution.

Numerous examples exist demonstrating both the presence of Henry VIII clauses and the executive's use of Henry VIII clauses nowadays. The Public Bodies Act 2011 is one of the most prominent enabling Acts since the 2006 Legislative and Regulatory Reform Act.[300] The Bill permitted (via a series of Henry VIII Clauses) the executive to abolish, merge and amend the construction and funding arrangements of several public bodies. After numerous amendments, U-Turns and defeats, the Act was a shadow of the original Bill. The House of Lords constitutional committee was critical of the use of Henry VIII clauses in the Bill:[301]

> *…Strikes at the very heart of our constitutional system, being a type of framework that drains the lifeblood of legislative amendment and debate across a very broad range of public arrangements.*[302]

Wide Henry VIII clauses allow the executive to legislate. This growth in power could prove dangerous when Parliament attempts to hold the executive to account. The Legislative and Regulatory Reform Act 2006 illustrates that danger. It attempted to give outrageously wide powers to the executive[303] described as having the potential to render Parliament redundant.[304]

There is, a lacking correlation between heightened executive power and heightened parliamentary oversight[305] and accountability, with the latter being a constitutional principle that can be undermined by excessive executive dominance. Consider the link made above and the numerical advantage amongst the other natural dominance factors discussed in the previous chapter and then combine that with the ability of the executive to change primary legislation using secondary legislation. The power to do

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[300] The Public Bodies Act 2011, Legislative and Regulatory Reform Act 2006.
[301] Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (2014) Hansard Society 91.
[302] Select Committee on the Constitution, *Public Bodies Bill* (HL 2010-11, 51)
[303] The History of Parliament, 'Henry VIII Clauses' (13th July 2017) <https://historyofparliamentblog.wordpress.com/2017/07/13/henry-viii-clauses/> accessed 12th October 2020.
[304] Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (2014) Hansard Society 26.
[305] As is demonstrated in the Coronavirus Case Study in chapter 6.

so is granted due to the First Past the Post electoral system, facilitating the executive's majority within the Commons allowing it to pass legislation that encompasses such powers increasing its power over the legislature. These powers tip the balance of power between the executive and legislature in favour of the executive to such a degree that it is harder for the legislature to uphold the constitutional principle of parliamentary accountability. Therefore, these factors may fulfil the second step of the two-step test, as they are capable of undermining constitutional principles. This strengthens the argument that the powers are excessive and not necessary for the functioning of the constitution. Instead, these powers can hinder the proper functioning of the constitution.

Unlike delegated powers which were set out in the previous chapter, there is a difficulty in finding the necessity of Henry VIII powers. It is not the result of a fast-paced society (unlike the justification for delegated legislation) to enable the executive to overturn primary legislation using secondary legislation. This is an extension of delegated legislation beyond that which is necessary for the proper functioning of the constitution. The scrutiny of such clauses is insufficient. The clauses limit the ability of parliamentary scrutiny. Secondary legislation is not subject to the same level of scrutiny as primary, again, this was justified in the previous chapter when considering the purpose of secondary legislation and the time efficiency. However, to allow substantial changes, i.e., changes to primary legislation, with such scrutiny extends the justification too far. The use of these clauses was regarded as a "constitutional oddity" by the House of Lords Constitutional Committee.[306] However, with this said, the scrutiny failures surrounding secondary legislation would feature as another factor to be considered shortly.

3.4.1 Prospective Henry VIII Clauses

What has been said thus far applies even more to prospective Henry VIII clauses. Retrospective Henry VIII clauses are clauses that empower the executive to overturn or amend prior Acts of Parliament (Acts prior to the power). Prospective Henry VIII clauses are Henry VIII clauses not restricted to only changing prior Acts of Parliament.

[306] Constitution Committee, *Legislative and Regulatory Reform Bill* (HL 2005-06, 194) 34.

Prospective Henry VIII clauses incorporate the power to amend future Acts of Parliament. The use of these clauses diminishes the orthodox sovereignty of Parliament. Namely their ability to make or unmake any law and the holding of the executive branch to account. Parliamentary sovereignty cannot be respected or adhered to when parallel to it runs a power of the executive to repeal or amend primary legislation both past and future. The ability for the executive to do this is based on a broad modified version of the doctrine, that is developed in chapter 4 and 5.

While retrospective clauses are problematic, prospective clauses are more so as they hinder future Parliaments. That means the executive has the ability to overturn Acts of Parliaments that are currently unelected. Parliament cannot be regarded as the apex of the constitution when the executive has the power to amend or repeal legislation not yet enacted. These clauses, therefore, enhance executive dominance. They impede Parliament by overturning and amending legislation, yet to be enacted. They enable the executive to have the control of another branch for which they should not, and therefore they are capable of undermining constitutional principles. The power is also excessive as it cannot be justified on the grounds of being necessary or consequential of the constitution's function. Whereas with retrospective clauses the enacting Parliament could, in theory, gauge the maximum possible extent of the power, with prospective Henry VIII clauses the enacting Parliament must put its trust entirely in the body to whom power is delegated.[307] Parliament is unable to bind its future self, but prospective Henry VIII clauses do just that, creating doubt over Parliament as the supreme lawmaker with the ability to make or unmake any law whatever.[308]

The European Communities Act 1972 was[309] an example of a prospective Henry VIII clause. Its S2 states:

[307] Nicholas Barber and Alison Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' (2003) PL 113.
[308] Nicholas Barber and Alison Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' (2003) PL 113.
[309] The Act has been repealed by the European Union (Withdrawal) Act 2018.

the purpose of implementing any Community obligation of the UK" a designated minister may by regulation make "such provision ...as might be made by Act of Parliament. [310]

This Henry VIII clause gives no limit to time or Acts, and it applies to both future and past Acts. This is very different from the worries of Hewart and the clauses he regarded as problematic. *Thoburn*[311] demonstrates the width of the measure where it was found that the 1972 Act takes precedence over conflicting Acts (both future and past). That is unless the future Act expressly states that the 1972 Act will not have said effect (express repeal). This is because LJ Laws argued the statute was a 'constitutional statute' and therefore not subject to implied repeal.[312]

The defences for the use of classic Henry VIII clauses[313] are not suitable to explain the use of prospective Henry VIII clauses.[314] The justifications by Forsyth outlined earlier for instance,[315] were concerning retrospective Henry VIII clauses, they cannot be used to justify the use of prospective clauses. It is questionable how making the clause prospective improves speed, technical complexity or requisite period of adjustment. It merely places the executive at a further enhanced position. It enables legislation which is yet to be enacted to be vulnerable to change via a branch which does not naturally possess the power to legislate.

The use of said clauses further shifts the balance of power from Parliament in favour of the executive. Such clauses are fitting with this chapter's aim of demonstrating that these factors place the executive in a position above that which is necessary. A position in which there is the ability to fulfil step two of the test – undermining constitutional principles. The use of such clauses does not help the constitution to function. It does, however, have a detrimental effect upon the constitutional landscape particularly when considering the doctrine of parliamentary sovereignty. A danger in the use of these clauses, is that they are not at the forefront of reform. In their report

[310] The European Communities Act 1972 s2(2)(a).
[311] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).
[312] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) [69].
[313] For instance, technicality of law, period of adjustment, speed, administrative requirements.
[314] Christopher Forsyth and Elizabeth Kong, 'The Constitution and Prospective Henry VIII Clauses' (2004) 9 JR 17.
[315] See chapter 3 (section 3.4).

on Henry VIII clauses, the Delegated Powers and Regulatory Reform Committee only dealt with the classic form and not prospective clauses. What is true for both types of Henry VIII clauses is the lack of appreciation for their ability to empower the executive at the expense of Parliament. The existence of such clauses should be mitigated with sufficient safeguards to prevent excessive executive dominance. With this said, the growth in delegating powers to the executive represents a sovereign legislative authority on the government.[316]

In effect by passing legislation encapsulating Henry VIII powers, we are continually passing legislation which virtually permits Governments to make new laws as they go along,[317] this therefore empowers the executive at the expense of the legislature, with the former carrying out the latter's role for which it is not naturally responsible. In doing so, the executive is also capable of impeding Parliament from any effective parliamentary control, this continues to draw a link between this thesis's definition of executive dominance and the use of Henry VIII clauses.

3.5 Inadequate Scrutiny of Delegated Legislation

Akin to the chapter on natural dominance this chapter also focuses on parliamentary scrutiny of secondary legislation. However, unlike the natural dominance chapter, this chapter demonstrates the inadequacy of said scrutiny. This inadequacy goes beyond the necessary 'lack' of scrutiny that is associated with the characteristics of secondary legislation. Inadequate scrutiny goes beyond what is necessary in order for secondary legislation to perform its intended purpose. This section focuses primarily on the inadequacy and inability of Parliament to provide sufficient scrutiny of the executive with regards to secondary legislation. In demonstrating the inadequate parliamentary scrutiny of delegated legislation this section starts by exploring the increase in delegated legislation and the lacking correlation between the increased use of delegated legislation and the scrutiny of said legislation. It then turns to the limited

[316] Paul Seaward, 'Reformation to Referendum: Writing a New History of Parliament' (History of Parliament Blog, 13th July 2017) <https://historyofparliamentblog.wordpress.com/2017/07/13/henry-viii-clauses/> accessed 19th August 2019.
[317] Lord Rippon, 'Henry VIII Clauses' (1989) SLR 205.

ability for parliamentarian involvement due to the nature of the scrutiny and the complexity of the scrutiny procedures. Finally, there is the use of data from the 2015-16 parliamentary session to support the argument of this section that parliamentary scrutiny of delegated legislation is inadequate. The factors considered so far within this chapter demonstrate that the executive can become excessively dominant and therefore in a position which tips the balance of power in favour of the executive, making it difficult for the legislature to oversee.

The primary source of scrutiny within Parliament, is via the Commons, understandably so, as it is the elected chamber.[318] It is the principal means of holding the executive to account between elections.[319] Parliamentary scrutiny of delegated legislation is how Parliament ensures the executive is acting appropriately, exercising its power in line with Parliament's intentions.[320] There exist constitutional controls over the use of secondary legislation, the ability for the executive to carry out a legislative role warrants them. However, as indicated in chapter 2 the executive often commands a majority within the Commons, a majority which allows them a certain degree of control and dominance, this is why the two functions of Parliament[321] are somewhat contradictory.[322] The scrutiny of delegated legislation is varied. The parent Act[323] outlines the scrutiny to be applied to the SI. It is therefore not surprising that the executive has grand powers and or control stemming from delegated powers, with minimal scrutiny.[324] This is because it is most likely the executive,[325] due to the numerical advantage, who is deciding the scrutiny procedure to assign to the powers.[326]

[318] Leader's Group on Working Practices, *Report of the Leader's Group on Working Practices* (1st Report, Session 2010-12, HL Paper 136) [18].
[319] Rt Hon Lord Newton, 'The Challenge for Parliament: Making Government Accountable. The Report of the Hansard Society Commission on Parliamentary Scrutiny' (Hansard Society, 2001).
[320] Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review* (HL 2015-16, 116) [36].
[321] See chapter 2 (section 2.5.1). Parliament gives assent to the legislative programme; however, Parliament is also responsible for the scrutinising of legislation and holding the executive to account.
[322] House of Lords, *Report of the Leader's Group on Working Practices* (HL Paper 136, 2011) 18.
[323] That is the Act that is the source of authority to make an instrument.
[324] Constitution Committee, *European Union (Withdrawal) Bill* (HL 2017-19, 22) [5].
[325] When considering that the majority of Acts passed in Parliament are introduced as Government Bills, with the minority of Acts coming from Private Member Bills.
[326] Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (2014) Hansard Society 62.

Parliament's inadequate scrutiny is nothing new; it has been recognised for years that the scrutiny of Bills by Parliament has been less than adequate.[327] The Lord Select Committee recognised this, quoting L S Amery who declared Parliament an overworked legislation factory.[328] The House of Lords was pivotal in the scrutiny of early delegated legislation and have remained so to this day. The Lords set up the Special Orders Committee in 1925, and this was the first form of systematic scrutiny. It continued to operate until 1973.[329] The powers of the Committee were however limited. They could only consider affirmative orders[330] immediately demonstrating the insufficiency of parliamentary scrutiny. However, the rate and scope of early delegated legislation was not like that we see today.

Notwithstanding an increase in the use of delegated legislation and the scope of its powers there has been a decrease in the scrutiny time spent on these powers.[331] The volume and detail of SIs make it difficult for MPs or members of the second chamber to tackle the powers.[332] This is demonstrated in both the Coronavirus and Brexit case studies in chapter 6 and 7 respectively. Even if there is scrutiny of the clauses it will be 'perfunctory'. This is according to The House of Lords Select Committee on the Scrutiny of Delegated Powers. Instead of weeks or months of scrutiny by committees, and the clauses being subject to the various stages of the legislative process, as is required for primary legislation (should the amending or repealing be done via primary rather than secondary legislation) Parliament gets the option to vote for or against it. [333] The European Union (Withdraw) Act 2018 is an example, with Parliament stating that "some 1,000 statutory instruments are required to implement the Bill, yet it is unclear how such a deluge is to be managed and how we ensure that adequate scrutiny is achieved.[334] The Commons has indeed inserted a sifting mechanism, but this is a very weak provision…"[335] The use of delegated legislation including Henry

[327] Constitution Committee, *Parliament and the Legislative Process* (HL 2003-4, 173) [2].
[328] LS Amery, *Thoughts on the Constitution* (OUP 1964) 41.
[329] There has however since 1973 been a joint committee to discuss delegated legislation.
[330] JD Hayhurst and Peter Wallington, 'The Parliamentary scrutiny of Delegated Legislation' (1998) PL 547.
[331] Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (2014) Hansard Society 24.
[332] Royal Commission, *A house for the future* (CM 4534, 2000).
[333] Delegated Powers and Regulatory Reform Committee, First Report (HL 1992-93, 57).
[334] See chapter 7 concerning the Brexit case study for further exploration.
[335] HL Deb 30 January 2018, vol 788, Lord Newby (LD).

VIII clauses to such a degree casts huge doubt over the accountability and scrutiny of the executive in its use of said powers. The biggest issue over the use of wide delegated legislation and Henry VIII clauses is that there is an inadequate level of scrutiny associated with both, which is placing the executive in a position capable of excessive dominance.

Flexibility, expertise and emergencies are all acceptable reasons for its use, but the amount produced is removing the ability to ensure its use is always genuine.[336] The volume and detail of SIs make it difficult for MPs or members of the second chamber to tackle the powers.[337] The powers are used in ways that were never originally intended.[338] Far less time is spent debating delegated legislation than is spent debating primary legislation. Therefore, this again raises issues over the ability for excessive dominance by the executive. The fact that there seems to be no correlation between the amount of delegated legislation passed and the scrutiny it receives exemplifies the inadequacy of the scrutiny process.

Although Henry VIII clauses can amend or repeal primary legislation, they are subject to varying degrees of parliamentary scrutiny. Due to the increased use of Henry VIII clauses and wide delegated powers the executive's influence has grown tipping the balance of power in favour of the executive, at the expense of the legislature, diminishing the ability of the legislature to hold the executive to account. This further prevents sufficient scrutiny of delegated legislation, undermining the constitutional principle of parliamentary accountability. The use of the executive or another body changing legislation hinders accountability, that is because such actions weaken the check and balance system, the executive is not subject to the same scrutiny process as changes made via primary legislation. This is even though Henry VIII clause and wide delegated powers allow it de facto to achieve the same as primary legislation.

The limited parliamentary scrutiny is evident in the fact that nothing happens to an instrument in the Commons (except those requiring an affirmative resolution) unless

[336] Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (2014) Hansard Society 28.
[337] Royal Commission, *A house for the future* (CM 4534, 2000).
[338] Take the Regulation and Investigatory Powers Act 2000 – they were used to spy on residents for littering and dog fowling. Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (2014) Hansard Society 29.

notice of a prayer against it is tabled.[339] For secondary legislation even when an MP does not agree with the legislation, they are unable to amend it. This is a major flaw in the effective scrutiny of SIs. The instruments are either accepted or rejected as presented,[340] there is no room for compromise. Of the roughly 3,000 SIs produced each year only around 1,200 are subject to parliamentary scrutiny.[341] Even when the instruments are subject to parliamentary scrutiny procedures, as few as 1% has prayer motions tabled.[342] These figures support the idea that delegated powers are not subject to stringent enough scrutiny. Delegated scrutiny procedures fetter oversight for Parliament over legislative matters. The adequacy of parliamentary scrutiny over delegated legislation is also identifiable in the lack of SI rejection; 17 in over 170,000 passed have been rejected since 1950.[343] The Commons have not prayed against an SI since 1979[344] and the Lords since 2000.[345] The use of this procedure is, therefore, particularly problematic when considering the fusion of powers between the executive and legislature considered in Chapter 2 on natural dominance.

Consequently, there is little opportunity for MPs to affect the substance of secondary legislation, therefore – demonstrating how this process very much revolves around the executive.[346] The inadequacy of the scrutiny process only further diminishes the process; the inability to amend secondary legislation does not give an incentive for MPs to dedicate time to scrutinise it. This is particularly the case when considering the natural dominance factors considered in chapter 2, particularly the fact the Commons are dominated by the executive, and therefore government defeats are rendered unlikely.

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339 JD Hayhurst and Peter Wallington, 'The Parliamentary scrutiny of Delegated Legislation' (1998) PL 547.
340 Royal Commission, *A house for the future* (CM 4534, 2000).
341 Royal Commission, *A house for the future* (CM 4534, 2000).
342 Royal Commission, *A house for the future* (CM 4534, 2000).
343 Joel Blackworth and Ruth Fox, 'Westminster Lens. Parliament and Delegated Legislation in the 2015-16 session' (2017) Hansard Society.
344 The paraffin (maximum retail prices) (revocation) order 1979, SI 1979/797.
345 The Greater London authority elections rules 2004, SI 2000/208.
346 Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review* (HL 2015-16, 116) [47].

Furthermore, to the lacking opportunity, the scrutiny procedures are complex with parliamentarians admitting they do not understand them.[347] Without this understanding, MPs cannot provide effective scrutiny or oversight. The scrutiny mechanisms and oversight of the executive by Parliament have remained stagnant since their inception.[348] Besides the introduction of the super-affirmative and enhanced procedures, the delegated legislative process has much remained the same.[349] The addition of which have not helped the complexity, instead they have created a patchwork of approaches developed over the years to cater for different forms of delegated legislation. Essentially, although the scrutiny of delegated legislation has been regarded as deficient nothing has been done about it. This reiterates the lack of correlation between the increase in the use and scope of delegated legislation and an increase in scrutiny. Lacking parliamentary scrutiny can contribute to excessive executive dominance by preventing the executive from being held to account. The procedures are not sufficient when considering the extent of the powers and the fact delegated legislation is being used increasingly to make policy changes and considering the amount of delegated legislation being used each year.

There are various forms of scrutiny procedures[350] ranging from the least stringent of being 'made'[351] through to the most stringent 'super affirmative' procedure. The lack of parliamentary scrutiny and use of less stringent procedures is particularly evident in the various SIs passed to date under the Coronavirus Act 2020, [352] all of which have been subject to the 'made negative procedure'.[353] This will be explored in more detail

[347] Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014).
[348] The Statutory Instruments Act 1946, with the introduction of the JCSI and SLSC.
[349] Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (2014) Hansard Society 53.
[350] According to the Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review* (HL 2015-16, 116) [11]. There exist 16 variations of procedure, 11 of which are different forms of the super affirmative procedure. The four main types were set out in the previous chapter on natural dominance, they include: no parliamentary scrutiny at all (with the instrument, either laid before Parliament with no subsequent procedure or not laid at all), negative (after 40-day period if not disproved becomes law), positive (required to be approved within 40-day period) and super-affirmative (subject to representation and scrutiny with a 60-day period).
[351] The instrument is signed off by a Minister.
[352] E.g., The Local Government (Coronavirus) (Structural Changes) (Consequential Amendments) (England) Regulations 2020, The Investigatory Powers (Temporary Judicial Commissioners and Modification of Time Limits) Regulations 2020.
[353] This procedure requires no prior scrutiny at all and offers minimal opportunity for parliamentary input. Statutory instruments under this procedure are made (signed off) by the relevant minister and

in Chapter 6 on the Coronavirus case study. However, the majority of instruments are subject to either affirmative or negative procedures.[354] Around three-quarters of instruments laid in each session are subject to the negative procedure,[355] the least stringent of the procedures that are applied (obviously no scrutiny at all is less stringent). Negative instruments are not subject to a routine scrutiny formula. They are only debated if a prayer motion is tabled and even when a negative instrument has been prayed against only a minority are referred to a standing committee.[356] A prayer submitted by the official opposition is likely to be debated, however, not guaranteed. A motion submitted by a backbench MP is unlikely to be debated without the support of many other MPs.[357]

In addition to the various scrutiny procedures, there is also the use of committees in providing scrutiny of delegated legislation. [358] The scrutiny of delegated legislation is fundamentally different from the scrutiny of primary legislation. Delegated legislation, unlike primary, is not scrutinised line by line by parliamentarians. Once delegated the powers are essentially not under the supervision of Parliament but instead handed to committees.[359] This is addressed by a Commons Select Committee:

> *currently few statutory instruments take up any parliamentary time and that those that do are generally taken in standing committee in a debate which may last up to 1 1/2 hours they have little bearing on parliament's capacity to consider legislation*.[360]

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then laid before Parliament. These instruments become law unless they are actively voted down within a set period.

[354] Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review* (HL 2015-16, 116).

[355] Secondary Legislation Scrutiny Committee, *Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation* (HL 2015-16, 128) [11].

[356] Referral is dependent upon the agreement of the party whips. Royal Commission, *A house for the future* (CM 4534, 2000).

[357] Parliament, 'MPs Guide to procedure' <https://guidetoprocedure.parliament.uk/collections/PtBJuBiU/negative-procedure> accessed 21st April 2021.

[358] Various committees exist including: JCSI, HL SCSLS, HL DPRR.

[359] Hansard Society, 'What is the aim of parliamentary scrutiny of delegated legislation?' (Hansard Society, 28 April 2020) <https://www.hansardsociety.org.uk/blog/what-is-the-aim-of-parliamentary-scrutiny-of-delegated-legislation> accessed 6th May 2020.

[360] Select Committee on Modernisation of the House of Commons, *The Legislative Process House of Commons* (HC 2005-6, 1097) [8].

In the 2015-16 parliamentary session[361] MPs spent 7hr and 49minutes debating affirmative and negative SIs whereas the Lords spent 34hr and 11minutes debating SIs. Within that session, only 3% of negative SIs were debated by MPs. This shows how natural executive dominance and the "efficient secret" of the constitution are being used to pass large amounts of delegated powers to the executive, thereby creating the ability for excessive dominance. This demonstrates the ability for lacking scrutiny to extending the executive's natural dominance to excessive. 80% of negative SIs came into force within 40 days of being laid and therefore, before the scrutiny period had expired.[362] This is worrying when compared with the earlier position in the 1920s and 30s. The data from this session therefore suggests that there is a disconnect between the volume of SIs being passed each year and Parliament's ability or willingness to scrutinise them.[363]

The Strathclyde review shone some light on the inability of Parliament to offer sufficient scrutiny to delegated legislation. Despite an increase in delegated legislation, the scrutiny of delegated legislation according to the House of Lords Select Committee is less effective than of primary legislation.[364] The report looked at the balance of power in secondary legislation between the two Houses. Unfortunately, it did not address the relationship or balance of power between the executive and Parliament.[365] The report found that the Government can pass legislative proposals with greater ease and with less scrutiny if it can do so as delegated, rather than primary, legislation.[366] This is problematic in terms of excessive executive dominance when we consider the amount of delegated legislation now being passed, the scope of the powers coupled with the abilities the executive has via its naturally accepted dominance. The literature does not seem to challenge this, as there is no distinction offered between that which is natural and acceptable and that which is excessive and unnecessary. There is also a

361 This is the most recent session that there is data on.
362 Joel Blackworth and Ruth Fox, 'Westminster Lens. Parliament and Delegated Legislation in the 2015-16 session' (Hansard Society 2017).
363 Joel Blackworth and Ruth Fox, 'Westminster Lens. Parliament and Delegated Legislation in the 2015-16 session' (Hansard Society 2017).
364 Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review* (HL 2015-16, 116) [36].
365 Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review* (HL 2015-16, 116) [35].
366 Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review* (HL 2015-16, 116) [36].

lack of acknowledgement of the dangers associated with this enhanced position of the executive.

In addition to this, the scrutiny that is available is somewhat in the executive's hands. When considering the previous factors, it is no surprise that executive accountability is being diminished. The fusion of powers between the executive and legislature mean that Parliament is numerically dominated by the executive in addition to the general power of the executive to control parliamentary proceedings and business. Where such a fusion exists, it becomes increasingly difficult for Parliament as a whole to hold the executive accountable. This is particularly true when accounting for party control and the loyalty of MPs to their party. There is an assumption that MPs will either support or oppose a Bill depending upon their party loyalty.[367] Generally, a Government can rely upon its MPs to almost always support it. A Government with a majority is therefore almost always ensured the successful implementation of its Bills. Party Whips work to prevent rebellions amongst MPs, and if an MP is too rebellious, it could 'have the whip removed' meaning they will be opposed by an official candidate of their party at the next election.[368] This overshadows the ability for Parliament to hold the executive to account. The Hansard Society Commission on Parliamentary Scrutiny recognises that for as long as this dominance exists i.e., the executive or majority party can organise parliamentary business the executive will dominate Parliament and not be subject to the required level of scrutiny.[369]

Another element that hinders scrutiny related to the executive's natural dominance of the Commons is that the government has control over annulment debates.[370] It is therefore again clear how the fusion of powers or delegated legislation alone is not the only contribution the constitution makes to the executive's natural dominance. The influence the fusion of power has upon the scrutiny offered by Parliament is also visible when comparing the two Houses. The Lords do not suffer the same issues that the Commons suffering with regards to scrutiny of legislation, such as commitment to the

[367] Mark Elliott, *Public Law* (3rd edn, OUP 2017) 215.
[368] In 2019 10 MPs had the whip removed over rebellions against the Governments Brexit plans Alistair Burt, Caroline Nokes, Greg Clark, Sir Nicholas Soames, Ed Vaizey, Margot James, Richard Benyon, Stephen Hammond, Stephen Brine and Richard Harrington.
[369] Rt Hon Lord Newton of Braintree, *The Challenge for Parliament: Making Government Accountable* (Vacher Dod 2001).
[370] There have been calls for improvements in the chances of debate for annulment. See, Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014).

party, avoiding certain issues to hope for promotion and acting in a way wanted by the constituents.[371] Unlike the Commons, the government does not have a majority within the Lords. However, the Lords do not have the same influence over the scrutiny process as the Commons, therefore what they offer in their independence of executive control they lack in clout.

The Constitution Select Committee has stated that some critics regard Parliament as becoming less rather than more effective in its calling Government to account.[372] Where Parliament is not effective in scrutinising the executive, the executive can become more dominant. The problematic nature of Parliament's inadequate scrutiny is evident when considering that if Parliament is not effective in scrutinising and holding the executive to account, then there is a clear ability for the executive to act in a way which they otherwise would not. It is within this scope that the executive can because of the constitution's setup impede or control another branch.

This section has demonstrated the interlinking of multiple factors i.e., the fusion of powers, Henry VIII clauses and wide delegated powers all of which help illustrate the inadequate parliamentary scrutiny of delegated legislation. In exploring the inadequate parliamentary scrutiny of delegated legislation this section has laid bare the problematic nature of the inadequate scrutiny. Including the lacking correlation between the increase in delegated legislation and scrutiny of delegated legislation, the complex nature of the scrutiny procedures and the deficient ability for parliamentarian input. Through this exploration it has been demonstrated how the inadequate scrutiny goes beyond the lacking scrutiny necessary for delegated legislation to fulfil its intended purpose, as explored in the natural dominance chapter.

3.6 Conclusion

It has been the principal aim of this chapter to evidence the ability for excessive executive dominance within the British constitution. The chapter has defined the concept of excessive executive dominance and in turn distinguished excessive

[371] Rt Hon Lord Newton of Braintree, *The Challenge for Parliament: Making Government Accountable* (Vacher Dod 2001).
[372] Select Committee on the Constitution, Fourteenth Report (HL 2003-4, 173).

executive dominance from natural executive dominance. This has been achieved through the exploration of various factors present within the British constitution, which are an extension and combination of the factors considered in chapter 2 on natural dominance.

In defining excessive executive dominance and distinguishing it from natural dominance, the chapter broke down the definition of excessive executive dominance into a two-step test which must be fulfilled in order for there to be excessive executive dominance. The test's first of the two steps is concerned with the various excessive executive dominance factors explored within this chapter. The presence of one or multiple factors can satisfy the first step. The second step of the two-step test concerns the combination/extension of the factors in step one, hindering the efficient functioning of the constitution by undermining constitutional principles or preventing another branch of the state performing their constitutional role. The second step on this test is explored more in the second part of this thesis concentrating on the consequences of excessive executive dominance.

This chapter primarily focuses on the first step exploring the various factors of excessive executive dominance. It was shown that the factors within this chapter are capable of satisfying the second step of the two-step test for determining excessive executive dominance. The factors can hinder the efficient functioning of the constitution by undermining constitutional principles, or by preventing other branches performing their constitutional role. However, the second step on the two-step test is explored more in the second part of this thesis concentrating on the consequences of excessive executive dominance.[373] This chapter primarily focused on exploring the various factors of excessive executive dominance that exist within the constitution and that can satisfy the first step of the test.

In summarising the arguments of this chapter, once it had set out the two-step test for determining excessive executive dominance it focused on exploring the various factors that exist within the constitution and that fulfil the first step of the test. In demonstrating the ability for excessive executive dominance, this chapter has further

[373] The consequences of excessive executive dominance are to be explored in chapter 5.

analysed the existence of wide delegated powers and Henry VIII clauses as an extension of the natural dominance factor “the executive’s ability to create delegated legislation”. Attention was then turned to the inadequate scrutiny by Parliament of secondary legislation.

The chapter has identified why excessive executive dominance, unlike natural dominance, is not excusable or necessary. In doing so, the chapter has not only distinguished the two forms of executive dominance but also demonstrated how they relate to one another, i.e., how excessive executive dominance is an extension of natural dominance. In exploring their relationship, examples have been given how the ability for excessive executive dominance can be dependant and influenced by natural dominance. The proceeding chapters are now going to build upon this further in illustrating the consequences of excessive executive dominance and how the courts are approaching this concept.

Chapter 4: Parliamentary Sovereignty

4.1 Introduction

This chapter is concerned with the doctrine of parliamentary sovereignty and how it links to executive dominance. The sovereignty of Parliament is a doctrine that is of "cardinal importance to the British constitution", and its importance "would be difficult to exaggerate."[374] The doctrine exists to protect the constitution from authoritarianism, despotism, an over-mighty monarch or an over-mighty executive.[375] It plays a central role in conditioning and organising the institutions of the constitution.[376] Despite its contentious nature,[377] and despite no written constitution that unconditionally declares parliamentary sovereignty as the cornerstone of the constitution, the doctrine of parliamentary sovereignty permeates constitutional law. The doctrine as a feature of the British constitution exerts a constant and powerful influence. In particular, it is an ever-present threat to the position of the courts. It has inclined in previous years the judges towards caution in their attitude to the executive since Parliament is effectively under the executive's control.[378]

The chapter begins by exploring and defining the orthodox doctrine of parliamentary sovereignty, establishing support for this doctrine within the literature. The chapter then explores the compatibility of the orthodox doctrine with this thesis's novel concepts of natural and excessive executive dominance. This is to determine whether the concepts and doctrine are compatible, or if the orthodox doctrine has any scope for natural or excessive executive dominance. Starting with natural dominance, the chapter sets out how the orthodox doctrine and natural dominance fit, and how at the time of natural dominance within the British constitution, the orthodox doctrine was adhered to. Excessive executive dominance is regarded as having no ability to

[374] Collins Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, CUP 2012) 60.
[375] Lord Judge, 'Ceding Power to the Executive; the resurrection of Henry VIII' (Kings College London 2016).
[376] Alison Young, 'M Gordon Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy' (2016) PL 367.
[377] Its contentious nature is seen in the disagreements relating to the basis/origins of the doctrine, the extent to which it now exists / is followed. Its competing nature with the rule of law, the ability for its change, how and if the doctrine is compromised.
[378] HWR Wade and CF Forsyth, *Administrative Law* (10th edn, OUP 2009).

undermine the orthodox doctrine. In determining whether excessive executive dominance undermines orthodox parliamentary sovereignty, it is important to consider both the negative and positive aspects of Dicey's definition. It is demonstrated that there exists no scope within the orthodox doctrine of parliamentary sovereignty for excessive executive dominance. The orthodox doctrine neither accommodates nor acknowledges the concept of excessive executive dominance. This, however, does not mean we do not have excessive executive dominance. The concept is present within the UK constitution as has been demonstrated throughout this thesis. What this lack of scope, acknowledgement and accommodation reiterates is that excessive executive dominance was not an issue at the time of Dicey's defining of the orthodox doctrine. In chapter 2's exploration of natural dominance, it was established that excessive executive dominance did not exist at the time of the earlier literature in the 1920s and 30s, it, therefore, did not exist at the time of Dicey's conception (the late 1880's). The existence of excessive executive dominance now demonstrates a shift in the constitutional landscape since both Dicey's conception and the earlier literature, a shift that can be explained by changing constitutional facts. It is for this reason that constitutional facts are considered in the latter half of this chapter, outlining how parliamentary sovereignty is rooted in constitutional fact and the different approaches to how these facts can change. The changing of these facts will also be illustrated in chapter 5 via case law analysis, evidencing the courts' qualifying of the orthodox doctrine to account for a change in constitutional facts resulting from excessive executive dominance.

4.2 Orthodox Parliamentary Sovereignty

The orthodox position is most famously stated by Dicey. In his seminal work,[379] Dicey defined the doctrine as:

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised

[379] AV Dicey, *Introduction to the study of the Constitution* (8th edn, Liberty Fund 1982).

by the law of England as having the right to override or set aside the legislation of Parliament.[380]

Dicey defines the sovereignty of Parliament in terms of two criteria, one positive and one negative. The positive aspect of Dicey's orthodox parliamentary sovereignty definition is that Parliament has the right to make or unmake any law whatever. The negative aspect is that no person or body is recognised as having the right to set aside or override the legislation of Parliament.[381] The Diceyan definition of parliamentary sovereignty follows on from that which was increasingly asserted in the 16th and 17th century. It was cemented by the 1688 Glorious Revolution – generating the primacy of statute over prerogative.[382] What the orthodox doctrine of parliamentary sovereignty establishes is the legal supremacy of statute. It essentially means that there is no source of law higher than an Act of Parliament. Therefore, according to the orthodox doctrine, Parliament as the supreme legal authority within the UK can create, amend, or repeal any law,[383] including laws that violate international law[384]or alter a principle of the common law. The theory also regards no one as having the legal authority to stop Parliament from doing so, therefore, should such laws be enacted by Parliament then the UK courts are, according to the orthodox doctrine, obliged to uphold and enforce them.[385] The simplistic nature and extent of the orthodox doctrine of parliamentary sovereignty is evident in the Leslie Stephen example, which regarded Parliament's ability to pass an Act of Parliament that authorised the killing of all blue-eyed babies.[386]

The absolute nature of the Diceyan definition means that the British constitution has no constitutional guarantees. Unlike countries with a codified constitution that may

[380] AV Dicey, *Introduction to the study of the Constitution* (8th edn, Liberty Fund 1982) 3-4.
Dicey defined Parliament as – "Parliament means, in the mouth of a lawyer, the King, the House of Lords, and the House of Commons; three bodies acting together may be aptly described as the "King in Parliament".
[381] Jeffrey Goldsworthy, *The sovereignty of Parliament: History and Philosophy* (Claredon Press 1999) 8.
[382] Collins Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, CUP 2012) 59.
[383] As is acknowledged by Parliament itself. UK Parliament, 'Parliament's Authority' <https://www.parliament.uk/about/how/role/sovereignty/> accessed 11th March 2021.
[384] United Kingdom Internal Market Act 2020.
[385] Collins Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, CUP 2012) 59.
[386] Leslie Stephen, *Science of Ethics*, (1st edn, 1882) 137.

protect fundamental/constitutional laws against amendment,[387] the UK since accepting the changes in the 17th century, regarding the sovereignty of Parliament by the judiciary, ceases to possess an ability to create constitutional guarantees. That is because when following the orthodox doctrine, any such guarantee could be amended or repealed by Parliament.[388] Parliament cannot, therefore, modify or destroy its continuing sovereignty, that is because the judiciary will always obey its latest commands.[389] Therefore, any shift from the orthodox doctrine of parliamentary sovereignty would arguably have to come in the form of a change in political fact[390] – similar to that in the 17th century which saw the birth of Parliament's supremacy.

The definition provided by Dicey in his seminal work is still clung to today. It is this that has provided the doctrine with its "absolute" nature, which in turn limits the literature to a competing theories approach. Many contemporary scholars are devoted to and hold onto this notion that parliamentary sovereignty is absolute as Dicey described.[391] This legacy appears impossible for competing contemporary scholars to shake off despite great efforts.[392]

This impulse to uphold parliamentary sovereignty as absolute is visible in the work of many prominent scholars in this field. Ekins for instance regards parliamentary sovereignty and its legislative freedom as of "utmost constitutional importance", arguing legislative freedom is the centerpiece of the constitution.[393] Goldsworthy and Jowell can also be seen championing the absolute nature of parliamentary sovereignty – regarding Parliament as legally unlimited[394]and respected by the courts.[395]

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[387] At least by simple majorities within the legislature – see the German constitution for instance that requires an enhanced majority for changes to constitutional law. Any such changes must be approved by two-thirds of the members of the Bundestag (the German Parliament), and two-thirds of the votes cast by the Bundesrat (the second chamber representing the governments of the Länder).
[388] This was a point raised in the House of Lords Select Committee, Lords Wilberforce, Scarman and Diplock stated under our constitution this was impossible. HL Deb 15 May 1978, 392.
[389] HWR Wade and CF Forsyth, *Administrative Law* (10th edn, OUP 2009).
[390] See chapter 4 (section 4.5).
[391] *'Dicey's conception of legislative supremacy has become so ingrained amongst English lawyers … it is hard to question his doctrine without appearing to lose touch with reality'*. (TRS Allan*, Law, liberty, and justice: the legal foundations of British constitutionalism* (OUP 1995)).
[392] Keith Ewing, 'Brexit and Parliamentary Sovereignty' (2017) 80 MLR 711.
[393] Richard Ekins, 'Legislative freedom in the United Kingdom' (2017) 133 LQR 582.
[394] Jeffrey Goldsworthy, 'Parliamentary Sovereignty and The Constitutional Change in the United Kingdom' in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (OUP 2013).
[395] Jeffrey Jowell, 'Parliamentary Sovereignty under the New Constitutional Hypothesis' (2006) PL 562.

MacCormick regards the sovereignty of Parliament as the central pillar of the constitution,[396] agreed with by Fredman.[397] Further, Forsyth[398] regards parliamentary sovereignty as "one of the most firmly established of all constitutional principles." This is clearly at odds with the literature below, which regards it as demised. Forsyth uses cases to support his approach, quoting *Miller*[399] as unequivocally and unconditionally confirming the principle of parliamentary sovereignty. Forsyth then goes on to do what a considerable proportion of the literature does – he relies upon the seminal work of Dicey. Barber gives a reasonably accurate portrayal when accepting that parliamentary sovereignty has continued to be relevant in the constitution but refuses to accept it in its absolute form.[400]

Notwithstanding the rhetoric supporting parliamentary sovereignty and the absolute characteristic of Dicey's perspective, there is an array of literature which runs in the face of that above. It intends the contrary – namely removing parliamentary sovereignty's absolute nature and its lingering cornerstone position. This therefore supports the notion that there can be a deviation from the orthodox position. A deviation this thesis intends to demonstrate due to the existence of excessive executive dominance the UK judiciary have begun applying a modified version of parliamentary sovereignty.

Firstly, McDonnell regards the doctrine as little more than historical. She acknowledges the gravitational pull to Dicey's theory but argues it is not the most accurate or convincing – her basis is its lack of appreciation for non-legal limits.[401] Orakhelashvili generally disregards the "absolute" doctrine for its lack of "practical feasibility".[402] He rejects specific elements of Dicey's seminal work, namely Parliament's ability to make or unmake any law. He regards this as incorrect,

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[396] Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 MLR 1.
[397] Sandra Fredman, 'Miller: A vital Reaffirmation of Parliamentary Sovereignty' (Oxford Human Rights Hub, 24th January 2017) <http://ohrh.law.ox.ac.uk/miller-a-vital-reaffirmation-of-parliamentary-sovereignty/> accessed 27th March 2020.
[398] Christopher Forsyth, 'Who is the ultimate guardian of the constitution?' (Judicial Power Project 2016) <https://judicialpowerproject.org.uk/christopher-forsyth-who-is-the-ultimate-guardian-of-the-constitution/> accessed 27th March 2020.
[399] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[400] NW Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 IJCL 144.
[401] Vanessa MacDonnell, 'The New Parliamentary Sovereignty' (2017) 21 RCS 13.
[402] Alexander Orakhelashvili, 'Parliamentary Sovereignty - A Doctrine Unfit for Purpose' (2017) 9 ICL 483 (his argument is somewhat similar to that of McDonnell's).

referencing its limited power over the common law. Additionally, Lakin, in his work,[403] supports the judgment of Lord Steyn in *Jackson* where he regarded the orthodox doctrine as out of place in the modern constitution.*[404]*

This only moderately begins to show the extent to which the literature in this field fails to reach anything near a common ground. For instance, Elliott, Tucker and Eleftheriadis see parliamentary sovereignty as diminished, however, all offering different perspectives for the demise. Elliott acknowledges the two competing theories this thesis has identified. Like Orakhelashvili, he concentrates on the absolute theory and the ability to make or unmake any law. His argument also supports McDonnell's concerning external limits (for Elliott it was political).[405] Tucker has a different approach. He viewed the orthodox doctrine of Dicey as incorrect on legal philosophical grounds – primarily looking at the rule of recognition.[406] In comparison, Eleftheriadis argues that the absolute theory and historical perspectives of Dicey and Wade as being outdated.[407]

4.3 Parliamentary Sovereignty and Natural Executive Dominance

It is the purpose of this section to discuss how natural executive dominance fits with the constitutional principle of parliamentary sovereignty. In discussing the relationship between natural dominance and the doctrine of parliamentary sovereignty, both the earlier literature and case law[408] will be referenced. Both help establish that there is a commitment by the judiciary to orthodox parliamentary sovereignty when the executive possesses natural dominance. Natural dominance as set out in chapter 2 is both consequential of the constitutional landscape and necessary for it to operate.

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[403] Stuart Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28 OJLS 709.
[404] *'The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom…" R (Jackson) v Attorney General* [2005] UKHL 56 [102].
[405] Mark Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2002) 22 SLS 340. Also reiterated in John Alder, *Constitutional and Administrative Law* (11th edn, Palgrave 2017) 163.
[406] Adam Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty' (2011) OJLS 31 61.
[407] Pavlos Eleftheriadis, 'Two Doctrines of the Unwritten Constitution' (2017) 13 ECLR 525.
[408] See history of executive dominance in chapter 2.

Firstly, it is essential to reconsider the early literature on executive dominance.[409] It is this literature and the dominance it speaks of, that this thesis believes to be natural dominance. The earlier literature did not discuss the effect that executive dominance, had upon the constitutional principle of parliamentary sovereignty. Hewart touched upon the damage that 'despotism' had upon the constitution, but he spoke of Parliament being a cloak that the executive hid behind.[410] He also spoke of how the sovereignty of Parliament was used in order to prevent the jurisdiction of the courts.[411] What was needed according to Hewart, was to reassert, in grim earnest, the sovereignty of Parliament and the Rule of Law.[412] The focus here, therefore, by Hewart, seems to be on the ability of the executive to obtain absolute power via Parliament, and that the reasserting of parliamentary sovereignty was needed to curb it. However, with this said, what will be seen is the difficulty in preventing the executive's dominant position, while there is adherence to the orthodox parliamentary sovereignty doctrine. This theme is featured in a later section of this chapter, focusing on excessive executive dominance.

The doctrine was not only mentioned by Hewart but by the Donoughmore Report, too. It is in assessing what the report regarded the doctrine to be, alongside the early case law examples, that we can identify the presence of orthodox parliamentary sovereignty at the time of these writings. This is important when considering the inability of the judiciary to prevent the executive's dominance when adhering to such a version of parliamentary sovereignty. The Donoughmore Report's support of orthodox parliamentary sovereignty can be appreciated by its declaration that parliamentary sovereignty was a principle of our constitution, that meant whatever laws are passed by Parliament are binding as the law of the land on everybody.[413] This approach by the Donoughmore Report will be evidenced by some of the cases that Hewart focused upon in his book. Although Hewart did not declare the cases examples of the orthodox doctrine, or use them to support, orthodox parliamentary sovereignty they do clearly evidence adherence to the orthodox doctrine at the time of his writing.

[409] This consideration will go further than the exploration in the natural dominance chapter (chapter 2).
[410] Lord Hewart, *The New Despotism* (Ernest Benn Limited 1929) 103.
[411] Lord Hewart, *The New Despotism* (Ernest Benn Limited 1929)76.
[412] Lord Hewart, *The New Despotism* (Ernest Benn Limited 1929) 151.
[413] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 2.

Take the court's view in the case of *The King v Minister of Health Ex Parte Wortley Rural District Council,*[414] a judgment concerning S67 of the Rating and Valuation Act 1925, which empowered the executive to remove difficulties associated with the enforcing of the Act. The court stated that:

> *This, I think, though I say it with some hesitation, may be regarded as indicating the high-water mark of legislative provisions of this character. It is obvious that if this Court had taken another view of the case presented to us to-day and had decided to quash this order as having been made ultra vires, the Minister might tomorrow, under the provisions of section 67, have arrived at the same end by making an order and removing the difficulty.*

This begins to show what will become extremely clear following the next section on excessive executive dominance and orthodox parliamentary sovereignty. The difference in the courts' approach from the 1920s and 30s when the constitution possessed what this thesis terms natural dominance, to the approach the courts take today. This extract demonstrates the courts' adherence to the legislation despite there being some hesitation, arguably because the doctrine of parliamentary sovereignty followed at that time meant that nothing or nobody could question primary legislation.

Another example regarding the judiciary's approach to the constitution, cementing the relevance of orthodox parliamentary sovereignty can be seen in the decision of Justice Darling (as he then was) in *Ex Parte Ringer.*[415] He stated that:

> *the section gave to an order made by a public department the absolute finality and effect of an Act of Parliament…Here there was a public department put in a position of absolute supremacy . . . and they could only say that Parliament had enacted only last year that the Board of Agriculture in acting as they did should be no more impeachable than Parliament itself.*

[414] *The King v Minister of Health Ex Parte Wortley Rural District Council* (1927) 2 KB 229.
[415] *Ex parte Ringer* (1909) 25 TLR 718.

This again witnesses the orthodox position as defined by Dicey, but it also observes the idea of separation of powers. This definition very much explains the approach by the early literature when considering the examples given. The courts' approach to the executive and the powers which Parliament has bestowed upon the executive, illustrates this notion of no other body or institution has the right to override or set aside the legislation. The judiciary was not willing to step into the territory for which the legislature is responsible. These examples show the limited influence the court had at the time of the earlier literature upon Parliament. Arguably due to the nature of the powers in question (they were not the powers we see today) there was little need for interference from the courts at the time. The powers referred to in these early cases and the 1920s/30s literature was natural, and not examples of excessive executive dominance. Therefore, there was no need for interference. However, in addition to the lacking need to interfere due to the nature of the powers, the very adherence and judiciary's commitment to orthodox parliamentary sovereignty prevents the judiciary from interfering in matters like these. As by its very definition *no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament,* meaning the court have little influence over the executive, although an influence that has grown since the early literature.

This orthodox approach is of particular interest to the natural dominance that this chapter talks about because it is this early inability for the judiciary or the unwillingness of the judiciary to intervene and curb executive dominance, which has arguably allowed the executive to enjoy its naturally occurring dominance. Whilst there is an adherence to this orthodox position, the judiciary is unwilling to intervene. This is understandable when considering the doctrine as defined by Dicey. The dominance this thesis defines as natural dominance, and the dominance I believe to be present at the time of the early contributions to this field, may have also been overlooked by the courts due to its nature. This kind of dominance is naturally consequential of the constitutional landscape and somewhat necessary for the constitution to operate. Therefore, questions can be raised as to how necessary interference from the court may be. Thus, while it is true the early literature demonstrates an appreciation of orthodox parliamentary sovereignty, which may in turn account for some of the courts' avoidance, there must also be an appreciation of the nature of the dominance and

therefore the need for interference. This, however, is very different when considering a dominance by the executive, which is regarded as excessive.

4.4 Excessive Executive Dominance and Orthodox Parliamentary sovereignty

Now attention turns to the compatibility of excessive executive dominance and orthodox parliamentary sovereignty. Excessive executive dominance as set out in chapter 3 is not a natural consequence of the constitution, and unlike natural dominance goes beyond that which is necessary for the constitution to function. It is the aim of this section in reassessing this definition, to determine whether the concept and doctrine are compatible, or if the orthodox doctrine has any scope for excessive executive dominance. In determining whether excessive executive dominance undermines orthodox parliamentary sovereignty, it is important to consider both the negative and positive aspects of Dicey's definition. The positive aspect of the orthodox parliamentary sovereignty doctrine is the ability for Parliament to make or unmake any law, this aspect depends on whether there is adherence to the negative aspect of the definition. That is because Dicey defines law as any rule which will be enforced by the courts.[416] As the negative aspect of the orthodox doctrine establishes that no person or body is above the law, the courts' adherence to this aspect inevitably impacts the positive aspect. The question nonetheless remains, does excessive executive dominance undermine either the positive or the negative aspect of the orthodox doctrine.

Firstly, the positive aspect, it merely has to be determined whether excessive executive dominance prevents Parliament from making or unmaking any law. As defined in chapter 3 excessive executive dominance is essentially a position of dominance the executive is placed in by a combination and importantly 'extension' of various factors within the UK constitutional landscape, which can undermine constitutional principles and therefore satisfy step two of the test to determine excessive executive dominance. The combination and extension disproportionately enhance the executive's position and power to a dominance that is more or higher than is necessary. It is important to reconsider the factors that amount to

[416] AV Dicey, *Introduction to the study of the Constitution* (8th edn, Liberty Fund 1982) 3-4.

excessive executive dominance – namely wide delegated powers, Henry VIII clauses and inadequate parliamentary scrutiny.

While wide delegated powers, Henry VIII clauses and inadequate scrutiny of delegated legislation all have a negative impact upon the proper functioning of the constitution, and place the executive in an excessively dominant position, as detailed in chapter 3, they do not undermine the positive aspect of orthodox parliamentary sovereignty. That is because the doctrine is so tightly defined and subsequently construed, that Parliament's ability to make or unmake any law theoretically still exists, despite there being excessive executive dominance. Wide delegated powers and Henry VIII clauses for instance, stem from Acts of Parliament and therefore fit with the notion of Parliament's ability to make or unmake any law. Consequently, as Parliament made the Acts which grant these delegated powers, they are also able to unmake said Acts. Henry VIII clauses and wide delegated powers as creations of Parliament, do not undermine the ability of Parliament to either make or unmake any law. Inadequate parliamentary scrutiny of delegated legislation is not as straightforward to dismiss for undermining the orthodox doctrine as Henry VIII Clauses or wide delegated powers, simply because inadequate scrutiny is not something 'passed' or 'created' by Parliament. It is instead more of a consequence of Parliament's actions. However, there does exist an ability for Parliament to require more stringent scrutiny,[417] and therefore again alike Henry VIII Clauses and wide delegated powers fits with the notion of stemming from Parliament's choice/actions. It was Parliament who passed the Act that grants these powers and subsequently their inadequate scrutiny. Therefore, theoretically Parliament can amend or repeal such Acts that grants these powers and their inadequate scrutiny. To summarise the factors of excessive executive dominance do not undermine the positive aspect of the doctrine, i.e., they do not prevent Parliament from making or unmaking any law.

Secondly, the negative aspect of the orthodox doctrine, much like the positive, is not undermined by the presence of excessive executive dominance within the British constitution. Excessive executive dominance does not position any person or body to

[417] For instance, the super affirmative procedure as set out in chapter 3 when discussing delegated legislation.

be recognised as having the right to set aside or override the legislation of Parliament. While wide delegated powers and Henry VIII clauses empower the executive, they do not undermine the orthodox doctrine in placing the executive above Parliament. The factors of excessive executive dominance stem from Parliament, and therefore theoretically do not permit or require another person or body to be regarded as above Parliament. Theoretically, according to the orthodox doctrine and as set out above, Parliament retains the ability to unmake the Acts that empower the executive via delegated powers, therefore nullifying the need or ability for another body to be placed above Parliament. Similarly, the inadequacy parliamentary scrutiny does not position any person or body above Parliament. It remains that every other law-making body within the constitution either derives its authority from Parliament or exercises it at the sufferance of Parliament. It cannot be superior; it is always subordinate to Parliament.[418]

The lacking extent to which excessive executive dominance undermines the negative aspect of the orthodox doctrine is evident in the fact that the courts have not to date struck down an Act of Parliament, be that for excessive executive dominance or any other reason. They, therefore, remain to be regarded as subordinate to Parliament – fitting with the negative aspect of the orthodox doctrine. Although the courts have not yet struck down legislation, that does not mean that they may not in the future. There have been remarks made by the judiciary[419] that suggest that in certain circumstances they would disregard parliamentary sovereignty and in particular the negative aspect of the orthodox definition. However, with that said what will be demonstrated in chapter 5 via case law analysis, is the courts' reading down Henry VIII clauses and ouster clauses in a manner not explainable by either orthodox parliamentary sovereignty or standard statutory interpretation. Chapter 5 illustrates a shift in the courts' approach concerning orthodox parliamentary sovereignty. While it remains true that they have not yet departed from the negative aspect of the orthodox doctrine, it will be shown in chapter 5 that the courts are modifying their approach to parliamentary sovereignty to account for excessive executive dominance.

[418] Stanley De Smith and Rodney Brazier, *Constitutional and Administrative Law* (8th edn, Penguin Books 1998) 67.
[419] *R (Jackson) v Attorney General* [2005] UKHL 56.

The adherence to both the positive and negative aspects of Dicey's orthodox definition, and subsequently the notion that the doctrine does not undermine excessive executive dominance, is illustrated in the following cases. Thomas Jay in *Cheney v Conn*[420] illustrated an adherence to both aspects of Dicey's doctrine. He stated that whatever statute cannot be unlawful, as what a statute says is of the highest form of law and of status that no other law could prevail over it. Subsequently, it is not for the court to say what Parliament has enacted as the highest form of law is illegal.[421] This shows adherence to both aspects because if nobody, including a court, can question an Act of Parliament, then by virtue Parliament can make or unmake any law whatever. This adherence to the negative aspect by the courts also as seen in both *Manuel v Attorney General*[422] where Sir Robert McGarry stated that there is a simple rule the courts must obey and apply every Act of Parliament and that the court cannot hold any act to be *ultra vires* and *R v Lyons*[423] where Lord Hoffman stated that the sovereign legislature in the UK is Parliament, and therefore it is the duty of the court to apply whatever it is that Parliament plainly lays down as the law. In this instance, even if that involves the Crown in breach of an international treaty or not.[424]

The positive aspect of Dicey's definition has also not escaped judicial attention, in *R v Secretary of State for Environment Hammersmith*[425] Lord Donaldson observed the limitless right of Parliament to alter or add to the law via primary legislation, in which he is clearly observing the ability for Parliament to make or unmake any law. He does proceed by addressing the negative aspect of Dicey's orthodox definition, recognising that not only this but in relation to statutes, the only duty of the judiciary is to interpret and apply them. What these cases illustrate is that there is an adherence (at least at the time of the cases) by the judiciary to the orthodox doctrine. They illustrate that there is little scope for deviation from the rigid definition provided in the orthodox definition, meaning external factors do not penetrate either the negative or positive aspect of the definition. They also illustrate what was set out above, that where there is an adherence to the negative aspect of the doctrine by the judiciary, there is by

[420] *Cheney v Conn* [1968] 1 all ER 779.
[421] *Cheney v Conn* [1968] 1 all ER 779 (Ungoed Thomas J).
[422] *Manuel v Attorney General* [1983] CH 77.
[423] *R v Lyons* [2002] UKHL 44.
[424] *R v Lyons* [2002] UKHL 44 (Sir Robert McGarry).
[425] *R v Secretary of State for the Environment, Ex Parte Hammersmith and Fulham LBC* [1991] UKHL 3.

default adherence to the positive aspect. The inflexible nature of this doctrine may be the reason there has been a modified approach by the courts as set out in chapter 5 to account for the presence of excessive executive dominance, which is because there is no scope for the concept of excessive executive dominance within this orthodox definition.

There may, however, be an entry point into the definition for excessive executive dominance if we can question what law is. Dicey's definition states that Parliament can make or unmake any law. Therefore, if we can question what law is, there may be an ability to demonstrate how excessive executive dominance undermines the orthodox doctrine. This argument would therefore be, that when legislation is enacted where excessive executive dominance factors are present, the law is not valid law – therefore excessive executive dominance would undermine orthodox parliamentary sovereignty. In the sense that it would limit the laws that have gone through Parliament to which the orthodox doctrine of parliamentary sovereignty applies. However, similar to the positive and negative aspect of Dicey's definition, this argument falls at the first hurdle.

The definition of law and what makes a law valid has been discussed by the judiciary in various cases, most famously by Lord Campbell in *Edinburgh & Dalkeith Railway Co v Wauchope:*[426]

> *All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through any Court in Scotland, but that due effect will be given to every Act of Parliament, private as well as public, upon what appears to be the proper construction of its existing provisions.*

[426] *Edinburgh & Dalkeith Railway Co v Wauchope* (1842) 8 ER 279.

While this statement was *obiter dictum*,[427] it neatly demonstrates the inability of an Act of Parliament to be questioned by the courts if it has passed the necessary process for a Bill to become an Act. There is, therefore, no scope for excessive executive dominance to undermine what law is, particularly as Lord Campbell stated, the courts cannot enquire into the mode of introduction or process of the Bill becoming an Act. For a court to consider the factors of excessive executive dominance being present and therefore undermining what law is, would require the court enquiring into the mode in which it was introduced – particularly considering factors such as fusion of powers, parliamentary scrutiny and those surrounding delegated powers. Parker Jay supports this notion of excessive executive dominance being unable to undermine what law is, due to its definition in *Bowles v Bank of England*[428] where it was stated that if an Act is expressed to have been enacted by Queen, Lords and Commons the court will not enquire whether it was properly passed or represents the will of Parliament.

The opinion of Lord Campbell in *Edinburgh & Dalkeith Railway Co* was approved in *Pickin v British Railway Boards* where Lord Reed stated:

> *The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution…. The function of the Court is to construe and apply the enactments of Parliament. The Court has no concern with the manner in which Parliament or its officers carrying out its Standing Orders perform these functions. Any attempt to prove that they were misled by fraud or otherwise would necessarily involve an enquiry into the manner in which they had performed their functions in dealing with the Bill which became the British Railways Act, 1968.*

Like *Edinburgh & Dalkeith Railway Co,* this case demonstrates the inability for the concept of excessive executive dominance to undermine what is to be considered law, and therefore consequently unable to undermine the orthodox doctrine. The court has made it clear that they will not delve into and enquire whether an Act of Parliament is valid by means of the way it came to be an Act of Parliament. This decision clarifies

[427] Stanley De Smith and Rodney Brazier, *Constitutional and Administrative Law* (8th edn, Penguin Books 1998).
[428] *Bowles v Bank of England* [1913] 1 Ch 57.

the situation. The courts take the view that they lack jurisdiction to pronounce a supposedly authentic Act of Parliament to be a nullity even if in fact Parliament has not functioned according to existing law.[429]

The courts' ability to decide the validity of an Act of Parliament was discussed again more recently in *Jackson.*[430] The court was invited to decide the validity of the Parliament Acts (both 1911 and 49) and the Hunting Act 2004. Lord Bingham stated that the authority of *Pickin* was unquestioned, and it was very clearly decided that the courts in this country have no power to declare an active law to be invalid.[431] Here, however, the courts looked at the parliamentary roll and see that both the 1949 Act and the 2004 Act have not passed both Houses. The case did not involve questions of parliamentary procedure, such questions would be subject to parliamentary inquiry, not court proceedings.[432] That is because as outlined in the above cases and as Lord Nichols states in this case, at first sight, a challenge in court to the validity of a statute offends the fundamental constitutional principle that courts will not look behind an Act of Parliament and investigate the process by which it was enacted. Those are matters for Parliament, not the courts.[433]

What this therefore means is that any Act of Parliament that features on the parliamentary roll, having been passed by both houses (or in certain circumstances the Commons only – see *Jackson*) and that receives royal assent, cannot be inquired into by the courts. This means that so long as the Act of Parliament that grants the wide delegated powers or Henry VIII clause is featured on the parliamentary roll and has been passed by both Houses receiving royal assent, it cannot be questioned. The factors of excessive executive dominance are irrelevant to the orthodox doctrine and the meaning of law. The inability to enquire behind an Act and or the mode/process it was passed or with what intention, also means that matters such as the fusion of powers and parliamentary scrutiny factors of excessive executive dominance fall short of the concept undermining the orthodox doctrine.

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[429] Stanley De Smith and Rodney Brazier, *Constitutional and Administrative Law* (8th edn, Penguin Books 1998) 87.
[430] *R (Jackson) v Attorney General* [2005] UKHL 56.
[431] *R (Jackson) v Attorney General* [2005] UKHL 56 [27].
[432] *R (Jackson) v Attorney General* [2005] UKHL 56 [27].
[433] *R (Jackson) v Attorney General* [2005] UKHL 56 [49].

It has therefore been demonstrated that there exists no scope within the orthodox doctrine of parliamentary sovereignty for excessive executive dominance. The orthodox doctrine neither accommodates nor acknowledges the concept of excessive executive dominance. This, however, does not mean we do not have excessive executive dominance. The concept is present within the British constitution as has been demonstrated throughout this thesis. What this lack of scope, acknowledgement and accommodation reiterates is that excessive executive dominance was not an issue at the time of Dicey's defining of the orthodox doctrine. The existence of excessive executive dominance now demonstrates a shift in the constitutional landscape since both Dicey's conception and the earlier literature, a shift that can be explained by changing constitutional facts.

4.5 Changing Constitutional Facts

Parliamentary sovereignty has long been considered the central principle of the British constitution. Evidence demonstrates that for centuries (at least since the constitutional settlement in 1688), all three branches of the state have accepted parliamentary sovereignty as the fundamental constitutional principle.[434] It continues to be regarded as the foundation on which the constitution rests.[435] The constitutional landscape, however, is changing, causing parliamentary sovereignty to sit increasingly uncomfortably in the transforming modern British constitution. Human Rights, the EU[436] and devolution are all contributors to this transformation. Although of themselves, they do not require a new constitutional settlement, they have altered the dynamics of the constitution.[437] Parliamentary sovereignty cannot exist as an island, untouched by changes elsewhere within the constitutional framework.[438]

[434] Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press 1999) 236.
[435] Richard Mullender, 'Parliamentary Sovereignty, the Constitution, and the Judiciary' (1998) 49 NILQ 138.
[436] That is when the UK was a member – having left the EU on the 31st January 2020, the ongoing relationship and subsequently the level of sacrificed sovereignty by the UK to the EU is yet to be agreed.
[437] Adam Tomkins, *Public law* (Claredon Press 2003) 15.
[438] Mark Elliott, 'United Kingdom: Parliamentary Sovereignty under Pressure' (2004) 2 IJCL 545.

The fact that prior to 1688 Parliament and parliamentary sovereignty was not the constitution's cornerstone demonstrates the ability and potential for change.

This section's aim is to demonstrate that parliamentary sovereignty is the product of constitutional facts. Since these facts can change, so too can the doctrine of parliamentary sovereignty. It is this, which enables the possibility for parliamentary sovereignty to become qualified,[439] moving away from the orthodox doctrine. This section begins by outlining what constitutional facts are and their relevance to the British constitution. Attention will then be turned to how these facts can change, predominantly looking at the common law and political reality approaches. This examination is fundamentally important to the thesis. It provides the theoretical underpinning to the relevance of excessive executive dominance within the constitution. Furthermore, it allows consideration of excessive executive dominance's impact on the constitution generally and more specifically on the doctrine of parliamentary sovereignty. Once established that these facts exist, and their underpinnings are explored, exploration can evolve from their ability to change to how the change is instigated by excessive executive dominance and the judiciary's response to this change. Namely, it will be explored whether excessive executive dominance is a new constitutional fact, responsible for the qualifying of parliamentary sovereignty by the judiciary.

4.5.1 The Concept of Changing Constitutional Facts

Constitutional facts (also referred to as political facts) are what the British constitution is built upon. They are the facts on which our constitution hangs. The UK does not have a codified constitution that gives authority to the constitutional actors and therefore we must derive authority from elsewhere. The lack of a codified constitution makes it challenging to trace back the source of power. The constitution operates on the political sphere in the sense that it works by a form of agreements between the organs of the state. The sovereignty of Parliament is rooted in the ultimate constitutional fact.[440] It has been an accepted consensus amongst organs of the state

[439] Philip Sales, 'Legalism in constitutional law: judging in a democracy' (2018) PL 687.

[440] HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13 CLJ 172. Wade stated that the foundational rule of parliamentary sovereignty in the British legal system was not - and could not be - a mere rule of law. It was an 'ultimate political fact'.

for centuries, making it a matter of political judgment as well as of legal interpretation. As a political fact, the exercise and existence of sovereignty is defined and influenced by the surrounding constitutional landscape. Political facts have the potential to shift over time due to changing constitutional landscapes.[441]

The facts come from and are shaped by events that have occurred. The current arrangement is based on The Glorious Revolution. This constitutional fact underpins parliamentary sovereignty. After the civil war in England in the seventeenth century resulting from the abuse of the monarch there was an agreement between the courts, Parliament, and the Crown that it would be Parliament who had constitutional primacy and would therefore be responsible for enacting laws. However, since said primacy has been accepted there has been the growth of the executive and its power over the legislature. There is now a risk of abuse by the executive rather than abuse of the Crown (pre-Glorious Revolution) questioning the underpinning of parliamentary sovereignty and the agreement between the organs prompting a reconsideration taking account of excessive executive dominance. The orthodox sovereignty of Parliament is based on a mixture of historical writing and examples to demonstrate the breadth of Parliament's powers in addition to the lack of any other competitive legislative power.[442] Dicey's conception was, therefore, empirical in nature.

This empirical nature is crucial as it demonstrates the principle is one founded on the constitutional facts of that time, namely the appearance of a central power that exercised its lawmaking and law enforcing authority within a particular territory.[443] Contrary to the compelling declarations of orthodox parliamentary sovereignty in the sixteenth and seventieth centuries the political reality of the nineteenth century and onwards appear to deviate from the orthodox sovereignty of Parliament. What was once a sound constitutional fact empirically, supported by equally sound realities of that period is now questionable with the advance of excessive executive dominance. The constitutional facts of this time as this thesis will endeavor to demonstrate throughout this thesis empirically support excessive executive dominance.

[441] Hans J Morgenthau, 'Problem of Sovereignty Reconsidered' (1948) 48 CLR 341.
[442] Martin Loughlin, *Public law and political theory* (OUP 1992) 141.
[443] Hans J Morgenthau, 'Problem of Sovereignty Reconsidered' (1948) 48 CLR 341.

With the constitutional landscape changing, it is questionable whether Parliament is still supreme in the same way it was following the Glorious Revolution or as Dicey declared. An analysis of the new constitutional landscape, accounting for excessive executive dominance as a new constitutional fact as this thesis intends to do, positions Parliament differently to that of Dicey's conception of the doctrine. Orthodox parliamentary sovereignty is no longer supported by the constitutional landscape, evidenced in later chapters via case analysis demonstrating a qualified version of parliamentary sovereignty.

As the constitutional landscape is changing it remains possible for the constitutional facts underpinning the constitutional doctrines to change too. Laws LJ states that in its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy.[444] The question remains as to how the constitutional facts change.

4.5.2 Political Reality Approach

A change via political reality is most famously championed by Wade who saw a revolution as the primary reason for a change in constitutional fact. The 'rule of recognition', which had led the courts to accept Parliament's legislation as the highest form of law, was according to Wade not a legal rule, but an ultimate political fact. It flowed from the historical reality of the 1688 Glorious Revolution.

Wade understood the relationship between the courts of law and Parliament as primarily a political reality. An example he gives of this is the execution of Charles I in 1649 when the courts continued to enforce the Acts of the Long Parliament. A revolution took place, and the courts (without any authority from the previous sovereign legislature) spontaneously transferred their allegiance from the King in Parliament to the kingless Parliament. However, in 1660 there was a counter-revolution: Charles II was restored, and it was suddenly discovered that all Acts passed by Parliament were void for want of Royal Assent. This demonstrates that

[444] *International Transport Roth GmbH & Ors v Secretary of State for the Home Department* [2002] EWCA Civ 158 [71].

constitutional facts have changed before, so there is nothing to stop them from changing again. Essentially the revolution saw the courts change the definition of an Act of Parliament. They recognised sovereignty had shifted. This was a change in political fact, which resulted in legal consequences.[445]

There is the ability (albeit remote) for another revolution to occur, should the judiciary react to the current excessive executive dominance for instance by refusing to follow an Act of Parliament. This would breach the agreement that was founded between the organs of the state resulting from the war of 17th century. Consequently, it would result in a change in the constitutional facts. According to the political reality approach for a change in constitutional facts, there is the need for a political revolution and not intelligent legal theory.[446]

The political reality approach to changing constitutional facts requires the organs to work together for change to occur. There is the argument that Parliament alone cannot change political facts, but it has to be a combination of the organs of the state. There is, therefore, the need for judicial recognition of political facts.[447] Wade provided a new foundation for the doctrine of parliamentary sovereignty. He regarded it as a political fact, rather than a rule of law or product of the common law. Parliamentary sovereignty was instead the ultimate political fact upon which the whole system depends. At the time of his writing, he stated that the ultimate political fact governing the UK was the Diceyan orthodox parliamentary sovereignty. Wade understood that parliamentary sovereignty was not introduced or created by an Act, and it could not, therefore, be abrogated by such an Act either. Lord Hope in *Jackson* adopted a "Wade-like" approach when stating that the sovereignty of Parliament is not purely legal but also political in nature.[448] With that said Lord Hope does not solely endorse a "Wade-like" approach. He states that in the absence of a higher authority, the sovereignty of Parliament has been created by the common law.[449]

Thus, this approach does not see the ability for the doctrine to change simply via

[445] HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13 CLJ 172.
[446] Ian Loveland, 'Parliamentary Sovereignty and the European Community: The unfinished Revolution?' (1996) 49 Parliamentary Affairs 517.
[447] Adam Tomkins, *Public law* (Claredon Press 2003) 74.
[448] *R (Jackson) v Attorney General* [2005] UKHL 56 [119-120].
[449] *R (Jackson) v Attorney General* [2005] UKHL 56 [126].

legislation. According to the "political reality" approach a change can only occur via political means, change occurs when one set of political facts supporting a legal system are replaced by another.[450]

Accordingly, the theory suggests it is for the courts to decide what is a valid Act of Parliament. Their decision is not determined by a rule of law but decided by political fact. Judges follow political reality, changes in political movements cause the judiciary to change their direction. The *Factortame* decision exemplifies the judiciary responding to political change. They recognise the primacy of EU law and how its practical politics required it.

Despite the traction in judicial decisions and remarks, the political theory approach does have critics. One counterargument to Wade's analysis would be on the ground of democracy. That is because democracy is the underpinning of parliamentary sovereignty.[451] Parliamentary sovereignty is dependent upon the legislature maintaining the trust of the electorate, the maintenance of which is vital in a democracy.[452] The judiciary does not possess the democratic credentials that Parliament. The judiciary, unlike Parliament is not elected and is also not held to account by the electorate. The theory, therefore, is placing importance upon the judiciary in recognising changes in political facts, detracts from the notion of Parliament being all-powerful, empowering an organ of the state that does not possess democratic legitimacy.

Moreover, it can be argued that the European Communities Act 1972 was incompatible with Wade's argument. The Act saw the UK Parliament doing exactly what he said they could not, namely changing the constitutional fact on their own. Parliament voluntarily limited its legislative powers in joining the EU, as already discussed in this chapter, community law took primacy over domestic.[453] Parliament therefore, displaced its own sovereignty, even if only to a certain degree or as some would argue only theoretically. The latter argument being made on the basis that Parliament could repeal the ECA and regain its sovereignty, the reality of which was

[450] Richard S Kay, 'Constitutional change and wades ultimate political fact' (2016) UQLJ.
[451] Elliott and Thomas, *Public Law* (OUP 2011) 214.
[452] *R (Jackson) v Attorney General* [2005] UKHL 56 [126].
[453] See *Factortame* decision. This was also while the UK was a member of the EU, with the UK leaving the EU on the 31st January 2020.

thought questionable. However, Brexit saw this to fruition with the ECA 1972 repealed by the European Union Withdrawal Act 2018.

4.5.3 Common Law Approach

The common law approach sees the constitutional fact as a common law issue, meaning the common law could trigger the constitutional fact to change rather than a revolution or political reality. The basis for the common law approach is that legislative supremacy is a legal rule, not a convention. Meaning it must be either in the common law or statute – since Parliament is not capable of legislating to declare itself sovereign. It is not possible to bestow power upon yourself for which you do not have and therefore do not have the power to do so. If parliamentary sovereignty is a legal principle and not the product of statute it is likely a principle of the common law. Like any other rule of the common law, it can be developed, refined, reinterpreted, or even changed by the judges.[454] Common law radicalism believes that the whole constitution, including parliamentary sovereignty, is based on the common law.[455] Lord Steyn acknowledges the common law basis of parliamentary sovereignty in *Jackson.*[456] He stated that "*the supremacy of Parliament is still the general principle of our constitution, it is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism."*[457] Therefore, according to this approach, while the doctrine of parliamentary sovereignty or legislative sovereignty may be fundamental in the sense that it is the basis to the constitution, it is no more entrenched or unchangeable than any other rule of English law.[458]

Before the English Civil War, it was less accepted by the judiciary that Parliament's legislative capacity was unquestionable, evident in the *Bonhams*[459] case. The Civil War saw Parliament win the conflict with the Crown and the courts have formally

[454] Adam Tomkins, *Public law* (Claredon Press 2003) 103.
[455] Adam Tomkins and Colin Turpin, *British Government and the Constitution* (6th edn, CUP 1985) 66.
[456] *R (on the application of Jackson) v Attorney General* [2005] UKHL 56.
[457] *R (on the application of Jackson) v Attorney General* [2005] UKHL 56 [102].
[458] Adam Tomkins, *Public law* (Claredon Press 2003) 104.
[459] *Thomas Bonham v College of Physicians* (1610) 8 Co Rep 114.

recognised this with their approach to statutes. Essentially the courts recognised the political reality that Parliament had enhanced powers since the Civil War. It was for this reason that parliamentary supremacy was recognised. This means that underpinning the strictly legal doctrine of legislative supremacy is the courts' recognition of political reality. This allows for the judiciary alone to change the constitutional facts. If the political reality is to change again, then there is nothing to stop the common law changing with it.[460] This differs from the political reality approach where the change occurs via revolution and requires a collaboration of the organs of the state for a change to occur.[461] It does not depend solely on the courts' recognition of what constitutes political reality. Parliament's sovereignty according to the common law approach is, therefore, due to the judiciary acknowledging its legal and political sovereignty.[462] The theory has had the support of the Attorney General who, when questioned on the source of Parliament's legislative power acknowledged the common law as the source.[463]

Like the "political reality approach", support exists for the common law theory too, identified as potentially being the most potent challenge to parliamentary sovereignty.[464] *Thoburn's* modification of parliamentary sovereignty, namely the disapplication of the implied repeal doctrine exemplifies the courts' role in facilitating constitutional change. The case established the principle would not be applied to "constitutional statutes,"[465] this could mark a small breakthrough in a much longer journey, in which the legislative authority is understood as a function of constitutional law, not a historical fact.[466] The *HS2* decision[467] goes further still, refining the *Thoburn* approach and asserting that not all constitutional statutes are of equal hierarchy, declaring some statutes are more constitutional than others.[468] This signals what Lord Wilberforce in *British Railways Board* detailed when stating that the common law is a

[460] Adam Tomkins, *Public law* (Claredon Press 2003) 104.
[461] *Thoburn v Sunderland City Council* [2002] EWHC 195 [62-69].
[462] TRS Allan, *Law Liberty and Justice the legal foundation of British Constitutionalism* (OUP 1993) 10.
[463] Lord Lester of Herne Hill asked Her Majesty's Government: What is their understanding of the legal sources from which the legislative powers of Parliament are derived; and what are those sources. [HL1954] Lord Goldsmith: The source of the legislative powers is the common law. (Anthony Lester QC, 'Beyond the Powers of Parliament' 2004 JR 9 95).
[464] Adam Tomkins and Colin Turpin, *British Government and the Constitution* (6th edn, CUP 1985) 66.
[465] *Thoburn v Sunderland City Council* [2002] EWHC 195 [61].
[466] Mark Elliott, 'United Kingdom: Parliamentary Sovereignty under Pressure' (2004) 3 IJCL 545.
[467] *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.
[468] *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 [206-208].

developing entity incrementally changing and refining. It is the judiciary who develop it, and these developments are made to keep the law moving in accordance with changes in society.[469]

Similar to the political reality approach, this approach also has criticisms. The decision of *Miller* stated that we could not accept that a major change to British constitutional arrangements can be achieved by ministers alone.[470] It must be affected in the only way that the British constitution recognises, namely by parliamentary legislation.[471] This is clearly at odds with the theory's approach that states that the common law (through the judiciary) can make changes to the constitutional facts. The approach, taken by the Supreme Court in *Miller* is more fitting with that of the political reality approach. There is the recognition of a collaboration required for significant changes to occur. These changes would likely cover the theoretical underpinning of constitutional principles. However, there is nothing in these which states that the "recognised" way cannot be changed.

Other theories also exist, which seek to explain the ability for constitutional facts to change. However, they have gathered less traction than the two discussed above. One obvious way for a political fact to change might be if the courts were to refuse to recognise an Act of Parliament as valid law.[472] The possibility of which was discussed albeit *obiter*, in *Jackson*[473] Lord Steyn stated:

> *In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.*

[469] *British Railways Board v Herrington* [1972] UKHL 1 (Lord Wilberforce).
[470] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[471] Thomas Poole, 'Devotion to Legalism: On the Brexit Case' (2017) 80 MLR 696.
[472] Mark Elliott, 'United Kingdom: Parliamentary Sovereignty under Pressure' (2004) 3 IJCL 545.
[473] *R (Jackson) v Attorney General* [2005] UKHL 56.

Lady Hale[474] also alluded to the fact that should Parliament do the unthinkable, then the courts may refuse to follow an Act of Parliament. She stated:

> *The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny.*

Globalization has encouraged a change in constitutional fact. For instance, the introduction of international law, and the EU has all meant that the constitutional facts underpinning orthodox parliamentary sovereignty have potentially changed.[475] Some have cited the Parliament Acts as demonstrating the ability for constitutional change. The Acts established Parliament's ability to modify the manner and form in which Acts of Parliament can be passed as identified in *Jackson* where the court rejected the appeal of the alliance because they were regarding the 1949 Act as changing the 1911 Act without the Lords consent to be unlawful. However, the court found that the 1911 Act created a new Manner and Form[476] requirement for enacting legislation without the Lords consent.[477]

Perhaps the changes in the constitution stem from the fact we are changing from a political to a legal constitution. Because our constitution has largely been a political one it means that the political process directs constitutional change. Lord Steyn in his judgment in *Jackson* regards parliamentary sovereignty as limited due to constitutional changes. He notes: European context (Factortame), the Scotland Act 1998 and the Human rights convention as all dividing sovereignty in the UK.[478] Regardless of how significant the reforms are (HRA, devolution, EU membership etc.), we cannot say they create a new constitutional order, this is because much of the constitution still operates as it already did. What can be said is that there is an acknowledgement for

[474] Then known as Baroness Hale.
[475] Adam Tomkins and Colin Turpin, *British Government and the Constitution* (6th edn, CUP 1985) 16.
[476] Manner and form provisions are designed to entrench certain legislative provisions. They are used to prevent the amendment or repeal of those legislative provisions, for instance requiring a super majority for an Act of Parliament to be repealed. See Stuart Lakin, 'The Manner and Form Theory of Parliamentary Sovereignty: A Nelson's Eye View of the UK Constitution?' 2018 OJLS 38 168.
[477] *R (Jackson) v Attorney General* [2005] UKHL 56 (Lord Steyn 75, Hale 160, Carswell 174 and Brown 187).
[478] *R (Jackson) v Attorney General* [2005] UKHL 56 [102].

the ability for constitutional facts to change, whether that is via a political reality or common law approach.

The political reality approach has a link with the judiciary as constitutional facts reflect the judiciary's recognition of political reality according to Wade,[479] the courts are therefore free to choose what they recognised as the proper expression of a new sovereign power. As noted, an example of this being the *Factortame*[480] decision where the judiciary responded to a change in political reality - recognising the primacy of EU law. The political reality approach, however, does not just require a change in approach or recognition by the judiciary. It requires collaboration between all organs of the state for constitutional change.

The common law approach is different. The common law is a product of the judiciary, and therefore the common law being responsible for constitutional facts changing rather than revolution and political reality creates a direct link. This approach places the changing of approach in the hands of the judiciary. Unlike the political reality approach however there is not the need for collaboration for a change to occur. The theory denotes that the common law underpinning of parliamentary sovereignty can be changed like any other common law doctrine.

Whilst this section has intended to a) outline what constitutional facts are, b) demonstrate how they can change, c) discuss their relevance to the British constitution, in addition to the relevance of excessive executive dominance. It remains for this thesis to explore the impact excessive executive dominance has upon constitutional facts. With particular notice paid to the judiciary's reaction to these facts changing and subsequently the consequences for parliamentary sovereignty. This section has established how both the political reality and common law theories accommodate the judicial role in constitutional facts changing. This consideration is intrinsic to this thesis as it provides the theoretical foundation supporting further exploration of the relevance and impact excessive executive dominance has upon the constitution. It allows the reflection of the current level of executive dominance within

[479] HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13 CLJ 172.
[480] *R (Factortame Ltd) v Secretary of State for Transport* [1990] UKHL 7.

the constitution as a means to changing constitutional facts, with political reality arguably no longer supporting the orthodox parliamentary sovereignty doctrine. It is this, which invites the case law analysis, visible in subsequent chapters.

4.6 Conclusion

The chapter acknowledges the cardinal importance of parliamentary sovereignty within the British constitution. The chapter focused on determining where the principle fits within the British constitution, accounting for executive dominance. The aim has been to determine what if any impact executive dominance has upon parliamentary sovereignty.

The chapter began by outlining the orthodox doctrine of parliamentary sovereignty. The chapter has linked this orthodox doctrine with the historical perspective of the constitution. Once defined, attention was turned to how the literature responds to the orthodox doctrine. The chapter then applies the orthodox doctrine to the novel concepts of this thesis – natural and excessive executive dominance. This was achieved to assess how the orthodox doctrine and the novel concepts worked together, whether they were compatible or whether they undermined the orthodox doctrine. The chapter has built therefore upon previous chapters, namely chapter 2 and 3 which outlined this thesis's novel concepts of natural and excessive executive dominance.

Once the compatibility of orthodox parliamentary sovereignty and the conceptions of natural and excessive executive dominance are considered. It is evident that the orthodox doctrine offers no scope for excessive executive dominance. The orthodox doctrine dismisses and does not acknowledge the ability for or consequence of excessive executive dominance. Yet this thesis has demonstrated an existence of excessive executive dominance within the British constitution. Parliamentary sovereignty is rooted in constitutional facts, the lacking scope for, yet existence of, excessive executive dominance, leads to an exploration of the ability for constitutional facts to change. The political reality and common law approaches to changing of constitutional facts are outlined. Under the political reality approach excessive

executive dominance may be a revolution, that if recognised as so by the other organs of the state results in a change of constitutional facts. Alternatively, under the common law approach excessive executive dominance could trigger the constitutional fact to change if recognised as such by the judiciary, rather than a revolution or political reality. Both theories require judicial support for constitutional facts to change. These theories begin to explain the modified version of parliamentary sovereignty that the courts are applying – as will be demonstrated through case law analysis in chapter 5.

This chapter has therefore not only built upon previous chapters[481] by applying the orthodox doctrine of parliamentary sovereignty to this thesis's novel concepts of natural and excessive executive dominance, but it has also taken a crucial step in laying the foundations for the upcoming section of this thesis. It did this by illustrating how the orthodox doctrine has no scope for excessive executive dominance, alongside outlining the ability for, and theories in which, constitutional facts can change, this chapter has provided the reasons for the courts modifying of parliamentary sovereignty to account for excessive executive dominance.

[481] Chapter 2 on natural dominance and chapter 3 on excessive executive dominance.

Consequences of Excessive Executive Dominance

Chapter 5: Failure of Political Constitutionalism and the push to Legal Constitutionalism

5.1 Introduction

This chapter examines the consequences of excessive executive dominance. The thesis thus far has defined what excessive executive dominance is, outlined the factors that amount to the concept and illustrated how over time there has been an evolution from natural to excessive executive dominance as demonstrated in the previous chapter. The focus now turns to the consequences of this concept, namely demonstrating the impact upon political constitutionalism and the judicial approach stemming from this impact. This chapter will demonstrate that as a consequence of excessive executive dominance there is a failure of political constitutionalism, resulting in a void which the UK judiciary is filling via various tools in the form of legal constitutionalism. The chapter will also demonstrate that in the shift from political to legal constitutionalism it is evident that (i) there has been a change in constitutional facts and (ii) the judiciary are – in tackling excessive executive dominance – applying a modified version of parliamentary sovereignty.

The chapter begins by discussing constitutionalism setting out political constitutionalism, exploring the background and its presence within the British constitution. Once set out, this section turns to outlining the failure of political constitutionalism stemming from excessive executive dominance, as set out in an earlier chapter.[482] The first section of the chapter finishes by demonstrating the push towards legal constitutionalism within the British constitution, to fill the void created by political constitutionalism's failure. A push this chapter argues is justified due to the

[482] See chapter 3.

existence of excessive executive dominance. Both the failure of political constitutionalism and the push to legal constitutionalism is illustrated through the case law analysis within the second part of this chapter. The focus here primarily rests upon explaining the case law considering my novel concept excessive executive dominance. The cases will be subject to the two-step test to determine the presence of excessive executive dominance. The cases concern judicial review, and the analysis will focus on statutory interpretation, the chapter will look at (i) the judiciary's use of the principle of legality and (ii) the courts' restrictive approach to Henry VIII and ouster clauses. The final part of the chapter focuses on whether the courts approach in these cases can be justified. This is particularly important as the courts in tackling excessive executive dominance depart from the orthodox parliamentary sovereignty doctrine. Focus here will be on the application of a modified version of parliamentary sovereignty and the changing of constitutional facts due to excessive executive dominance.

5.2 Excessive Executive Dominance as a Justification of Legal Constitutionalism

5.2.1 Background

The doctrine of constitutionalism appears often within public law discourse. It is present in debates and literature around many public law topics, from the rule of law and judicial review to the changing constitutional landscape.[483] Constitutionalism in its basic form is a set of ideas, principles and rules to prevent an arbitrary government, ensuring protection from and the prevention of arbitrary power, whilst placing government before the law.[484] One of the purposes of a constitution is to prevent arbitrary power and find ways of forming sufficient checks and balances on the executive.[485] Holding government to account involves ensuring that it behaves constitutionally. That is in accordance with the requirements and values of the constitution.[486] Constitutionalism establishes that the authority of government and the

[483] Jo Murkens, 'The Quest for Constitutionalism in the UK Public Law Discourse' (2009) 29 OJLS 427.
[484] Anthony King, *The British Constitution* (OUP 2010) 12.
[485] Adam Tomkins, *Public Law* (OUP 2003) 18.
[486] Mark Elliott, *Public Law* (3rd edn, OUP 2017) 38.

officials who exercise governmental powers are limited and determined by a higher power.[487] Constitutionalism is a means of limiting government's power.

The prevalent theory within the British constitution is political constitutionalism. The British constitution, unlike many of its codified counterparts, does not have a judicial body able to strike down legislation. The British constitution has a sovereign Parliament.[488] It is therefore political not legal factors which prevent Parliament from enacting certain laws. The constitution, therefore, is one of political constitutionalism rather than legal constitutionalism.[489] The essence of political constitutionalism is that the executive is held to account 'through political processes and in political institutions.[490] Political constitutionalism assigns the legislature the greatest power and legitimacy. The basis for this power and legitimacy being entrusted in Parliament is due to it being an elected body, representing the majority's interests and therefore seen as pertinent in holding the government to account. The accountability of the executive under political constitutionalism is therefore through Parliament and namely through MPs who can call the Government to account via scrutiny such as Prime Minister questions, Select Committees' debates and both written and oral questions.

The basis of political constitutionalism primarily rests upon the doctrine of parliamentary sovereignty, which as detailed in an earlier chapter[491] followed the Glorious Revolution in 1688.[492] Parliament is therefore unrestricted by the courts. This sits well with political constitutionalism as it places the constitution and therefore its accountability in the hands of the democratically elected organ of Parliament.

However, both political and legal constitutionalism are present within the British constitution. The presence of legal constitutionalism within the British constitution illustrates the failure of political constitutionalism, as will be explored in this chapter.

[487] Either higher law or the constitution – this is depending on the form of constitutionalism that is followed.
[488] As explored in chapter 4.
[489] Graham Gee and Grégoire Webber, 'What is Political Constitutionalism' (2010) 30 OJLS 273.
[490] Graham Gee and Grégoire Webber, 'What is Political Constitutionalism' (2010) 30 OJLS 273.
[491] See chapter 4 on Parliamentary Sovereignty.
[492] The revolution saw the rejection of controlling monarchs in favour of a sovereign Parliament, democratically elected and consequently legitimate.

5.2.2 The Failure of Political Constitutionalism as a Result of Excessive Executive Dominance

The questioning of political constitutionalism's effectiveness can be witnessed in the rife debate between the two polarised schools – legal and political constitutionalism.[493] The most prominent dispute between political and legal constitutionalism is regarding whether it is the courts or the legislature who should have the ultimate decision-making authority,[494] and who is best to hold the government to account. To be effective, political constitutionalism requires strong politics – requiring those who have the scrutiny power to take the role seriously whilst also having a degree of independence.[495] The latter is certainly not true within the British constitution, as demonstrated in chapter 2 when exploring the fusion of powers between the executive and legislature. Parliament is not independent and has considerable overlaps with the executive. The executive's dominance of Parliament forms a core factor within this thesis. It is also detrimental for political constitutionalism as will be examined shortly. Without a strong legislature, the ability of a sufficient check on the executive's power becomes significantly limited.

Miller I[496] illustrated the division in opinion, as to how to resolve questions regarding the relationship between Parliament, the executive, and the courts.[497] The case demonstrated the British constitution is today a far more complex decisional space.[498] It displays at least a lack of confidence in elements of political constitutionalism as well as, the lack of command political constitutionalism has in the face of a dominant executive. This is evident in the need for legal measures to resolve the dispute of triggering Art.50 TEU. In essence, the case saw the application of legal constitutionalism to enforce political constitutionalism, the court ruled to ensure a parliamentary vote on the triggering of Art.50 TEU. The decision therefore reiterates the reconsideration of parliamentary sovereignty and in turn political constitutionalism.

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[493] Robert Brett Taylor, 'Foundational and regulatory conventions: exploring the constitutional significance of Britain's dependency upon conventions' (2015) PL 614.
[494] Cormac Mac Amhlaigh, 'Putting political constitutional in its place' (2016) 14 IJCL 175.
[495] Adam Tomkins, *Public Law* (OUP 2003) 19.
[496] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[497] Paul Daly, 'Miller: Legal and Political Fault Lines' (2017) PL 73.
[498] Mark Elliott, 'The Supreme Court's Judgment in Miller: In Search of Constitutional Principle' (2017) 76 CLJ 257.

Whilst political constitutionalists argue that Parliament can exert real control over legislation and the executive,[499] the reality is not so clear-cut. The fact that Parliament has managed to exert some control over some parts of legislation in some limited instances[500] falls short of establishing political constitutionalism as viable for upholding accountability of the executive.[501] The reality is that the executive dominates the legislature, a position evident in numerous select committee reports,[502] which highlight the defects in both the legislative process and accountability of the executive. These defects have resulted in advancement in judicial control.

The legislature cannot uphold constitutional standards as it once could. This is due to the growth of executive dominance,[503] particularly when considering the growth and facilitation of the concept, the success of political constraints certainly become questionable. A fundamental element of political constitutionalism is a strong legislature.[504] The UK legislature, due to excessive executive dominance, cannot always be described as strong.[505] Where there is the presence of excessive executive dominance, the UK legislature is instead compromised and insufficiently independent to hold the executive to account.

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[499] See for instance. Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 University of Toronto Law Journal 1. Adam Tomkins, 'What's left of the political constitution?' (2013) 14 German Law Journal 2275. Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 OJLS 157, JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1, Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 30-37, Martin Loughlin, *Swords & Scales: An Examination of the Relationship of Law & Politics* (Hart 2000) 4, Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007).

[500] For instance, sifting committees offer limited political restraint upon the executive – especially when looking at the EUWA18 and the memorandum issues. The executive is able to state why they did not follow the Committee's recommendations post passing of the Bill / Power. Another example is ministerial responsibility, and the onus being on the Minister to resign. There is nothing to force them to and often blame is passed to the civil service. A further example is evident in the *Miller* litigation with Parliament lacking the influence to ensure a vote on triggering Art 50 without the intervention of the courts. The limited capacity of political constitutionalism is also evident when comparing Theresa May and Boris Johnson's Governments – a comparison made in chapter 7 on the Brexit Case Study.

[501] Paul Craig, 'Political Constitutionalism and the Judicial Role: A Response' (2011) IJCL 112.

[502] The Donomough Committee, Committee report on Effectiveness of local authority overview and scrutiny Committee's, work by the Secondary Legislation Scrutiny Committee and the Select Committee on the Constitution. These are just a few examples of committees or reports which fit with the notion of the executive dominating the legislature.

[503] See chapter 2 and 3 on the executive's growth / dominance.

[504] Mark Tushnet, 'The Relation Between Political Constitutionalism and Weak- Form Judicial Review' (2013) 14 German Law Journal 2249.

[505] See the chapter 2 and 3 exploring the factors of executive dominance in particular the fusion of powers, numerical advantage and First Past the Post system and the inability to offer proper scrutiny. All of these prevent the legislature from being regarded as 'strong'.

Political constitutionalism is therefore failing because of excessive executive dominance. The failure was set out in chapters 2 and 3 when exploring the factors of natural and excessive executive dominance. I argue that due to this failure, there are questions raised over the effectiveness of Parliament in holding the executive to account. It is submitted that for this reason, that there has been a push in recent years from political to legal constitutionalism. Legal constitutionalism is attempting to fill the void that political constitutionalism's shortfalls have created. Excessive executive dominance, therefore, justifies the growing influence of legal constitutionalism within the British constitution.

5.2.3 Push towards Legal Constitutionalism

Legal constitutionalists believe the contrary to political constitutionalist. They regard legal means as the best form of accountability predominantly via the courts.[506] They support greater judicial oversight of constitutional issues, advocating constitutional review of primary legislation and powers of judicial strike down.[507] Legal constitutionalism is the dominant model of constitutionalism globally,[508] arguably trumping political constitutionalism due to the commonplace written constitution. The theory is driven by the widely held belief that judges safeguard constitutions from the political interests of the governing elite.[509] There are therefore apparent differences to be drawn between legal and political constitutionalism, predominantly via the former's focus on the judiciary's ability to command accountability of the executive and the latter preferring political means. Though different in their approach both have a mutual aim of upholding the constitution and ensuring the executive is held to account.

Legal constitutionalism is linked with the rule of law. This feeds into the notion of legal and political constitutionalism being polarised schools, as the rule of law and

[506] Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 Toronto Law Journal 1.
[507] Robert Brett Taylor, 'Foundational and regulatory conventions: exploring the constitutional significance of Britain's dependency upon conventions' (2015) PL 614.
[508] Robert Brett Taylor, 'The contested constitution: an analysis of the competing models of British constitutionalism' (2018) PL.
[509] Aileen Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape' (2011) 9 IJCL 172.

parliamentary sovereignty are also positioned as opposed to each other in the literature. Legal constitutionalism's positioning of the judiciary as guardians of both democracy and the rule of law creates a link with common law constitutionalism – a notion employed increasingly by the judiciary. Common law constitutionalism positions the common law as the source for determining what is considered constitutional, with the common law serving as the structure of the judiciary's authority to review legislative and executive action against, providing a standard to assess it.[510] Common law constitutionalism understands the role of the judiciary as guardians of the constitution and society's fundamental values and rights whilst upholding the rule of law and therefore assuming a pivotal role within the polity.[511] This is particularly important with regards to executive dominance, as it is the rule of law and common law constitutionalism, which the judiciary relies upon when reading down statutes to ensure the executive is kept in check.[512] The push towards legal constitutionalism and use of common law constitutionalism is increasingly evident in the courts' addressing of excessive executive dominance. It is accounting for not only the failure of political constitutionalism but also the changing of constitutional facts. The former has seen a shift in the role of the judiciary, to one that emphasises the courts' role as an integral component to secure accountable government.[513] This is crucial for combating excessive executive dominance when considering the vast overlaps between the executive and legislature within the British constitution. Unlike Parliament, the judiciary does not suffer from the same overlaps as the legislature and executive. Of the UK's three state organs, the judiciary is the most independent, supporting its role and legal constitutionalism in ensuring the government does not possess arbitrary power.[514]

Dicey's view was that the courts should play a limited role in the constitution. He saw the role of Parliament as the fundamentally important aspect of the constitution. While Dicey's views were considered authoritative, the judiciary had a limited role within the constitution. A limited role for the judiciary inherently means a limited role for legal

[510] Douglas E Edlin, Judges and Unjust Laws: Common Law Constitutionalism and the foundations of Judicial Review (University of Michigan Press 2010) 123.
[511] Thomas Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23 OJLS 435.
[512] Evan Fox-Decent, 'democratizing common law constitutionalism' (2009) Mcgill Law Review 511.
[513] Lord Irvine of Lairg, 'Activism and restraint: human rights and the interpretative process' (1999) EHRLR 350.
[514] Adam Tomkins, *Public Law* (OUP 2003) 19.

constitutionalism. However, since the constitutional landscape has changed and the judiciary's powers have grown, there has been a noticeable shift away from orthodox parliamentary sovereignty. This will be illustrated in the forthcoming case law analysis. Dicey's orthodox doctrine is, therefore, to be questioned and so too is the suitability of political constitutionalism. Therefore, it is necessary to reassess the role of legal constitutionalism, particularly in tackling excessive executive dominance.

The judiciary and in turn legal constitutionalism offers a counterbalance to the failing of accountability of the executive via the political sphere. If the mechanisms of political constitutionalism were successful, there would be no need for judicial input. The fact that the judiciary has grown such an arsenal of mechanisms to hold the executive to account demonstrates the limitations of the political spheres. Their independence makes them more suitable for providing a sufficient check and balance on the work of the executive.[515] The use of legal constitutionalism unlike political constitutionalism is not impacted upon by the factors amounting to excessive executive dominance. Regardless of the majority the government has, the judiciary is still capable of ensuring accountability, thereby mitigating the effects of executive dominance. Unlike political constitutionalism, legal constitutionalism enables the upholding of individual rights in the face of politics. The independence of the judiciary also strengthens the scrutiny of the executive, important when considering that inadequate scrutiny is another factor amounting to excessive executive dominance. Legal constitutionalism is therefore well positioned to fill the void left when constitutionalism fails due to excessive executive dominance.

A worthy starting point for recognising the shift in constitutionalism from that of political to legal, acknowledging the shortcomings of the former and subsequently the push to the latter is with Lord Mustill, who in the ***Fire Brigades Union***[516] case acknowledges not only the failure of political constitutionalism, but also the presence of excessive executive dominance:

[515] Legal constitutionalism does not suffer the same issues; Legal constitutionalism and its constraints via the judiciary is sufficiently independent from both the legislature and the executive to offer effective accountability. The executive does not control the judiciary unlike the legislature, since the Constitutional Reform Act 2005 its independence has only increased – the judiciary and executive do not have overlaps since the altering of the Lord Chancellors role.

[516] *R v Secretary of State for Home Department, Ex Parte Fire Brigades Union* [1995] 2 AC 513.

In recent years, however, the employment in practice of these specifically Parliamentary remedies has on occasion been perceived as falling short, and sometimes well short, of what was needed to bring the performance of the executive into line with the law…[517]

He goes on to address the changing judicial function, in which the courts now have a pivotal role in securing accountable government, protecting constitutional principles and fundamental rights:

To avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground in a manner, and in areas of public life, which could not have been foreseen 30 years ago.[518]

The recognised shortcomings of political constitutionalism and the push towards legal constitutionalism coincides with the changing of constitutional facts. This is a noteworthy point when considering the link between orthodox parliamentary sovereignty and political constitutionalism, and between the rule of law and legal constitutionalism. Therefore, the courts' recognition of political constitutionalism's inadequacy is more than just that. It is also a recognition of the changing constitutional landscape and consequently, the courts changing approach to the orthodox doctrine. The various tools of legal constitutionalism not only demonstrate the courts' use of legal constitutionalism to curb excessive executive dominance, but also the modified version of parliamentary sovereignty.

5.3 Tools of Legal Constitutionalism

5.3.1 Background

[517] *R v Secretary of State for Home Department, Ex Parte Fire Brigades Union* [1995] 2 AC 513 [28] (Lord Mustill).
[518] *Ibid*.

The tools explored within this section provide examples of the judiciary limiting, through legal constitutionalism, executive power. This is to fill the void created by political constitutionalism's failure, owing to excessive executive dominance. As outlined above, common law constitutionalism is becoming increasingly prevalent, which is evidenced throughout this section. The courts use tools such as (i) the principle of legality, (ii) the reading down of Henry VIII clauses and (iii) the reading down of ouster clauses.

To illustrate the tools of legal constitutionalism this section will analyse various judicial decisions. The cases explored within this section are cases of statutory interpretation. The aim of statutory interpretation is to give effect to parliamentary intent. There is a link that can be drawn between orthodox parliamentary sovereignty and giving effect to parliamentary intent.[519]

The cases explored within this section are contentious. They cannot adequately be explained based on standard statutory interpretation, giving effect to parliamentary intent or the orthodox doctrine. This line of reasoning is unsatisfactory to explain the cases within this section. However, this section offers an explanation that can explain the cases. It demonstrates via the application of the two-step test the presence of excessive executive dominance and the concept's impact upon political constitutionalism, explaining the courts response to said dominance via legal constitutionalism. The tools of legal constitutionalism would not be used if orthodox parliamentary sovereignty were adhered to and would not be necessary if political constitutionalism was effective.

In recent years the courts have become increasingly vocal about their willingness to question the orthodox doctrine of sovereignty. Arguably the most famous example is found in the case of *Jackson.*[520] Lord Steyn stated in *obiter* that the classic account given by Dicey, of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom.[521] This explicitly makes the

[519] See chapter 4 for further discussion of the orthodox doctrine.
[520] *R (Jackson) v Attorney General* [2005] UKHL 56.
[521] *R (Jackson) v Attorney General* [2005] UKHL 56 [102]. Lord Hope agreed with Lord Steyn [104] who regarded the doctrine as no longer, if it ever was.

point of this chapter. What *Jackson* and in particular Lord Steyn's judgment suggests, is that there is a clear shift in the constitutional landscape with a push towards legal constitutionalism, and in particular common law constitutionalism. This chapter argues that this push is understandable due to the existence of excessive executive dominance.

The doubts of Lord Steyn in *Jackson*[522] regarding the orthodox doctrine were referred to by Lord Hope in *AXA*[523] in a manner particularly fitting with this thesis. Lord Hope noted that the governing party (presently)[524] enjoys a large majority, dominates the legislative process and might conceivably seek to use its power "to abolish judicial review or to diminish the court's role in protecting the interests of the individual".[525] His Lordship states that the rule of law requires that the judges must retain power to insist that legislation of that extreme kind is not law that the courts will recognise.[526] An explanation for Lord Hope's applying and or recognising the necessity of limiting the orthodox doctrine, using legal constitutionalism, is to prevent the impact of excessive executive dominance.

The deference that therefore once existed by the judiciary towards the executive is beginning to disappear. The courts are modifying their ordinarily deferential nature towards the executive, particularly in matters involving politics/policy considerations, as expressed by Lord Bingham in *Belmarsh 9*:

The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions.[527]

[522] Lord Steyn described the described the doctrine as out of place in the modern constitution.
[523] *AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents) (Scotland*) [2011] UKSC 46.
[524] True as of August 2021.
[525] *AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents) (Scotland*) [2011] UKSC 46 [51].
[526] *Ibid*.
[527] *A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department* [2004] UKHL 56.

Such deference is arguably diminishing in favour of protecting constitutional principles. This is evident in the courts' use of the principle of legality.

5.3.2 The Principle of Legality

The principle is based on presumptions as to Parliament's intentions in the constitutional landscape in which it legislates.[528] The role of the principle of legality is to exercise a checking or editorial function to see that the legislature and the executive, have sufficiently held in mind the constitutional principles, rights, and freedoms, when legislating.[529]

It is most famously defined in *Simms*[530] by Lord Hoffman who stated:

> *Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.*[531]

In implementing the principle, the court can read down general words in a statute.[532] This is to ensure that the statute conforms with fundamental rights and constitutional

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[528] See *R (Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] 2 AC 349* at 396 (Lord Nicholls); *R. v Secretary of State for the Home Department, Ex p. Pierson [1998] AC 539* at 587 (Lord Steyn), 573–574 (Lord Browne-Wilkinson); Richard Ekins, 'The Intention of Parliament' (2010) PL 709; Philip Sales, 'A Comparison of the Principle of Legality and s3 of the Human Rights Act' 1998 (2009) 125 LQR 598 at 600–607; Philip Sales and Richard Ekins, 'Rights-Consistent Interpretation and the Human Rights Act' 1998 (2011) 127 LQR 217 at 220–222.

[529] Philip Sales, 'Legislative intention, interpretation and the principle of legality' (2019) 40 SLR 53.

[530] *R v Secretary of State for the Home Department Ex Parte Simms* [2000] 2 AC 115 at 131.

[531] *R (Pierson) v Secretary of State for the Home Department* [1998] AC 539 (HL) Lord Steyn [591] and Lord Brown-Wilkinson [575].

[532] *R (Nicklinson) v Ministry of Justice* [2013] EWCA Civ 961 [59]. See, *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL) [170–171] and its assessment by Griffith, *B (Algeria) v Secretary of*

principles. The principle has been implemented to protect various constitutional, basic, and fundamental rights. As Lord Hoffman stated, except for by express enactment, these rights cannot be interfered with, hindered, taken away, defeated, undermined or encroached.[533] This was touched upon by Lord Reed in *AXA*[534] when he stated that the principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so.

The principle of legality departs from the standard statutory interpretation. It is more than a principle of statutory interpretation. It is also a constitutional principle that establishes limits of executive power, evident in the courts' reading down of legislative provisions when determining the scope of powers granted to executive bodies.[535] It is this reading down of powers and arguably Parliament's intention that cannot be associated with orthodox parliamentary sovereignty. Lord Hoffman recognises as much in Simms. He states that applying the principle of legality by UK courts while accepting parliamentary sovereignty, applies constitutional principles with little difference from those in countries limited by a constitutional document.[536] Arguably, the case law surrounding the interpretation of Henry VIII and ouster clauses witnesses 'sister principles' to the principle of legality,[537] which will be discussed further in the proceeding sections. The case analysis here of *Evans*,[538] and *UNISON*[539] will focus upon demonstrating how the principle of legality has been used by the executive as a tool of legal constitutionalism to fill the gap created by the failure of political constitutionalism due to excessive executive dominance. Both cases demonstrate the

State for the Home Department [2018] UKSC 5 [29–31] (Lord Lloyd-Jones, with whom Lady Hale, Lord Mance, Lord Hughes and Lord Hodge agreed).

[533] See the case law referred to in: SA De Smith, 'The reformation of English administrative law? "Rights", Rhetoric and Reality' (2013) 72 CLJ 369.

[534] *General Insurance Ltd v HM Advocate* [2011] UKSC 46 [152].

[535] Alison Young, 'Prorogation, Politics and the Principle of Legality' UKCLA 2019 (UKCLA, 13th September 2019) <https://ukconstitutionallaw.org/2019/09/13/alison-young-prorogation-politics-and-the-principle-of-legality/> accessed 14th September 2019.

[536] *R (Simms) v Secretary of State for the Home Department* [2000] 2 AC 115 (HL) [131], *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [32].

[537] Alison Young, 'Prorogation, Politics and the Principle of Legality' UKCLA 2019 (UKCLA, 13th September 2019) <https://ukconstitutionallaw.org/2019/09/13/alison-young-prorogation-politics-and-the-principle-of-legality/> accessed 14th September 2019.

[538] *R v Evans* [2015] UKSC 21.

[539] *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

limiting executive power via the reading down of statutory provisions in the name of protecting constitutional principles.

5.3.3 R v Evans

The facts of the case need only be briefly outlined.[540] Evans, a journalist for the Guardian newspaper, issued a request under the Freedom of Information Act 2000[541] and Environmental Information Regulations[542] to have communication between the Prince of Wales and Ministers from various government departments. The Upper Tribunal decided the letters should be disclosed. However, the communications were not released. The Attorney General (acting as a person in authority)[543] used his executive override power to issue a certificate preventing such disclosure. The use of this power witnesses the executive carrying out a role which would ordinarily be carried out by the judiciary – the power is therefore an example of the UK's non-standard separation of powers.[544] Unlike the fusion of powers between the executive and legislature explored in the natural dominance chapter, this veto power is not necessary for the constitution to function and therefore could be a factor of excessive executive dominance. It is an 'extension' of the non-standard separation of powers natural dominance factor. This therefore fulfils step one of the two-step test for determining excessive executive dominance. The executive's use of this veto power was subject to judicial review proceedings by Evans, with success in the Supreme Court.[545]

Lord Neuberger stated that even though the executive veto is reviewable judicially, the mere fact that a member of the executive can overrule a decision of the judiciary because he does not agree with that decision is remarkable.[546] This is especially true

[540] For a more detailed overview see, Mark Elliott, 'A Tangled Constitutional Web: The Black-Spider Memos and the British Constitution's Relational Architecture' (2015) PL 34; Alison Young, 'R (Evans) v Attorney General [2015] UKSC 21 – the Anisminic of the 21st Century?' <https://ukconstitutionallaw.org/2015/03/31/alison-young-r-evans-v-attorney-general-2015-uksc-21-the-anisminic-of-the-21st-century/> accessed 12th April 2021. Case Comment: R (Evans) & Anor v Attorney General [2015] UKSC 21 <http://ukscblog.com/case-comment-r-evans-and-anor-v-attorney-general-2015-uksc-21/> accessed 12th April 2021. Also see para 1-48 of the judgement.
[541] Freedom of Information Act 2000.
[542] Environmental Information Regulations 2004.
[543] According to s53 of the Freedom of Information Act 2000.
[544] See chapter 2 on natural dominance for further exploration.
[545] *R v Evans* [2015] UKSC 21, [2015] 2 WLR 813.
[546] *R v Evans* [2015] UKSC 21, [2015] 2 WLR 813 [53].

in this case when considering that the Upper Tribunal in reaching their decision, conducted a full hearing into whether, in the light of certain facts and competing arguments, the public interest favours disclosure of certain information. The Upper Tribunal concluded for reasons given in the judgment that it did. According to Lord Neuberger it cannot, therefore, be that S53 empowers the executive to overrule that judgment merely because considering the same facts and arguments they disagree.[547] It is the executive whom Lord Neuberger is targeting here, and limiting their power, preventing the executive from conducting the role of another organ – which demonstrates the satisfying of step two of the two-step test. This can be witnessed in Lord Neuberger's reference to *Re Racal*[548] and the presumption that Parliament did not intend an administrative body to be the final arbiter on questions of law.[549] Lord Neuberger's judgment also references *Anisminic.*[550].What is worth noting here, is the importance *Anisminic* put upon the need for the executive to be reviewable by the judiciary. This point lay behind the majority judgment in that case.[551] This begins to show the judicial attitude towards excessive executive dominance and in turn the judiciary's limiting of executive power.[552] In reading down S53, it was stated that if the section was to have the remarkable effect that the Attorney General argued it did, then it must be "crystal clear" from the wording of the FOIA 2000.[553] Such an effect could not be and justified by "general or ambiguous words".[554] In the view of Lord Neuberger S53 fell far short of being "crystal clear" in regard to saying that a member of the executive could override the decision of a court, merely because it disagrees with it.[555] It was established that to protect the two constitutional principles set out above, S53 had to be accorded a narrow effect.[556] The narrow interpretation owing to the principle of legality, was implemented to protect constitutional principles and limit executive power – as stated by Lord Neuberger. He argues it is merely a matter of interpretation

[547] *R v Evans* [2015] UKSC 21 [58].
[548] *Re Racal Communications Ltd* [1981] AC 374, 383.
[549] *Re Racal Communications Ltd* [1981] AC 374, 383 (Lord Diplock).
[550] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
[551] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL) (Lord Reid, Pearce and Wilberforce).
[552] *R v Evans* [2015] UKSC 21 [54].
[553] Freedom of Information Act 2000.
[554] *R v Evans* [2015] UKSC 21 [58].
[555] *R v Evans* [2015] UKSC 21 [58].
[556] *R v Evans* [2015] UKSC 21 [87].

that prevents executive dominance, comparing the difference in the conclusions reached by Lord Wilson, Hughes and Mance.[557]

The approach the court took in determining the scope and use of the S53 veto power cannot be explained by standard statutory interpretation. Which can be defined in essence as *the basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed*.[558] The narrow interpretation given by Lord Neuberger in his majority judgment cannot be reconciled with standard statutory interpretation. This was emphasised by both Lord Hughes and Lord Wilson in their dissenting judgments. Both are critical of the narrow interpretation of S53, that the majority judgment given by Lord Neuberger applied. Lord Hughes states that while it is important to uphold the rule of law, it is also an integral part of that doctrine for the courts to give effect to parliamentary intention. The rule of law is not, Lord Hughes states the same as a rule that courts must always uphold, no matter what the statute says.[559] He went on to argue that the interpretation given in the majority's judgment was highly strained, and if Parliament had wished to limit the power of the executive, they would have said that. Lord Hughes is essentially flipping the crystal-clear wording argument on its head. Lord Wilson, on the other hand, regarded Lord Neuberger's approach to S53 as rewriting the section, he argued in doing so against 'the most precious' constitutional principle of parliamentary sovereignty. [560]

It also cannot be linked with the orthodox doctrine of parliamentary sovereignty. Instead, the Supreme Court used the principle of legality, to read down the statutory powers, limiting the executive's dominance and preventing the executive having the power to override constitutional principles. The proceeding analysis will surround the Supreme Court's use of the principle of legality as a tool of legal constitutionalism, to fill the void created by excessive executive dominance within political

[557] *R v Evans* [2015] UKSC 21 [89].
[558] See *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13 (Lord Bingham) [8]. Lord Bingham spoke of different approaches to interpreting statutes. Which included the "literal (or ordinary, or natural) meaning", "true meaning", "legislative intention", and "mischief" approaches.
[559] *R v Evans* [2015] UKSC 21 [154].
[560] *R v Evans* [2015] UKSC 21 [168].

constitutionalism. It will also demonstrate how the use of this legal constitutionalism tool limits executive dominance.

Throughout the judgment, various comments evidence the use of the principle of legality in deciding the case. Lord Neuberger[561] in his judgment outlined the case was not only concerned with the ability for a member of the executive to overrule a decision of the judiciary, but also the impact it would have in doing so. He stated that the power[562] cut across two constitutional principles which are fundamental to the rule of law.[563] In exploring these two constitutional principles, the judgment is demonstrating how the case satisfies the second step of the two-step test for determining excessive executive dominance.

The first of these two principles, which is a decision of a court is binding as between the parties. This is unless overruled by a higher court or a statute. The decision cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive.[564] The comment here begins to demonstrate the court's work in attempting to prevent excessive executive dominance, which is preventing the executive possess control over or impede another branch of the constitution. The court does this by utilising tools of legal constitutionalism. This substantiates the claim above that the judiciary will read down powers to limit the executive.

The second of these principles also targets the executive. That is, the executive's decisions and actions are, subject to necessary well-established exceptions,[565] reviewable by the court at the suit of an interested citizen. Lord Neuberger states that *S53, as interpreted by the Attorney General's argument in this case, flouts the first principle and stands the second principle on its head. It involves saying that the court's final decision can be set aside by a member of the executive (normally the minister in charge of the very department against whom the decision has been given) because he does not agree with it.* [566] Therefore, it can rightly be said that the reading down of

[561] With whom Lord Kerr and Lord Reed agreed.
[562] Found in s53(2).
[563] *R v Evans* [2015] UKSC 21 [51].
[564] *R v Evans* [2015] UKSC 21 [52].
[565] Such as declarations of war, and jealously scrutinised statutory exceptions.
[566] *R v Evans* [2015] UKSC 21 [52].

this, is to prevent the executive having the power to override constitutional principles, combating factors that as explored earlier in this thesis amount to excessive executive dominance. Again, this argument by Lord Neuberger reiterates the push to legal constitutionalism,[567] particularly on the grounds of the judiciary's independence.

It is the Attorney General's use and judiciary's treatment of the veto power that is most important in demonstrating the presence of excessive executive dominance and the judiciary's treatment of said dominance. The power used by the Attorney General was an executive override power, i.e., the executive was empowered to quash the judiciary's decision to release the communication. The power found in S53 of the Freedom of Information Act 2000 can be closely linked with the definition of excessive executive dominance, namely on the basis that the executive branch of the constitution possesses control over or impedes the other branches of the constitution. The power granted here, or at least used, is not necessary or justifiable for the constitution to operate. In contrast, excessive dominance hinders the efficient functioning of the constitution by undermining constitutional principles or preventing other branches performing their constitutional role, as is necessary to satisfy step two of the two-step test for determining excessive executive dominance. The use of power here undermined the rule of law, *as it is fundamental to the rule of law that decisions and actions of the executive…are reviewable by the court at the suit of an interested citizen.*[568] It also prevented the judiciary from performing its constitutional role i.e., upholding the rule of law.

The majority judgment quite clearly evidences the shift this thesis talks of - from political to legal constitutionalism. Their Lordships also evidence the inability to explain these cases via standard statutory interpretation – permitting alternative explanations, like the one provided in this chapter accounting for excessive executive dominance. The way in which the court deals with excessive executive dominance in this case illustrates not only the push from political to legal constitutionalism, but also supports what this thesis has already demonstrated, namely the negative impact excessive

[567] Lord Neuberger makes explicit references to the principle of legality in his judgment, particularly when referencing cases such as *Jackson*, *AXA* and *Ex p Pierson*[567]. He referenced comments by Lady Hale from *Jackson* to illustrate the importance of the right of citizens to seek judicial review of actions and decisions of the executive and the significance of that on statutory interpretation.
[568] See *R v Evans* [2015] UKSC 21 [52].

executive dominance has upon political constitutionalism, resulting in the failure of the concept.[569] The failure or at least weakness of political constitutionalism is evident here in the court's recognition of the need for legal constitutionalism tools to be implemented, in order to limit the executive's power and fill the void in political constitutionalism's safeguards.

5.3.4 R (UNISON) v Lord Chancellor

Similar to *Evans* above, I will keep the description of the facts of the case brief.[570] The case concerns the legality of the Employment Tribunals and Employment Appeal Tribunal Fees Order 2013.[571] The Order was made by the then Lord Chancellor, Chris Grayling, via S42 of the Tribunals, Courts and Enforcement Act 2007.[572] The Order introduced fees for lodging claims in the employment tribunals, a notion that UNISON sought judicial review proceedings against, challenging the Order's lawfulness. The Supreme Court decision was an appeal by UNISON on various grounds including the Order interfering unjustifiably with the right of access to justice under the common law, EU law, and for frustrating the operation of parliamentary legislation granting employment rights and finally for discriminating unlawfully against women and other protected groups.[573] The appeal was unanimously allowed by the Supreme Court.

The presence of excessive executive dominance within this case is evident in its satisfying of the two-step test. The Lord Chancellor's use of S42 of the Tribunals, Courts and Enforcement Act 2007 to create the Employment Tribunals and Employment Appeal Tribunal Fees Order 2013, satisfies the first step of the test. S42

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[569] See chapter 3 and 5 for further exploration of this point.
[570] For a more detailed account see, Mark Elliott, 'The rule of law and access to justice: some home truths' 2018 CLJ 77 5; Case Comment: R (UNISON) v Lord Chancellor [2017] UKSC 51 (UKSC blog, 2017) http://ukscblog.com/case-comment-r-on-the-application-of-unison-appellant-v-lord-chancellor-respondent-2017-uksc-51/; Mark Elliott, 'UNISON in the Supreme Court: Tribunal Fees, Constitutional Rights and the Rule of Law' (Public Law for everyone, 2017) [https://publiclawforeveryone.com/2017/07/26/unison-in-the-supreme-court-employment-fees-constitutional-rights-and-the-rule-of-law/]; R (UNISON) v Lord Chancellor [2017] UKSC 51 [1-15], [60-64].
[571] SI 2013/1893.
[572] "the Lord Chancellor may by order prescribe fees payable in respect of".
[573]Case Comment: R (UNISON) v Lord Chancellor [2017] UKSC 51 (UKSC Blog, 2017) <http://ukscblog.com/case-comment-r-on-the-application-of-unison-appellant-v-lord-chancellor-respondent-2017-uksc-51/> accessed 21st October 2020.

contains a wide delegated power,[574] which is a factor of excessive executive dominance and therefore the first step of the two step-test for determining excessive executive dominance is fulfilled.

The statutory interpretation adopted by the court in this case to determine the legality of the Employment Tribunals and Employment Appeal Tribunal Fees Order 2013 cannot be reconciled with standard statutory interpretation accounting for the presumed parliamentary intention. The departure from the standard statutory interpretation and indeed the orthodox doctrine of parliamentary sovereignty can be seen in the UKSC's use of the principle of legality. The use of this principle is also important in illustrating the second step of the two-step test to determine excessive executive dominance. The references and presence of the principle of legality are more explicit in *UNISON* than in *Evans*. Lord Reed in his judgment[575] states that in determining the extent of the power conferred upon the Lord Chancellor by S42, the court must consider the text of the provision, the constitutional principles that underlie the text and the principles of statutory interpretation which give effect to those principles.[576] In considering both the constitutional principles and statutory interpretation which gives effect to said principles the Supreme Court are evidently using the principle of legality in determining the scope of the Lord Chancellor's powers under S42. This is arguably a balancing by the courts against considering the power and the constitutional principle impacted. Lord Reed stated there are two principles which are of particular importance in this case. One is the constitutional right of access to justice,[577] the second is that specific statutory rights are not to be cut down by subordinate legislation passed under the *vires* of a different Act.[578]

The principle of legality can be seen in play when Lord Reed deals with the first (right of access to the courts)[579] of the two constitutional principles that he regards as of

[574] s42 (1) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") provides that the Lord Chancellor may by order prescribe fees payable in respect of anything dealt with by the First-tier and Upper Tribunals or by an "added tribunal". s42(3) defines an "added tribunal" as a tribunal specified in an order made by the Lord Chancellor. The ET and the EAT were so specified by the Added Tribunals (Employment Tribunals and Employment Appeal Tribunal) Order 2013 (SI 2013/1892).
[575] With whom Lord Neuberger, Lord Mance, Lord Kerr, Lord Wilson and Lord Hughes agreed.
[576] *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [65].
[577] Referencing *R v Secretary of State for the Home Department, Ex p Saleem* [2001] 1 WLR 443 [65].
[578] Referencing *R v Secretary of State for Social Security, Ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, 290 per Simon Brown LJ at para 65.
[579] *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [76].

particular importance in the case. This can be seen in Lord Reed's referencing of Viscount Simonds in *Pyx Granite Co Ltd*[580] who stated that *it is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words.* Lord Reed also referenced Lord Bridge in *Raymond v Honey* who stated *a citizen's right to unimpeded access to the courts can only be taken away by express enactment.*[581]

In applying the principle of legality, Lord Reed read down the scope of the powers granted in S42, limiting the executive's power, and preventing excessive executive dominance. The prevention of excessive executive dominance in this case is found in the court recognising that access to the courts is a constitutional principle. Lord Reed stated that the Lord Chancellor cannot impose whatever fees he chooses to achieve the purposes conferred by S42(1).[582] Lord Reed went on to state that there are no words that authorise the prevention of access to the relevant tribunals. Referencing *Ex p Witham*[583] and in particular Laws J's comment that despite the wide discretion seemingly conferred on the Lord Chancellor, there exists implied limitations upon his powers. The relevant provision in that case did not permit the Lord Chancellor to exercise the power in such a way as to deprive the citizen of what has been called his constitutional right of access to the courts.[584] The fees in *Ex p Witham* were declared unlawful, Lord Reed argued it therefore follows that since S42 contains no words authorising prevention of access to the relevant tribunals, the fees order is *ultra vires*.[585]

The creation of the order meant that claimants were required to pay fees for bringing an employment tribunal case enforcing their employment rights.[586] The fees that the order created were therefore regarded as preventing access to the courts, subsequently undermining constitutional principles, namely the rule of law.[587] The

[580] *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260 [286].
[581] *Raymond v Honey* [1981] UKHL 8 (Lord Bridge).
[582] s42 (1) of the Tribunals, Courts and Enforcement Act 2007
[583] *R v Lord Chancellor, Ex p Witham* [1998] QB 575.
[584] *R v Lord Chancellor, Ex p Witham* [1998] QB 575 [580].
[585] *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [87].
[586] Most employment rights can only be enforced in an employment tribunal. See *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [2].
[587] These fees unlike the fees for small claims are related to the value of the claim, the ET and EAT fees bear no direct relation to the amount sought and can therefore be expected to act as a deterrent to claims

second step is satisfied due to this undermining of the constitutional principle of the rule of law. Within this case there was no compensating and therefore the court correctly identified that the constitutional principle was undermined. Like *Evans* the significance of this case is found in the judiciary's treatment of executive empowerment. Alike *Evans* the judiciary narrowly construed the power, reading down S42, using the principle of legality as a tool of legal constitutionalism. This was in order to limit the executive's power, filling the void created by excessive executive dominance within political constitutionalism and to protect constitutional principles and therefore illustrating the satisfying of the second step of the two-step test for determining the presence of excessive executive dominance.

Emphasis is also placed upon the importance of the rule of law – Lord Reed regards access to the courts as 'inherent' in the concept.[588] Lord Reed explains that the rule of law and the role of the courts stemming from the concept includes a role for the judiciary in ensuring that the executive branch of government carries out its functions in accordance with the law.[589] So, while there is clear emphasis placed on access to the courts, there is also a link made with the idea that the court has a role in ensuring that the executive is acting within the law, a role that arguably would be lost, should the executive be able to prevent access to the courts. Therefore, there is an emphasis placed upon the courts' role in limiting executive power and the consequential ability for dominance/overreach. As outlined earlier, there is a clear link between the rule of law and legal constitutionalism, as there is with parliamentary sovereignty and political constitutionalism. This emphasis of Lord Reed's judgment, therefore, begins to demonstrate the push towards legal constitutionalism, that this chapter aims to evidence. A push that stems from the judiciary's filling of the void created by the failure of political constitutionalism, a push that is necessary and justified in order to provide a sufficient check and balance on executive power.

5.4 Implications for Parliamentary Sovereignty

for modest amounts or non-monetary remedies (which together form the majority of ET claims). See *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [20-37].

[588] *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [66].

[589] *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [68].

The principle of legality and its use by the judiciary, particularly the Supreme Court, has clear implications upon the orthodox doctrine of parliamentary sovereignty.[590] The two cases above demonstrate the court arguably departing from the statutory provision provided by Parliament to protect constitutional principles. These cases are not unique. There exists an array of cases[591] where the judiciary seems more interested in protecting constitutional principles than giving effect to the presumed parliamentary intention.[592] The reading down of general terms in statutory provisions, as is possible under the principle of legality, is arguably a technique of judicial law-making.[593] The modern application of the principle of legality goes beyond the intention of Parliament and subsequently cannot be reconciled with the orthodox doctrine. This is because judges are departing from the (presumed) intention of Parliament.[594] The principle of legality as applied by the judiciary demonstrates the presence of common law constitutionalism within the British constitution, yet it is disguised as statutory interpretation.[595]

However, it has been shown that these cases can be explained due to the existence of excessive executive dominance, the subsequent failure of political constitutionalism stemming from the concept and the courts' use of legal constitutionalism to fill the void created by excessive executive dominance. The principle of legality has a clear link with the push towards legal constitutionalism, particularly in its link with common law constitutionalism. The principle's use allows the judiciary to without openly refusing or dismissing orthodox parliamentary sovereignty, read down legislation so as to give it a different meaning to that which was intended by Parliament – having a similar effect to refusing to apply it at all.[596] This effect was particularly evident in *Evans* where the dissenting judgment of Lord Wilson identified the power in question was effectively rewritten. The implication of this is that the principle's use is evidently pushing away

[590] For further discussion and analysis of the case law see Martin Brenncke, *Judicial Law-Making in English and German Courts* (Intersentia 2018) 358-380.
[591] As is evidenced in this thesis's case analysis.
[592] This approach by the court illustrates the satisfying of the second step of the two-step test. This argument and the case law is explored in Mark Elliott, 'Judicial power and the United Kingdom's changing constitution' 2017 University of Queensland Law Journal 49.
[593] Martin Brenncke, *Judicial Law-Making in English and German Courts* (Intersentia 2018) 251.
[594] Martin Brenncke, *Judicial Law-Making in English and German Courts* (Intersentia 2018) 252-253.
[595] Martin Brenncke, *Judicial Law-Making in English and German Courts* (Intersentia 2018) 256.
[596] Elliott and Thomas, *Public Law* (3rd edn, OUP 2017) 247.

from political constitutionalism, and in turn casts doubt over the orthodox doctrine – this is in a manner that is much less likely to be regarded as 'overstepping the mark'.[597]

5.5 Henry VIII Clauses

Not only are the clauses a factor of excessive executive dominance, but they also illustrate the failure of political constitutionalism, often wide in their scope and subject to little parliamentary scrutiny. Henry VIII clauses illustrate the void created by executive dominance and the advantage of that void for the empowerment of the executive. Within this section I demonstrate that not only are the clauses controversial, so too is the judicial treatment of Henry VIII clauses. I apply the two-step test to argue that the courts approach to excessive executive dominance can be witnessed in their treatment of Henry VIII Clauses. Throughout the various cases explored in this section, I will demonstrate that the judiciary are using legal constitutionalism tools to read down Henry VIII clauses. The approach taken by the courts cannot be explained via standard statutory interpretation or the orthodox doctrine of parliamentary sovereignty. I argue that the judiciary's approach can be explained by excessive executive dominance, namely, that there is a failure of political constitutionalism, accountable to excessive executive dominance and that the void created is filled by the courts via legal constitutionalism.

The judiciary has been very explicit in giving Henry VIII clauses narrow and strict construction, stating that any doubts about the scope of these clauses should be resolved by a restrictive approach.[598] The tool of legal constitutionalism used by the judiciary in giving a narrow construction to Henry VIII clauses is a 'sister principle' to the principle of legality.[599] It is to be demonstrated below how this 'sister principle' is used due to excessive executive dominance and the subsequent failure of political constitutionalism. Since the executive is empowered by Henry VIII clauses, the courts'

[597] Elliott and Thomas, *Public Law* (3rd edn, OUP 2017) 247.
[598] *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349 [35].
[599] Alison Young, 'Prorogation, Politics and the Principle of Legality' (UKCLA, 2019) <https://ukconstitutionallaw.org/2019/09/13/alison-young-prorogation-politics-and-the-principle-of-legality/> accessed 16th January 2020.

reading down of such clauses certainly exemplifies the judiciary limiting executive power.

5.5.1 R (Public Law Project) v Lord Chancellor

The presence of excessive executive dominance within this case is evident in its satisfying of the two-step test. The case concerns S9 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). S9 of LASPO is entitled "General cases", and it provides:

> *(1) Civil legal services are to be available to an individual under this Part if - (a) they are civil legal services described in Part 1 of Schedule 1, and (b) the Director has determined that the individual qualifies for the services in accordance with this Part ... (2) The Lord Chancellor may by order – (a) add services to Part 1 of Schedule 1, or (b) vary or omit services described in that Part, (whether by modifying that Part or Parts 2, 3 or 4 of the Schedule).*

The first step is satisfied due to S9(2)(b) Legal Aid, Sentencing and Punishment of Offenders Act 2012[600] being a Henry VIII clause, which as has been established, is a factor of excessive executive dominance. The second step of the test is satisfied due to this Henry VIII clause undermining of constitutional principles and the executive's performance of another organ's constitutional role, thus, preventing that organ performing its role. The constitutional principle at issue according to Lord Neuberger's judgment is parliamentary sovereignty,[601] however as the below analysis demonstrates the narrow construction of the Henry VIII clause cannot be reconciled with orthodox parliamentary sovereignty. Irrespective of the constitutional principle at play here, the Henry VIII clause does empower the executive to perform another organ's constitutional role and therefore prevent said organ from performing their role.

The push towards legal constitutionalism within this case can be witnessed in the courts' reading down of the power alongside their addressing of this delegation and its 'exceptional course'.[602] In doing so the judiciary is providing checks and balances to

[600] s9 (2) The Lord Chancellor may by order (b) vary or omit services described in that Part.
[601] *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39 [20-28].
[602] *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39 [27].

combat the excessive dominance that stems from the delegation, illustrating the courts filling the void in political constitutionalism that is created by excessive executive dominance. Lord Neuberger went on to apply such a position to this case,[603] reading down the power offered in S9(2)(b). He notes that the words in S9(2)(b) could just about extend to the draft order. However, that is not the words' 'natural meaning', and the natural meaning of the words is essential, particularly so when regarding a Henry VIII clause. However, the words used are particularly wide giving the Lord Chancellor the ability to 'vary' and 'omit'. Lord Neuberger himself recognises their width when stating that a different conclusion was possible.[604]There is an emphasis placed upon the fact it is a Henry VIII clause in question. For that reason, the court and Lord Neuberger were unwilling to stretch the meaning of the words – demonstrating the courts limiting the executive's power.

This case saw an emphasis by the Supreme Court placed upon narrow construction of the Henry VIII clause.[605] Lord Neuberger[606] stated (quoting Craies)[607] that amendments permitted under a Henry VIII clause[608] are subject to the rule that the more general the words by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's contemplation.[609] This narrow construction that Lord Neuberger applied prevented the Lord Chancellor from introducing a residence test for civil legal aid. Unlike *Evans* and *Unison*, the UKSC was using a narrow construction according to the judgment of Lord Neuberger, to protect the doctrine of parliamentary sovereignty. Lord Neuberger explicitly stated the importance of upholding parliamentary sovereignty when considering such clauses.[610] He stated that when a court is considering the validity of a statutory instrument made under a Henry VIII power, the role of the court to uphold Parliamentary supremacy is particularly striking, as the statutory instrument will be purporting to vary primary legislation passed into law by Parliament.[611]

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[603] *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39 [30].
[604] *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39 [34].
[605] *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39 [26].
[606] With whom Lady Hale, Lord Mance, Lord Reed, Lord Carnwath, Lord Hughes and Lord Touslson agreed.
[607] William Feilden Craies, *Craies on legislation: a practitioners' guide to the nature, process, effect and interpretation of legislation* (Sweet & Maxwell 2017).
[608] Which are often cast in wide terms – see chapter 3.
[609] Para 26 of the judgment quoting Craies para 1.3.11.
[610] *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39 [25].
[611] *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39 [25].

However, the case like the others within this chapter are contentious when considering the judicial treatment of them and the inability of explaining the cases by standard statutory interpretation and the orthodox doctrine of parliamentary sovereignty. Despite the claims made by Lord Neuberger in his judgment, the narrow construction of the Henry VIII clause here cannot be reconciled with, nor therefore explained by, the orthodox doctrine or parliamentary intent[612] following standard statutory interpretation. It has to be questioned whether a Parliament backed by a powerful executive[613] passing sweeping Henry VIII clauses – as can be seen in the Brexit legislation[614] - intends for the courts to then give such powers a narrow construction. The reconciling of parliamentary intent and the orthodox doctrine with such narrow constitutions is difficult. The case, however, can be explained by excessive executive dominance, the failure of political constitutionalism and push to legal constitutionalism approach I take in this chapter. Despite the claims of upholding parliamentary sovereignty, the case illustrates the use of a principle like that of the principle of legality. This demonstrates the judicial use of a tool of legal constitutionalism pushing from political to legal constitutionalism, to read down the intentions of Parliament, to fill the void within political constitutionalism.

In this case, the Supreme Court in its narrow construction of the Henry VIII clause cited various cases with approval. It is in the citing of these cases, that the court's application of a principle of legality *like* concept can be witnessed. Lord Neuberger referenced *Ex Parte Britnell and Ex Parte Spath Holme Ltd*[615] and their support for Lord Donaldson's observations in *McKiernon*.[616] He did this to support his reading down of the Henry VIII clause found in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Lord Donaldson stated that *'Whether subject to the negative or affirmative resolution procedure, [subordinate legislation] is subject to much briefer, if any, examination by Parliament and cannot be amended."*[617] This supports the standpoint of this thesis[618] in declaring the use of Henry VIII clauses and more widely

[612] As expressed by in their words, arguably.
[613] Look at the current Johnson Government (elected in 2019 with a significant majority of 80).
[614] See chapter 7 Brexit case study for exploration of the powers.
[615] *R v Secretary of State for the Environment, Transport and the Regions and Another, Ex Parte Spath Holme Limited* [2001] 1 All ER 195, *R v Secretary of State for Social Security, Ex parte Britnell* [1991] 1 WLR 198.
[616] *McKiernon v Secretary of State for Social Security* [1989] 1 WLUK 519.
[617] *McKiernon v Secretary of State for Social Security* [1989] 1 WLUK 519 (Lord Donaldson).
[618] See chapter 3 for further exploration of this point.

the lacking scrutiny of delegated legislation as factors that contribute and amount to excessive executive dominance. Not only do Henry VIII clauses and subordinate legislation contribute to excessive executive dominance but they are also subject to little effective scrutiny and therefore illustrate the failure of political constitutionalism. Due to the failure of political constitutionalism, it is not surprising that the courts are using tools of legal constitutionalism. That is by reading down such powers to limit executive power and fill the void created within political constitutionalism by excessive executive dominance. According to Lord Donaldson the role of the court is to resolve any doubt about the scope of power conferred upon the executive with a restrictive approach. That is because a delegation to the executive of power to modify primary legislation must be an exceptional course,[619] unfortunately, it is not an exceptional course, as is demonstrated within this thesis.[620] The explanation I provide via excessive executive dominance, the failure of political constitutionalism and the push to legal constitutional better explains the case law.

5.5.2 R v Secretary of State for Social Security Ex Parte B and the Joint Council for the Welfare of Immigrants

Similar to *Public Law Project* the case is subject to the two-step test to determine the presence of excessive executive dominance. The case sees a challenge to the validity of the Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1996.[621] The regulations are the result of an empowerment of the Secretary of State via Henry VIII clauses.[622] This empowerment through and presence of a Henry VIII clause fulfils the first step of the two-step test. The second step of the test is satisfied by the executive performing a legislative role and therefore preventing the legislature performing their constitutional role and the undermining of constitutional principles. In this case the court can be seen reading down the Henry VIII clause to protect certain fundamental rights. In satisfying both steps, the case is one concerning excessive executive dominance.

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[619] *McKiernon v Secretary of State for Social Security* (1989) 2 Admin LR 133 140.
[620] As explored in chapter 3.
[621] (SI 1996/30).
[622] The Secretary of State for Social Security, in exercise of powers conferred upon him by ss 64(1), 68(4)(c)(i), 70(4), 71(6), 123(1), 124(1), 128(1), 129(1), 130(1) and (2), 131(1) and (3), 135, 137(1) and (2)(a) and (i) and 175(1) and (3) to (5) of the Social Security Contributions and Benefits Act 1992(1) and s5(1)(r) of the Social Security Administration Act 1992(2).

The applicant's case was that the regulations were *ultra vires* – although the enabling power is wide it cannot have been intended to interfere with statutory or common law right. The case focused on the deprivation of statutory rights conferred on asylum seekers by the Asylum and Immigration Appeals Act 1993 and fundamental human rights. Therefore, again there the principle of legality in play to read down the powers bestowed upon the Lord Chancellor and quashing the regulations to protect said rights and limit executive power.

The reading down of the powers witnessed in Lord Justice Simon Brown's judgment can be explained by the second step of the two-step test. This can be witnessed when Brown LJ states that the enabling powers in the primary legislation empowered the Secretary of State to make regulations specifying the persons who were or were not entitled to receive income support and other income-related benefits.[623] However, Parliament did not intend the enabling Act to be used to create regulations in such a way that persons would be deprived of their common law or statutory rights, or in a way to interfere with fundamental rights.[624] Simon Brown LJ accepted in part the argument of the applicant that was specific statutory rights are not to be cut down by subordinate legislation. He relied upon the *Ex Parte Leech*[625] decision where the courts struck down regulations which interfered with prisoners' basic rights– which is quite evidently an argument to limit the powers of the executive. He recognised that while the cases were not exactly the same, comparable to *Ex Parte Leech,* there cannot be a complete disregard or interference with a basic right. Therefore, he took the *Ex Parte Leech* principle a step further into an area of law which Parliament has been closely involved in the making of the regulations. He stated that since it is subordinate legislation, only that is in question, parliamentary sovereignty is not questioned. However, the courts involvement, despite Parliament being heavily involved, illustrates the courts modified view of the orthodox doctrine of parliamentary sovereignty. Lord Justice Simon Brown in stating that:

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[623] *R v Secretary of State for Social Security Ex Parte B and the Joint Council for the Welfare of Immigrants* 1997] 1 WLR 275, [1996] 4 All ER 385 (Lord Justice Brown).
[624] *R v Secretary of State for Social Security Ex Parte B and the Joint Council for the Welfare of Immigrants* 1997] 1 WLR 275, [1996] 4 All ER 385 (Lord Justice Simon Brown).
[625] *R v Secretary of State for the Home Department, Ex Parte Leech* [1994] QB 198, [1993] 4 All ER 539, [1993] 3 WLR 1125 (CA).

Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma… Primary legislation alone could in my judgment achieve that sorry state of affairs.

He essentially declared the powers in question ultra vires, reading the powers down in order to limit executive power and protect basic rights, this illustrates the second step's relevance within this case.

The case has influenced others since it. Particularly Lord Justice Brown's unqualified statement: "Specific statutory rights are not to be cut down by subordinate legislation passed under the *vires* of a different Act. So much is clear."[626] Lord Justice Waite reiterated this stance in his judgment. [627] The case in essence recognised the reading down of the regulations to protect the individual's basic rights stating that subsidiary legislation must not only be within the *vires* of the enabling statute but must also be so drawn as not to conflict with statutory rights already enacted by other primary legislation. This is explicable by reference to excessive executive dominance and the two-step test. The first step is fulfilled by the presence of the Henry VIII clause, as that is a factor of excessive executive dominance. The second step is satisfied in the court's recognition of the clause being used in a way that could inflict on individual rights, but most importantly the second step is satisfied by the executive performing a legislative role and therefore preventing the legislature performing their constitutional role. This stance has since been relied upon by Moses LJ in *To Tel Ltd,*[628] and also Lord Reed in *UNISON.*[629] This evidences the judiciary's use of tools of legal constitutionalism to fill the void created by the failure of political constitutionalism owing to the presence of excessive executive dominance.

The case law analysis here clearly demonstrates the use of a tool of legal constitutionalism, in the form of the principle of legality or a 'sister' principle like the

[626] *R v Secretary of State for Social Security Ex Parte B and the Joint Council for the Welfare of Immigrants*1997] 1 WLR 275, [1996] 4 All ER 385 (Lord Justice Simon Brown).
[627] *R v Secretary of State for Social Security Ex Parte B and the Joint Council for the Welfare of Immigrants*1997] 1 WLR 275, [1996] 4 All ER 385 (Lord Justice Waite).
[628] *R (ToTel Ltd) v First-tier Tribunal (Tax Chamber) and another* [2012] EWCA Civ 1401 [2012] WLR (D) 303 [28].
[629] *R (UNISON) v Lord Chancellor* [2017] UKSC 51 (Lord Reid).

concept. The general approach amongst the cases looks to be that where there is a doubt as to the scope of a Henry VIII clause, there is a narrow and strict construction applied. The courts' approach is restricting executive power, as that is precisely who Henry VIII clauses empower. This restriction is via the use of legal constitutionalism and is applied due to excessive executive dominance and the subsequent failure of political constitutionalism. In applying a narrow construction to Henry VIII clauses, the judiciary is limiting executive power and filling the void created in political constitutionalism. The judicial approach, therefore, does more than restrict executive power. It demonstrates the wider constitutional matters at play here – namely the push from political to legal constitutionalism, and the courts trying to bolster the opportunity for political constitutionalism, due to the failure of the former because of excessive executive dominance.

5.6 Ouster Clauses

5.6.1 Background

The purpose of an ouster clause is to restrict the jurisdiction of the courts. These clauses are found within primary legislation, and their use is nothing new.[630] They essentially put certain subject matters beyond the reach of the courts, or at least attempt to. They provide that certain decisions are not susceptible to judicial challenge. The last 70 years have arguably witnessed Parliament and the judiciary play a cat and mouse game regarding the use and success of ouster clauses.[631] As demonstrated in this section, the courts have not taken ouster clauses lying down,[632] generally taking a very restrictive approach to the interpretation of ouster clauses. This is arguably to protect the role of the judiciary within the constitutional landscape.

The judicial approach to ouster clauses further illustrates the inability of explaining the case law within this chapter by standard statutory interpretation and the orthodox

[630] See for instance *R v Cheltenham Commisoners* (1841) 1 WB 467.
[631] Ronan Cormacain, 'The UK Internal Market Bill and the mother of all Ouster Clauses' (Bingham Centre, 28th October 2020) <https://binghamcentre.biicl.org/comments/108/the-uk-internal-market-bill-and-the-mother-of-all-ouster-clauses> accessed 2nd November 2020.
[632] Mark Elliott, 'Through the Looking-Glass? Ouster Clauses, Statutory Interpretation and the British Constitution' (2018) Carswell.

doctrine of parliamentary sovereignty. The analysis of the cases in this section will support the final section of this chapter concerning the judiciary's modification of orthodox parliamentary sovereignty. The changing approach to the orthodox doctrine and the inability to explain the cases in this section with reference to it is evident when considering case law such as *Liversidge v Anderson.*[633] The judiciary in that case actually 'bent over backwards' to read a legislative provision in a way that did harm to both individual rights and the rule of law, a far cry from what we see today.[634] Lord Atkins in his dissenting judgment stated that the judiciary were more executive-minded than the executive.[635] What is evident through this chapter and within this section is that the constitutional landscape has moved on since then; a time when the courts followed the orthodox doctrine. Today, the judiciary is much more willing to read down legislation to safeguard constitutional rights, limit executive power and protect their own role as guardians of those rights.[636]

The case law concerning ouster clauses have had distinctions drawn between different types of ouster clause cases; Craig's 'bright line distinction' distinguishes ouster clause cases depending on whether they are in relation to a judicial or administrative body.[637] This distinction appears too clear cut, particularly when there exist multiple cases where the judiciary have read down ouster clauses concerning judicial bodies. The fact that the judiciary has read down ouster clauses in such cases questions whether there is more than an administrative and judicial split. This section also distinguishes the cases, however it does so in a manner different to other literature in this area.[638] The proceeding analysis will witness the two-step test for determining excessive executive dominance applied to each of the cases. In applying

[633] *Liversidge v Anderson* [1941] UKHL 1.
[634] The case concerned emergency powers in Regulation 18B of the Defence (General) Regulations 1939 permitted the Home Secretary to intern people if he had "reasonable cause" to believe that they had "hostile associations". The deference in the case was great, with the judgment essentially stating that legislation should be interpreted in a way that gives effect to what Parliament intended, even if that means adding to the words to give that effect.
[635] *Liversidge v Anderson* [1941] UKHL 1 (Lord Atkin).
[636] Mark Elliott, 'Through the Looking-Glass? Ouster Clauses, Statutory Interpretation and the British Constitution' (2018) Carswell.
[637] Judicial ouster clauses concern an attempt by parliament to oust the supervisory jurisdiction of the high court where the apparently immune body is acting in a judicial rather than executive capacity. An executive ouster clause therefore concerns an attempt by parliament to oust the supervisory jurisdiction of the high court where the apparently immune body is acting in an executive capacity.
[638] Robert Craig, 'Ouster clauses, separation of powers and the intention of Parliament: from Anisminic to Privacy International' (2018) PL 570.

the two-step test, an alternative explanation for the cases can be provided - one which differentiates the cases depending on whether they satisfy the said test. Those cases which do not are exclusively judicial decisions. Those cases do not witness the executive performing a judicial role nor is the judicial body reviewing an administrative decision, and in these cases, the courts do not apply a narrow interpretation, instead the ouster clause is upheld. The cases which do satisfy the two-step test are concerned with an executive body and decision, that includes the executive performing a judicial role or a judicial body reviewing an administrative decision or action. The ouster clauses in these cases are subject to a narrow interpretation. Ouster clauses that remove a check and balance upon an executive action or decision are an extension of the non-standard separation of powers doctrine. That is because they remove the very thing that the non-standard separation of powers doctrine places emphasis upon – checks and balances.

These purely judicial cases fall outside of the parameters of this thesis. These cases are however useful in demonstrating this thesis's alternative approach to explaining the cases using excessive executive dominance. That is because these cases do not satisfy the test and witness the court upholding the clauses in the cases. This then enables a distinction to be drawn between *Racal* and *Page* and *Cart* and *Privacy International*. All four concern judicial bodies, however the ouster clauses in the last two cases were given a narrow construction. This section explains the difference in the judiciaries approach between the four cases by applying the two-step test.

Much like the case analysis above, there can be a link drawn with the judicial treatment of ouster clauses and the principle of legality. The courts can be seen applying legal constitutionalism tools to read down and narrowly construe ouster clauses. There will be particular emphasis placed upon this in the analysis of *Anisminic* and *Privacy International.* The linking of the judicial approach in these cases with excessive executive dominance and legal constitutionalism, I provide an alternative explanation for the differing approach by the courts with regards to the reading down of ouster clauses concerning judicial and quasi-judicial bodies. This approach proposes excessive executive dominance as an alternative explanation.

5.6.2 Anisminic Ltd v Foreign Compensation Commission

The case concerned the Foreign Compensation Act 1950, in particular, section 4(4) which provided an ouster clause stating: 'The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law'. The clause sought to oust judicial intervention into the Foreign Compensation Commission's determinations – the foreign compensation commission was an administrative body not a judicial body. On the face of it, the clause is straightforward. On a natural interpretation, it precludes any judicial intervention.[639] The interpretation given by the House of Lords cannot be explained on a natural interpretation. They decided the ouster clause only applied to lawful determinations,[640] thereby preventing the Commission's decisions from being beyond the law. In their decision, the Lords stated they assumed Parliament would never have intended to oust judicial oversight of unlawful determinations.[641] The House of Lords stated that since the ouster clause did not refer to 'purported determinations', the ouster clause had no effect in the case at hand.[642]

Like the other cases in this chapter, the approach taken by the judiciary can be explained by the presence of excessive executive dominance. The judiciary can be seen using legal constitutionalism to limit executive power while filling the void within political constitutionalism. In this case, the ouster clause is ousting the courts' jurisdiction of an administrative body's decision, who formed part of the executive. The ouster clause in this case therefore empowers the executive because it was the executive making a judicial decision. This empowerment of the executive to perform a judicial role is a result of the UK's non-standard separation of powers doctrine, which was explored in chapter 2 concerning natural dominance. As chapter 2 outlines, this non-standard doctrine enables a fusion of power between the executive and legislature, which is necessary for the constitution to function. However, the executive performing a judicial role unlike the fusion of powers between the executive and

[639] Mark Elliott, 'Through the Looking-Glass? Ouster Clauses, Statutory Interpretation and the British Constitution' (2018) Carswell.
[640] See for instance comments made by Lord Reed. *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 [170-171].
[641] *Ibid*.
[642] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (Lord Pearce).

legislature is not necessary for the constitution to function and therefore an extension of the natural dominance factor. The ouster clause in this case attempts to prevent judicial review of a decision by an executive body performing a judicial role. This therefore has the effect of removing a check and balance upon the executive. This extension of the natural dominance factor concerning the non-standard separation of powers doctrine therefore fulfils step one of the two-step test.

What is particularly striking about *Anisminic* is that the ouster clause in question was uncompromising and arguably explicit in its intentions. The explicit nature of the clause perfectly illustrates the point of this chapter – the courts are not resolving the case law via standard statutory interpretation or following the orthodox doctrine of parliamentary sovereignty. It is difficult to see on the face of the clause how the court could have been intended to have oversight, with the 'determinations' 'of any application' 'shall not' 'in any court of law' are all explicit in the intention of the clause. Elliott regarded the decision 'as a radical judgment, albeit dressed in relatively conservative 1960s garb'.[643] Despite the arguably explicit nature of the clause, the House of Lords managed to read down the clause allowing judicial input. This has clear implications for the orthodox doctrine of parliamentary sovereignty and perfectly illustrates the judicial deviation from the doctrine. Rather than merely striking down an Act of Parliament, the courts have employed a more creative and candid approach through statutory interpretation, yet the outcome is arguably the same. Lord Phillips spoke of this stating that the courts will say Parliament could not have possibly meant that and give a preferred interpretation to the legislation rather than refusing to apply an Act of Parliament. [644] The former, unlike the latter, would result in a constitutional crisis. He stated this was the very approach that the House of Lords applied in *Anisminic.*[645] However, this declaration that Parliament could not have intended such an ousting of judicial oversight is fiction particularly when considering the words of the clause. The judiciary is using legal constitutionalism to read down the ouster clause. This is better explained by the argument of this chapter, which the judiciary have read the clause

[643] Mark Elliott, 'Through the Looking-Glass? Ouster Clauses, Statutory Interpretation and the British Constitution' (2018) Carswell.
[644] House of Commons Political and Constitutional Reform Committee, *Constitutional Role of the Judiciary if there were a Written Constitution* (HC 2013–14, 802) [16–17].
[645] *Ibid*.

down in order to mitigate excessive executive dominance and fill the void in political constitutionalism's safeguards.

The approach of the court in *Anisminic* can be explained by the second step of the two-step test. The court's reading down of the ouster clause in this case ensures that the judiciary are not prevented from performing their constitutional role. In doing so, the courts are preventing the undermining of constitutional principles, namely the rule of law. In deciding the case, the judges did not wear their constitutional heart on their sleeves. Their reliance on fundamental principles was implicit, in stark contrast to the much more explicit reliance on such principles by the UKSC in recent cases,[646] some of which have been analysed above.[647] This is an important point of this chapter, it demonstrates the judiciary's changing approach, which has resulted in a push from political to legal constitutionalism accounting for excessive executive dominance within the British constitution. This push has resulted in a growth of judicial oversight and subsequent conviction with regards to their role as guardians of the constitution. Therefore, they have become much more explicit in their reading down of powers,[648] their reliance upon fundamental principles, their protection of the rule of law and their limiting of executive power.

However, littered throughout the judgment are references to the principle of legality. The principle is evident in the reading down of the clause. Lord Reed, for instance, stated that if Parliament had intended to introduce a new kind of ouster clause to prevent any inquiry … 'I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law.'[649] He argued that if the Commission in passing its decisions made an error of law, it would be acting *ultra vires* as it would be "doing something which it had no right to do". Meaning its decision was a "nullity", something that the ouster clause did not protect, it protected "determinations".[650] The House of Lords emphasis upon constitutional principles and in particular the rule of law within the judgment can also

[646] Mark Elliott, 'Through the Looking-Glass? Ouster Clauses, Statutory Interpretation and the British Constitution' (2018) Carswell.
[647] See *Evans* for instance and the courts reading down of the executive's power on the basis of fundamental rights.
[648] See the earlier discussion in 5.3 and 5.4.
[649] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 [170-171].
[650] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 [147].

be seen in comments such as 'it cannot be for the Commission to determine the limits of their own powers'[651] and that the Commission has authority derived from statute, meaning it is limited and for the courts to determine the limit, made by Lord Wilberforce.[652] In following standard statutory interpretation, the House of Lords should have emphasised parliamentary intent. Instead, they were emphasising constitutional principles. Such emphasis can be explained by the courts limiting of executive power in order to prevent the undermining of the rule of law. It is the court preventing the executive from performing the role of the judiciary and preventing the rule of law being undermined. While this is an administrative case, the House of Lords approach is much better explained by this thesis's novel concept of excessive executive dominance and the application of the two-step test, in comparison to the bright line distinction of administrative and judicial ouster clauses. Such use of legal constitutionalism tools not only fills the void in political constitutionalism but also in turn limits the executive's power.

In explaining *Anisminic* via the presence of excessive executive dominance there is also an acknowledgment of the implications these cases have upon the orthodox doctrine of parliamentary sovereignty. An acknowledgment the bright line distinction does not offer. On the face of it, the clause looks to be explicit, Parliament intended to oust judicial input, and the fact that it fails to do so because the House of Lords read it down has a direct implication on the orthodox doctrine of parliamentary sovereignty. Had the orthodox doctrine been followed by the judiciary, we should have seen a judgment arguably akin to *Liverage v Anderson.*[653] The fact that the clause was not upheld illustrates the shift in judicial attitude towards the sovereignty of Parliament. Orthodox parliamentary sovereignty suggests that Parliament can limit the executive's oversight. The reality, however, is not so straightforward. This is evident in the judicial approach to and narrow construction of ouster clauses.

5.6.3 Re Racal Communications Ltd

[651] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (Lord Reid).
[652] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (Lord Wilberforce).
[653] *Liversidge v Anderson* [1941] UKHL 1.

The case concerns S441(3) of the Companies Act 1948, which stated: "decision of a judge of the High Court ... on an application under this section shall not be appealable". The High Court upheld this, refusing an application by the applicants to permit prosecutors to inspect paperwork of a particular company. The Court of Appeal, however reversed the decision of the High Court.[654] It was then for the House of Lords in its dealing with S441(3) to decide whether it did, in fact, oust the High Court's jurisdiction and determine whether the Court of Appeal's decision to overturn the High Court's decision was correct. Therefore, the House of Lords, had to decide whether the *Anisminic* decision extended beyond administrative bodies to judicial ones. The position they took was to reject the extension of the *Anisminic* decision to judicial bodies,[655] with Lord Diplock distinguishing the two cases (*Racal* and *Anisminic*) based on one being an administrative body and the other a judicial body.[656] The former being more narrowly construed – meaning more likely for the courts to read down as in *Anisminic*.[657] This approach fits with the courts' approach more generally at the time: their adherence to the orthodox doctrine of parliamentary sovereignty. For instance, the case of *Pickin*[658] decided only a couple of years prior to *Racal* demonstrates the court's adherence to the orthodox doctrine at the time. However, the 'bright-line distinction' has since begun to fade, and so too has the court's adherence to the orthodox doctrine.[659]

If the reason for the court upholding the clause was due to the ouster clauses concerning a judicial body, then two of the proceeding cases[660] in this section are anomalies to the bright line distinction and cannot be explained by said distinction. Therefore, perhaps a better explanation for the decision is that this case concerns a judicial body making decisions about a non-executive body. Therefore, while the case does fit with Craig's bright line distinction approach, it can also be explained with reference to the two-step test to determine excessive executive dominance. This case is an exclusively judicial decision, meaning the decision maker is a judicial body and

[654] *Re Racal Communications Ltd* [1980] CH 138.
[655] *Re Racal Communications Ltd* [1980] UKHL 5 [1981] AC 374 [392].
[656] *Re Racal Communications Ltd* [1980] UKHL 5 [1981] AC 374 [382–383].
[657] This fits with Craig's bright line distinction spoke of in 5.6.1.
[658] As discussed earlier. See also chapter 4 on parliamentary sovereignty more generally.
[659] As has been demonstrated thus far through analysis of the principle of legality and the reading down of Henry VIII clauses.
[660] Cart and Privacy international.

the decision it has made does not concern an executive body. In this case, the claimant was a Ltd company and not a body or organisation associated with the executive. The case therefore does not fulfil the two-step test, that is because this case unlike the others in this section do not extend the non-standard separation of powers doctrine. The case concerns a judicial body reviewing non-executive matters, there has therefore been no removal or prevention of a check and balance by the ouster clause in this case. The case therefore is not one of excessive executive dominance - the executive is not placed in a position of dominance because of the ouster clause in this case. Therefore, the court does not need to narrowly construe the ouster clause to protect constitutional principles or constitutional organ's roles.

5.6.4 R v Lord President of the Privy Council Ex Parte Page

This case concerned the decisions of a University Visitor[661] and whether their decisions are subject to judicial review. This was not a case concerning an administrative body. Unlike *Anisminic*, the University Visitor is operating a judicial role.[662] The House of Lords in *Page* stated that the *Anisminic* approach applies to both judicial and administrative bodies, therefore, clearly departing from the 'bright line' distinction in *Racal.* Lord Browne-Wilkinson stated that *in general any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law*. That is apart from an 'exceptions' category where the 'general law of the land' does not apply.[663] That is what has been seen here with University Visitors, they do not follow the general law of the land. However, for the vast majority of cases, what this case means is the *Anisminic* approach will be applied. This approach has since been applied in other cases including *Woolas* and *R v Special Immigration Appeals Commission.*[664]

Like *Racal,* this case can be explained with reference to the orthodox doctrine and standard statutory interpretation. However, this case casts doubt upon the bright line

[661] A visitor is an overseer of certain institutions – often cathedrals, chapels, schools, colleges, universities, and hospitals. A visitor will intervene in internal affairs of the institution in question.
[662] For further exploration of the role see, David Price, 'The University Visitor and University Governance' (1996) 18 Journal of Higher Education Policy and Management 45.
[663] *R v Lord President of the Privy Council Ex Parte Page* [1993] AC 682 [702].
[664] *R (Woolas) v Parliamentary Election Court* [2010] EWHC 3169 (Admin) [2012] QB 1; *R (U) v Special Immigration Appeals Commission* [2010] EWCA Civ 859 [2011] QB 120.

distinction, particularly the comments by Lord Browne-Wilkinson. The fact the House of Lords acknowledged that the *Anisiminic* principle could be applied to the interpretation of ouster clauses concerning both administrative and judicial bodies strengthen the distinction of the judicial ouster clause cases offered here via excessive executive dominance and the two-step test approach.

In applying the two-step test similar to *Racal,*[665] the decision maker is a judicial body and the decision it has made does not concern an executive body. The judicial body in this case was making decisions about a university and therefore this case does not touch upon executive power and subsequently does not need a narrow construction in order to limit executive power. Similar to *Racal,* the ouster clause in this case does not remove or prevent a check and balance upon the executive, nor does it witness the executive performing a judicial role. It is therefore not a case which fulfils the two-step test, that is because it does not witness an extension of the natural dominance factors. Due to step one of the two-step test not being fulfilled within this case, there is again no need for the courts to consider the undermining of constitutional principles to limit the ouster clause. Therefore, like *Racal* the court does not need to narrowly construe the ouster clause.

5.6.5 R (on the application of Cart) v Upper Tribunal

Cart deals with three appeals, all three concern the scope for judicial review by the High Court or Court of Session of unappealable decisions of the Upper Tribunal, a Tribunal established by the Tribunals, Courts and Enforcement Act 2007.[666] In all three appeals, the claimant seeks a judicial review of the refusal of permission to appeal by the Upper Tribunal.[667] The case therefore saw the UKSC determine the nature of the relationship between the Upper Tribunal and the High Court. The case established the circumstances in which decisions of the Upper Tribunal are open to judicial review challenges. *Cart*, like *Racal* and *Page,* concerns the judicial review of a judicial body. This decision by the UKSC has not been without criticism, particularly from the

[665] An exclusively judicial decision.
[666] Tribunals, Courts and Enforcement Act 2007.
[667] In each case the claimant failed in an appeal to the First-tier Tribunal and was subsequently refused permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal. See, UKSC Press Summary for more information.

executive.[668] The UKSC very much builds upon and goes further than that of *Page,* as this decision disregards the 'exceptions' outlined in *Page* as to when a judicial body is not subject to the *Anisminic* principle.[669]

This case, unlike *Racal* and *Page,* cannot be explained with reference to orthodox parliamentary sovereignty or standard statutory interpretation. The inability to reconcile the UKSC decision with the orthodox doctrine of parliamentary sovereignty is evident when considering Sedley LJ judgment in the Court of Appeal (CoA) decision, when he stated, it was clear that Parliament intended the contrary.[670] The intention of Parliament was to create a separate jurisdiction, that would therefore fall within the exceptions created by *Page*. The fact that this was raised as obvious in the CoA decision but then almost dismissed by the UKSC via their allowance of judicial review for important errors of law demonstrates the extent to which the orthodox doctrine is not followed in the UKSC decision. Craig[671] has argued that the imposition of a second appeal test on the Upper Tribunal via this case is arguably an example of judicial legislation that is unwarranted and compromising of the orthodox doctrine of parliamentary sovereignty.[672] The courts approach to ouster clauses can be better explained by the judicial and administrative split, that is because the judicial are applying a restrictive approach to both types of clauses. This more restrictive approach illustrates the judicial shift in constitutional role and also illustrates the shift in constitutionalism. The judiciary's restrictive approach to ouster clauses both administrative and judicial exists in order to protect their most valuable tool as

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[668] These criticisms fall outside the parameters of the thesis, however for completeness the Cart decision was considered by The Independent Review of Administrative Law (IRAL). The independent review considered options for reform to the process of Judicial Review. The panel in their review stated that *Cart* judicial reviews ought to be discontinued on the basis they are a disproportionate use of judicial resource. For more on this see, Lord Edward Faulks QC, 'The Independent Review of Administrative Law' (CP 407, March 2021), Joe Tomlinson and Alison Pickup, 'Putting the Cart before the horse? The Confused Empirical Basis for Reform of Cart Judicial Reviews' (UKCLA, 29th March 2021) https://ukconstitutionallaw.org/2021/03/29/joe-tomlinson-and-alison-pickup-putting-the-cart-before-the-horse-the-confused-empirical-basis-for-reform-of-cart-judicial-reviews/> accessed 3rd May 2021, Mikołaj Barczentewicz, 'Should Cart Judicial Reviews be Abolished? Empirically Based Response' (UKCLA, 5th May 2021) <https://ukconstitutionallaw.org/2021/05/05/mikolaj-barczentewicz-should-cart-judicial-reviews-be-abolished-empirically-based-response/> accessed 5th May 2021.

[669] That is when they do not follow the general law of the land.

[670] *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859 [2011] QB 120 at [42]. He stated that the new structure of the tribunal system and the evident desire of Parliament to make it, basically, autonomous.

[671] Robert Craig, 'Ouster clauses, separation of powers and the intention of Parliament: from Anisminic to Privacy International' (2018) PL 570.

[672] J Boughey and L Burton Crawford, 'Reconsidering R. (on the application of Cart) v Upper Tribunal and the rationale for jurisdictional error' (2012) PL 592.

guardians of the constitution – judicial review. To allow a diminishing of judicial review would, in turn, harm the push of constitutionalism from political to legal, as judicial review is imperative to legal constitutionalism. The wider impact of this would also be the hindrance of the judiciary filling the void of accountability stemming from the failure of political constitutionalism.

Since the case cannot be explained by standard statutory interpretation or orthodox parliamentary sovereignty, nor does it fit with the bright line distinction, a more convincing explanation is found in applying the two-step test for determining excessive executive dominance. Although the case concerns a judicial body, it does fulfil step one of the two step test. That is because the ouster clause in this case removes a check and balance upon a judicial body reviewing an executive decision. The non-standard separation of powers doctrine places a greater importance upon the checks and balance system (as spoken of in chapter 2). The *Cart* decision like *Anisminic* witnesses a removal of a check and balance. The difference between *Anisminic* and *Cart* is that *Anisminic* is an administrative body performing a judicial role reviewing an executive decision, whereas *Cart* is a judicial body reviewing an executive decision. However, while the ouster clause in this case concerns the unappealable decisions of the Upper Tribunal - a judicial body, the decision of the Upper Tribunal concerns an executive action. Therefore, unlike *Racal* and *Page,* the judicial body here were making decisions about an executive body. Amongst the three appeals *Cart* concerned a decision by the Child Support Agency[673] regarding the amount of maintenance the claimant was required to pay, and subsequently the Social Security and Child Support Tribunal's[674] decision to dismiss his appeal against the level of support.[675] *Cart* also concerned an appeal regarding an immigration decision.[676] The ouster clause in this case by preventing judicial review of the Upper Tribunal, who's decisions concern executive action, is removing a check and balance and therefore similar to *Anisminic* the ouster clause here extends the non-standard separation of powers doctrine.

[673] Whose functions have since been taken over by the Child Maintenance and Enforcement Commission.
[674] Now taken over by the upper tribunal.
[675] The link to the executive in this case is due to the Child Support Agency being an arm of the Department for Work and Pensions (who's is part of the executive within the UK).
[676] The link to the executive here is via the Home Office, a branch of the executive who are responsible for applications of asylum.

Now consideration turns to the second step of the two-step test to determine excessive executive dominance, this will help explain the approach of the UKSC in this case. There are similar to the other cases within this chapter (that read down statutory powers, be that ouster or Henry VIII clauses) various references to the principle of legality. The UKSC stated that precluding judicial review could only be done by clear and explicit language[677] and that there is no clear and explicit recognition that the upper tribunal is permitted to make mistakes of law.[678] Not only is this relevent for the presence of the principle of legaility in reading down the ouster clause, it also illustrates the courts preventing the undermining of a constitutional principle and or the role of another organ of the state. The constitutional principle in play within this case is the rule of law, in addition to this the UKSC, is also preventing the judiciary's constitutional role of guardians of the constitution being undermined. This role is undermined if it is permitted for the exclusion of judicial review. This protection of the court's role and subsequently the rule of law can be witnessed in Lady Hale's jugdment where she questions: *should there be any jurisdiction in which mistakes of law are, either in theory or in practice, immune from scrutiny in the higher courts?*[679] The UKSC can therefore be seen limiting the ouster clauses and applying a narrow construction, visible in statements such as *there is therefore a real risk of the Upper Tribunal becoming in reality the final arbiter of the law, which is not what Parliament has provided.*[680] Lady Hale in her judgment goes on to state that *it appears to be accepted that full judicial review of the unappealable decisions of the First-tier Tribunal, and possibly of excluded decisions of the Upper Tribunal other than the refusal of permission to appeal, remains available…. In short, while the introduction of the new system may justify a more restricted approach, the approach of the Court of Appeal in Cart is too narrow, leaving the possibility that serious errors of law affecting large numbers of people will go uncorrected.*[681] This approach is much better explained by the second step of the two-step test, when compared with the alternative bright line and parliamentary sovereignty explanations.

[677] Para 30.
[678] Para 40.
[679] Para 37.
[680] Para 43.
[681] Para 44.

This case illustrates the value of the two-step approach as an alternative explanation. This approach seems a more credible explanation when considering the court's approach to the case. The court is clearly seen within the case applying a narrow construction in order to prevent the undermining of the constitutional principle, the rule of law. The court in applying a restrictive approach to ouster clauses concerning both judicial and administrative bodies weaken the explanation provided by the bright line distinction approach following the bright line distinction the decision here is an anomaly. For this reason, the application of the two-step test better explains the UKSC decision. The case can also not be explained with reference to the orthodox doctrine of parliamentary sovereignty or standard statutory interpretation. This is why the cases in this chapter are so problematic because it is questionable at best whether they can be reconciled with parliamentary intent. There are other constitutional considerations at play in these cases rather than simply trying to follow parliamentary intent, as has been demonstrated throughout this chapter. These constitutional considerations are excessive executive dominance and its impact.

5.6.6 R (on the application of Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)

Privacy International concerns the Regulation of Investigatory Powers Act 2000, particularly, the legal status of S68(7). The UKSC was tasked with deciding whether the clause successfully ousted the jurisdiction of the High Court. The clause stated that: *except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court.*[682] The decision of the UKSC squarely rests upon whether this ouster clause has the effect of excluding judicial review. The body in question (the IPT) is a body possessing a judicial function, therefore on the distinction offered by earlier case law[683] and some academics,[684] this clause should not succeed as it is not an administrative body and subsequently not given such a narrow construction. The

[682] s67(8).
[683] *Re Racal Communications Ltd* [1980] UKHL 5 [1981] AC 374.
[684] Robert Craig, 'Ouster clauses, separation of powers and the intention of Parliament: from Anisminic to Privacy International' (2018) PL 570.

decision can be split into two parts, the first dealing with interpreting the clause and establishing the 'apparent' intention of Parliament. The second is determining whether Parliament can ever enact an ouster clause of this scale.[685] In answering these two questions, the case concerns the two fundamental principles of the British constitution – the rule of law and parliamentary sovereignty.

The case again illustrates in the judicial approach, the use of legal constitutionalism and the disregard for the orthodox doctrine and standard statutory interpretation. The inability to explain this case by standard statutory interpretation and orthodox parliamentary sovereignty is witnessed in the more restrictive approach of the UKSC in interpreting the ouster clause than that in *Anisminic*, this is despite the clause arguably being an upgraded version of that found in the *Anisminic* case.[686] The words used in the ouster clause this case concerns were explicit; particularly the inclusion of awards, orders and other decisions and attempting to oust the jurisdiction of the court in determining whether the tribunal should be subject to judicial review. It can be argued that the clause was designed to circumvent the *Anisminic* approach – that is being explicit in the intention to prevent a creative interpretation by the judiciary. The intention was clear and still the clause was read down. The UKSC still found it to be insufficiently clear to oust judicial review of the IPT decisions. The UKSC's determination that the ouster clause in S68(7) was not sufficiently clear to override the rule of law, cements the judiciary's departure from standard statutory interpretation and the orthodox doctrine of parliamentary sovereignty. The case, therefore, evidences the use of the *Anisminic* principle in a case concerning a judicial body – again casting further doubt over the bright line distinction while supporting the alternative explanation of the cases by excessive executive dominance.

The case's illustration of the departure from the orthodox doctrine of parliamentary sovereignty and the use of legal constitutionalism is particularly evident in the majority judgment. In *obiter*, the judgment arguably goes beyond the principle of legality in its

[685] Mike Gordon, 'Privacy International, Parliamentary Sovereignty and the Synthetic Constitution' (UKCLA, 26th June 2018) <https://ukconstitutionallaw.org/2019/06/26/mike-gordon-privacy-international-parliamentary-sovereignty-and-the-synthetic-constitution/> accessed 15th August 2020.
[686] Mike Gordon, 'Privacy International, Parliamentary Sovereignty and the Synthetic Constitution' (UKCLA, 26th June 2018) <https://ukconstitutionallaw.org/2019/06/26/mike-gordon-privacy-international-parliamentary-sovereignty-and-the-synthetic-constitution/> accessed 15th August 2020.

suggestion that Parliament cannot oust judicial review even with the clearest of words – Parliament lacks the power to do this.[687] Lord Carnwath stated it is not *I believe in dispute... that there are certain fundamental requirements of the rule of law which no form of ouster clause could exclude from the supervision of the courts*.[688] Lord Carnworth affirmed the continuing relevance of the strong interpretative presumption against the exclusion of judicial review, other than by "the most clear and explicit words".[689] He went further and stated that the law has developed since *Anisiminic* and that the courts' presumption against the ousting of the judicial supervisory role can be seen as an application of the principle of legality.[690] The majority judgment firmly demonstrates a departure from orthodox parliamentary sovereignty, despite the judgment referencing parliamentary sovereignty as the reason for their decision, there is a real struggle in reconciling the interpretation of the clause with the orthodox doctrine. It is this inability to reconcile that fits with the other cases in this chapter – there must therefore be another reason for the decision of the courts.

The case can however be explained by excessive executive dominance. To do so, it has to first be established whether the case fulfils step one of the two-step test. Similar to *Racal, Page* and *Cart, Privacy International* concerns an ouster clause preventing judicial review of a judicial body. However, like *Cart* and unlike *Racal* and *Page,* this case does fulfil step one of the two step test. That is because the ouster clause is preventing judicial review of a judicial body reviewing an executive body. Therefore, similar to *Cart* and again unlike *Page* and *Racal,* the judicial body here were making decisions about a body linked to the executive, the judicial body here is the Investigatory Powers Tribunal (IPT). The IPT has jurisdiction to consider complaints about the use of surveillance by any organisation with powers under the Regulation of Investigatory Powers Act, but most importantly for this case analysis it has jurisdiction over the security service, secret intelligence service and GCHQ, all executive bodies.

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[687] *R (Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22 paras [199], [210], [211].
[688] *R (Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22 [122].
[689] *R (Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22 [37]. The cases quoted were - (Cart [2011] QB 120 [31], per Laws LJ; citing Denning LJ in R v Medical Appeal Tribunal, Ex p Gilmore [1957] 1 QB 574, 583, and Lord Phillips MR in R (Sivasubramaniam) v Wandsworth County Court [2003] 1 WLR 475 [44].
[690] *R (on the application of Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22 [100].

The *Privacy International* case alike the *Cart* and *Anisminic* decisions witnesses an ouster clause that would remove a check and balance upon the executive. *Privacy International* is comparable to *Cart* as both cases unlike *Anisminic* are not concerning an executive body performing a judicial role. Nonetheless, the ouster clause in this case by preventing judicial review of the IPT, who's decisions concern executive action, is removing a check and balance and therefore similar to *Anisminic* and *Cart* the ouster clause here extends the non-standard separation of powers doctrine.

The second step of the test now must be considered. The judgment demonstrates the courts firmly illustrating their position as guardians of the constitution. The UKSC can be seen reading down the ouster clause in this case, utilising legal constitutionalism tools to protect constitutional principles, namely the rule of law and parliamentary sovereignty. However, the latter of the two is called into question in the proceeding analysis, particularly on an orthodox definition. The SC's position is particularly clear in comments such as those from Lord Carnwath:

> *I see a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. In all cases, regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law*.[691]

Despite arguably going beyond the principle of legality in *obiter*, Lord Carnwath stated that if Parliament has failed to make its intention sufficiently clear, it is not for us to stretch the words used beyond their natural meaning.[692] With that said, Lord Carnwath

[691] *R (Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22 [144].
[692] *R (Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22 [111].

did state that parliamentary intention is beside the point[693] and the fact that Parliament had been more explicit in this provision than the provision which was the focus of the *Anisminic* case casts doubt over the judiciary giving words their natural meaning. To find that this clause does not oust the judicial review arguably represents the judiciary doing exactly what Lord Carnwath said they would not – stretch the words beyond their natural meaning. The UKSC approach here is linguistically creative, demonstrating that the judiciary will, when protecting constitutional principles, read down a clause so long as it is linguistically possible for them to do so.[694] The use of the principle is also seen in the declaration that a more robust clause (as was seen in the Asylum and Immigration (Treatment of Claimants, etc.) Bill) may not survive parliamentary scrutiny, as the principle is an interpretative function – therefore, providing some justification for the UKSC's reading down of the clause.

The use of legal constitutionalism tools can be seen in reading down of the clause at the heart of this decision, the majority judgment relies upon the principle of *Cart*, stating that there is a strong interpretative presumption against the exclusion of judicial review, other than by *the most clear and explicit words.*[695] *However, they stated that a more explicit approach may have succeeded, for instance ousting purported determinations and determinations and also covering nullity by reason of lack of jurisdiction, error of law or any other matter.*[696]

The earlier distinction between administrative and judicial bodies is explicitly removed in this case, the presumption against ousting of judicial review of other adjudicative bodies was the case even if the body established by Parliament has *apparently equivalent status and powers to those of the High Court.*[697] They are evidencing the claim of this chapter that a shift in constitutionalism, whilst demonstrating these cases cannot be explained via the bright line distinction, the orthodox doctrine and or standard statutory interpretation. The judiciary is now actively seeking to ensure it maintains its role as guardian of the constitution. Therefore, any restricting of the rule

[693] *R (Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22 [111].
[694] Benjamin Joshua Ong, 'The ouster of Parliamentary sovereignty?' (2020) PL 41
[695] Laws LJ in *Cart* at the Court of Appeal.
[696] *R (Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22 [111].
[697] *R (Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22 [99].

of law within the British constitution should be a matter for the court to determine.[698] The majority judgment states that the rule of law is the foundation of the constitution and the source of the legitimacy of all legislation and that judicial review is its procedural embodiment. For this reason, Parliament is not competent to legislate contrary to the rule of law. The approach fits with the shift in constitutionalism, the push from political to legal constitutionalism. The courts are reading down the clause within this case to prevent the undermining of the constitutional principle the rule of law, can be explained with reference to the second step of the two-step test.

The *Privacy International* case is the latest in the series of ouster clause cases - it is also the boldest of the cases yet, despite the increased clarity of Parliament in its intentions in the disputed ouster clause, the UKSC still read the clause down. It therefore highlights a few important points. Firstly, it reinforces the value of the two-step test and excessive executive dominance as a means of explaining the case law concerning ouster clauses, especially when considering the current explanations available are not adequate. The case also reiterates the others in this chapter, not only on ouster clauses but those concerning Henry VIII clauses too, that the judiciary are willing to apply a narrow construction in order to prevent the undermining of the constituional principles. The judiciary's use of legal constitutionalism tools and the narrow constitution it applies in this case endorses the departure from orthodox parliamentary sovereignty and the standard statutory interpretation. It is this depature by the judiciary that the proceeding section will focus on when considering the modified version of parliamentary sovereignty.

5.7 Modified Version of Parliamentary Sovereignty

It has been well established already that the case law considered in this chapter is contentious, namely because it cannot be explained or reconciled with the orthodox doctrine of parliamentary sovereignty or standard statutory interpretation. I have provided an alternative explanation for this case law, by demonstrating the presence of excessive executive dominance and the courts limiting of this novel concept via legal constitutionalism tools, due to the failure of political constitutionalism. This

[698] *R (Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22 [132].

limiting of executive power, particularly through legal constitutionalism tools interacts with the orthodox doctrine of parliamentary sovereignty.[699] It was well established in chapter 4 that there is essentially no scope for acknowledging excessive executive dominance within the positive or negative aspect of Dicey's conception of the orthodox doctrine. The undermining of parliamentary sovereignty by excessive executive dominance is therefore based on a broad version of the doctrine, not the orthodox definition. However, this chapter has illustrated the existence of excessive executive dominance within the various cases explored. The case law analysis demonstrates that there exists a void, created by excessive executive dominance. A void that is facilitated by the failure of political constitutionalism. A void that the UK judiciary has gradually and progressively been filling. The case law examined has revealed the courts have been using various tools of legal constitutionalism to limit executive power, in a manner that cannot be reconciled with the orthodox doctrine. The judiciary is becoming less deferential in matters concerning policy, politics, and the executive, and are actively pursuing a route of upholding constitutional principles, against executive overreach. This lacking deference represents a moving away from the orthodox doctrine, confirmed by the cases above, which are not able to be reconciled with the orthodox doctrine. I therefore submit that the judiciary is applying a modified version of parliamentary sovereignty.

There has been a clear shift since comments made by Lord Bingham in *Belmarsh 9*:

The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions.[700]

The diminishing of this deference, I submit is due to the failure of political constitutionalism and the courts filling of the void via legal constitutionalism. In filling the void not only is there a push from political to legal constitutionalism, but also a shift from the orthodox doctrine to a modified version. This modified version is evident in

[699] As explored in chapter 4.
[700] *A and others v Secretary of State for the Home Department* [2004] UKHL 56 [29].

the courts' use of legal constitutional tools, tools that favour the protecting of constitutional principles.

This modification has occurred over time, as is highlighted in the case law. In recent years the courts have become increasingly vocal about their willingness to question the orthodox doctrine of sovereignty. This is reflective of the changing constitutional landscape, the influence of executive dominance in addition to the consequential push from political to legal constitutionalism. Arguably the most famous example is found in the case of *Jackson,*[701] though *obiter* dicta, the case clearly outlines the changing judicial outlook. Lord Steyn stated that the classic account given by Dicey, of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom.[702] This explicitly makes the point of this chapter. Lord Steyn goes further and affirms another argument of this chapter, that is the courts' modified approach to the doctrine orthodox doctrine and their push to legal constitutionalism. He does this when stating that the judges created this principle (*parliamentary sovereignty)*. *If that is so, it is not unthinkable that circumstances could arise where the courts may qualify a principle established on a different hypothesis of constitutionalism.*[703] Lord Hope, in his judgment, argued that *step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.*[704] This again, is an explicit (though dicta) acknowledgement of the doctrine's qualified status. What *Jackson* and in particular Lord Steyn's judgment suggests, is that there is a clear shift in the constitutional landscape with a push towards legal constitutionalism, and in particular common law constitutionalism. This chapter argues that this push is justified due to the existence of excessive executive dominance. A stance, which in no way fits with the orthodox doctrine.

The modifying of parliamentary sovereignty was illustrated in the ouster clause cases. The legislature's inclusion and use of ouster clauses are seen as a principal trigger for speculation over the validity of the orthodox doctrine within the modern constitutional

[701] *R (Jackson) v Attorney General* [2005] UKHL 56.
[702] *R (Jackson) v Attorney General* [2005] UKHL 56 [102] Agreed with by Lord Hope [104] who regarded the doctrine as no longer if it ever was.
[703] *R (Jackson) v Attorney General* [2005] UKHL 56 [102].
[704] *R (Jackson) v Attorney General* [2005] UKHL 56 [104].

landscape. This can be seen in comments made by Lady Hale in *Jackson*[705] in which she questioned the absolute status of Parliament, suggesting there are limitations on the ability of Parliament. Lady Hale even suggested that the judiciary may reject an attempt by Parliament to subvert the rule of law, particularly removing judicial scrutiny and or oversight. This judgment was delivered shortly after the Government attempted to input an ouster clause into what became the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. However, they succumbed to intense criticism and removed the clause from the Bill. This begins to give some insight to the judiciary's position with regards to ouster clauses and their changing stance on the orthodox doctrine. They are willing to modify the doctrine in order to protect the rule of law and their position as guardians of the constitution.

The last case explored in the previous section, *Privacy International* established where the UKSC's thinking lies more than 10 years on from *Jackson* regarding the most fundamental constitutional issues.[706] The UKSC's approach in that case simply cannot be reconciled with the orthodox doctrine. This begins to show the push from orthodox parliamentary sovereignty and political constitutionalism to one of a modified version and of legal constitutionalism. Regardless of whether the body in question is administrative or judicial. *Privacy International* confirms the modifying of the orthodox doctrine, the UKSC approach to s68(7) cannot be reconciled with the orthodox doctrine of parliamentary sovereignty and is also at odds with comments made by the judiciary with regards to Parliament intent and judicial interpretation.[707] The UKSC in its creative interpretation of S68(7) which is arguably the opposite of what Parliament intended, challenging the legislature's legally unlimited law-making.[708] The case, therefore, contributes to the contemporary judicial tradition of doubting Parliament's legislative power, evident in the majority's unwillingness to accept the ordinary meaning of Parliament's legislative language.

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[705] *R (Jackson) v Attorney General* [2005] UKHL 56 (Lady Hale).
[706] Mark Elliott, Privacy International in the court of Appeal Anisminic distinguished again' (Public Law for everyone, 2017) <https://publiclawforeveryone.com/2017/11/26/privacy-international-in-the-court-of-appeal-anisminic-distinguished-again/> accessed 17th February 2020.
[707] See *R (on the application of Black) (Appellant) v Secretary of State for Justice (Respondent)* [2017] UKSC 81 [36] where Lady Hales comments on the judiciary and their adherence to parliament intent.
[708] See Mike Gordon, 'Privacy International, Parliamentary Sovereignty and the Synthetic Constitution' (UKCLA, 26th June 2019) <https://ukconstitutionallaw.org/2019/06/26/mike-gordon-privacy-international-parliamentary-sovereignty-and-the-synthetic-constitution/> accessed 12th May 2021.

All the cases in this chapter demonstrate the judiciary's departure from the orthodox doctrine, as they cannot be explained following parliamentary intent and or standard statutory interpretation. *UNISON and Evans* for instance demonstrate the extent to which the UK judiciary protects the rule of law, in each case this was arguably at the expense of the orthodox doctrine. The courts' willingness to modify the doctrine of parliamentary sovereignty is evident most recently in *Miller 2*; Cherry[709] a case that will form part of the upcoming Brexit case study in chapter 7. However, for completeness the UKSC in that case applied an extended version of parliamentary sovereignty specifically to limit executive dominance.[710] The judiciary's approach to excessive executive dominance, and their use of legal constitutionalism tools is therefore explicable via the application of a modified version of parliamentary sovereignty. The approach of the judiciary as outlined above demonstrates that parliamentary sovereignty is no longer what it once was, the cases explored in this chapter build upon various others[711] with regards to the limits of parliamentary sovereignty. The focus here has been on the impact of excessive executive dominance upon the orthodox doctrine.

5.8 Conclusion

This chapter has illustrated the consequences of excessive executive dominance. First, the chapter concentrated upon the failure of political constitutionalism, building upon previous chapters.[712] The concept's background was outlined, along with the rivalry between political and legal constitutionalism. This set out the background against which the case law analysis was founded, namely that the failure of political constitutionalism, a consequence of excessive executive dominance, has caused a void within the accountability of the executive, a void that has been filled by a push towards legal constitutionalism. This push from political to legal constitutionalism is demonstrated through the various tools the UK judiciary uses to limit excessive

[709] *R (Miller) v Prime Minister, Cherry and others v Advocate General for Scotland* [2019] UKSC 41.
[710] *R (Miller) v Prime Minister, Cherry and others v Advocate General for Scotland* [2019] UKSC 41 [42].
[711] *Jackson, AXA, HS2 and Moohan.*
[712] See chapter 2 and 3.

executive dominance whilst filling the void created by the failure of political constitutionalism.

The cases within this chapter cannot be explained or reconciled with the orthodox doctrine and or giving effect to parliamentary intent. Therefore, there must be another explanation. The case law analysis of this chapter offers an alternative and more suitable explanation to the cases. I submitted that the cases can be explained by demonstrating (i) the presence of excessive executive dominance (ii) the failure of political constitutionalism, causing a void in accountability and (iii) the courts use of legal constitutionalism tools to fill the void. The analysis demonstrated these themes and substantiated the British constitution's shifting from political to legal constitutionalism to limit excessive executive dominance. This is done by focusing upon cases surrounding statutory interpretation, judicial review, Henry VIII, and ouster clauses. The judiciary have at times been explicit in their filling of the void created by the shortcomings of political constitutionalism, a shortcoming this thesis has illustrated is caused by excessive executive dominance.

The final section of this chapter is concerned with clarifying that the judiciary's approach to excessive executive dominance can only be explained via a modified version of parliamentary sovereignty. The judiciary in their use of legal constitutionalism to limit excessive executive dominance are applying a modified version of parliamentary sovereignty, rather than following parliamentary intent and the orthodox doctrine. This is particularly evident when looking at the cases on ouster clauses, and through the judiciary's use of the principle of legality. This final section also touches upon the changing of constitutional facts within the British constitution. As a consequence of excessive executive dominance, amongst the push from legal to political constitutionalism, constitutional facts are changing, it is this which has witnessed the court approaching parliamentary sovereignty differently and applying a modified version of the doctrine. The chapter has therefore served as a vital link for various of the earlier chapters, allowing the themes within the thesis to come together, demonstrating the impact of excessive executive dominance through the consequences of the concept. The proceeding chapter will further illustrate that link; however, this will be done via the use of the coronavirus pandemic rather than case law analysis.

Chapter 6: Coronavirus Case Study

6.1 Introduction

This chapter will illustrate the presence of excessive executive dominance within the British constitution evident via a case study of the UK's legislative approach to the coronavirus pandemic. The chapter will build upon and bring together various chapters of the thesis thus far. It will demonstrate the factors of excessive executive dominance in a timely example while also illustrating other aspects of the thesis, namely the consequences of excessive executive dominance i.e., the failure of political constitutionalism and the inapt orthodox doctrine of parliamentary sovereignty. The coronavirus pandemic is an excellent example of when the executive may be expected to be empowered, particularly to make decisions rapidly, as it is an emergency. This is an example of natural dominance, required by the seriousness of the threat to public health and the need for rapid action. To deal with this threat in a timely manner there exists factors of excessive executive dominance, particularly wide delegated powers, powers that, as detailed in chapter 3, receive less parliamentary scrutiny. The chapter will apply the two-step test posited by this thesis to determine the presence of excessive executive dominance. It will be argued that there were sufficient existing legislative provisions for the government to implement and achieve their Coronavirus response without enacting the Coronavirus Act 2020 (CA2020) and accompanying regulations, and subsequently without excessive executive dominance. This could have been achieved through existing public health legislation that would have allowed sufficient scrutiny. It would have enabled the protection of political constitutionalism and executive accountability. In using existing legislative provisions, the approach would have been necessary and acceptable for the functioning of a constitution, therefore fitting with natural dominance.

It is submitted that the actual approach taken by the Government side-lines Parliament, avoids scrutiny and demonstrates the failure of political constitutionalism and results in excessive executive dominance. The fact that the Government could have managed the pandemic through existing legislation, which observed constitutional roles and protected constitutional principles, but instead decided to

disregard them by enacting legislation that does not, and which could be regarded as unnecessary, demonstrates excessive executive dominance when applying the two-step test. The executive dominance in the coronavirus pandemic goes beyond what is necessary or reasonable, for the constitution's efficient operation.

The chapter starts by briefly setting out the background of the pandemic. Next, in the second section, the alternative approach that the Government could have taken is outlined, had they utilised existing public health legislative provisions. This approach is fitting with natural dominance. The third section is concerned with the approach the UK government did take, an approach that demonstrates the hallmarks of a government operating with excessive executive dominance. The final section of this case study will focus on making a comparison between the two approaches as far as they allow for a distinction to be drawn between the executive's natural dominance at times of emergency, and the powers they have via existing legislation, compared with the approach the government took, an approach which illustrates the existence of excessive executive dominance.

6.2 Background

In late 2019 Chinese authorities reported an unknown virus, causing pneumonia-like cases in Wuhan province[713] - later identified as a new strain of coronavirus. The World Health Organisation (WHO) named this new strain: Covid-19. The coronavirus outbreak was declared a public health emergency on 30 January 2020 by the WHO, only the sixth such emergency since 2009. On the 11th March 2020, with outbreaks worldwide, the WHO declared the spread of Covid-19 a global pandemic.[714] Since the outbreak, there have been over 100 million confirmed Covid-19 cases and over two million deaths. In response to the global pandemic, the UK passed various legislative provisions to tackle the outbreak.

[713] House of Lords, 'Coronavirus: A Public Health Emergency' (Briefing paper, House of Lords 2020)
[714] World Health Organisation, 'WHO Director-General's opening remarks at the media briefing on COVID-19' (WHO, 11 March 2020) <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> accessed 15th June 2020.

The UK imposed a range of restrictions and 'social-distancing' policies intended to delay the virus's transmission. Through a combination of primary legislation[715] and various regulations, the UK Government was tasked with managing the pandemic's effects in the UK. The CA2020 contains temporary measures to amend existing legislative provisions or introduce new statutory powers to mitigate the impact of the outbreak.[716] These powers include the emergency registration of health professionals[717] and social workers,[718] amendments to mental health legislation,[719] closure of educational establishments,[720] detention of those suspected of being infected with Covid-19,[721] restrictions on public movement, gatherings[722] and travel[723], reforms to death management processes,[724] and postponement of elections.[725]

6.3 The approach that could have been taken

It is accepted and not disputed that there are and will be times of emergency that require the executive to be empowered. The Covid-19 pandemic is an example of such a time. The public health legislation 'pre-pandemic' offers a means of dealing with such situations. There exists a wide range of legislative provisions available to the government for handling various emergencies. These include counter-terrorism laws[726] and laws associated with disasters including floods[727] and or public health concerns.[728] It is to be demonstrated through this section how and what provisions could have been utilised by the UK Government, while also outlining the heightened scrutiny they provide and their mitigation of excessive executive dominance. Both the Civil Contingencies Act 2004 (CCA2004) and the Health and Social Care Act 2008

[715] Coronavirus Act 2020.
[716] Explanatory Notes to the Coronavirus Act 2020, para 1.
[717] Coronavirus Act 2020, s2.
[718] Coronavirus Act 2020, s6.
[719] Coronavirus Act 2020, s10.
[720] Coronavirus Act 2020, s37.
[721] Coronavirus Act 2020, s51.
[722] Coronavirus Act 2020, s52.
[723] Coronavirus Act 2020, s25B.
[724] Coronavirus Act 2020, Sch13.
[725] Coronavirus Act 2020, s59.
[726] Including: Prevention of Terrorism Act 2005, Anti-Terrorism Crime and Security Act 2001, Counter Terrorism Act 2008, Terrorism Prevention and Investigation Measures Act 2011, Counter Terrorism and Security Act 2015.
[727] Flood and Water Management Act 2010.
[728] The Public Health (Control of Disease) Act 1984, Health Protection Act 2008, Civil Contingencies Act 2004.

(HSCA2008) could have been utilised to deal with the Covid-19 pandemic. These legislative provisions reconcile the need for urgency and wide delegated powers with scrutiny and procedural fairness.

6.3.1 The Civil Contingencies Act 2004

The CCA2004 updated and consolidated laws enabling public authorities to prepare for and respond effectively to emergencies. It replaced the Emergency Powers Act 1920. The CCA2004 was subjected to a prolonged consultation period led by a special parliamentary joint committee. The Act empowered the executive with all the necessary powers required to deal with various public emergencies including terrorist attacks, protests, environmental events, and human and animal disease pandemics. This is while also ensuring sufficient parliamentary oversight (as will be outlined below) to avert disproportionate or arbitrary action. The following analysis is selective and will outline the legislative provisions within the CCA2004 that could have been used for the Covid-19 pandemic.

The Act starts by defining an emergency.[729] The Act regards an event or situation which threatens serious damage to human welfare in a place in the United Kingdom to be an emergency.[730] An event or situation that threatens damage to human welfare includes a loss of human life,[731] human illness or injury,[732] disruption of a supply of money, food, water, energy or fuel[733] and disruption of services relating to health.[734] The Covid-19 pandemic has not only threatened but in fact caused a huge loss of human life. There has also been disruption to the supply of food and services relating to health. The NHS becoming overwhelmed, and the consequential loss of life has been the central focus for much of the government's policy decisions concerning Covid-19. This is particularly evident in the government's slogans, including: "Stay

[729] Civil Contingencies Act 2004, s1.
[730] Civil Contingencies Act 2004, s1(a).
[731] Civil Contingencies Act 2004, s2(a).
[732] Civil Contingencies Act 2004, s2(b).
[733] Civil Contingencies Act 2004, s2(e).
[734] Civil Contingencies Act 2004, s2(h).

home, protect the NHS, save lives".[735] The Covid-19 pandemic, therefore, certainly falls within the CCA2004's definition of an emergency.

The second part of the Act is concerned with emergency powers. It provides the ability for senior Ministers to make emergency regulations so long as certain conditions are met.[736] The first condition is that an emergency has occurred, is occurring or is about to occur.[737] The second condition is that it is necessary to make provision to prevent, control or mitigate an aspect or effect of the emergency.[738] The third condition is that the need to prevent, control or mitigate the emergency's effect is urgent.[739] All three of these conditions are met by the Covid-19 pandemic. The CCA2004 thus grants minister's emergency powers to make regulations to prevent, control or mitigate the impact of the Covid-19 pandemic.

Emergency regulations under the CCA2004 allow the person making the regulations to make any provision which they are satisfied is appropriate for preventing, controlling or mitigating an aspect or effect of the emergency in respect of which the regulations are made.[740] The provision available under this legislation is of any kind that could be made by an Act of Parliament or by the exercise of the Royal Prerogative.[741] In particular, emergency regulations may make any provision which the person making the regulations[742] is satisfied is appropriate for the purpose of protecting human life,[743] health or safety, treating human illness or injury,[744] protecting or restoring the provision of services relating to health.[745] Therefore, the regulations under this legislative provision can prohibit, or enable the prohibition of, movement to or from a specified

[735] Department of Health and Social Care, Press release New TV advert urges public to stay at home to protect the NHS and save lives (10 January 2021) <https://www.gov.uk/government/news/new-tv-advert-urges-public-to-stay-at-home-to-protect-the-nhs-and-save-lives> accessed 12 January 2021.
[736] Civil Contingencies Act 2004, s20(1).
[737] Civil Contingencies Act 2004, s21(2).
[738] Civil Contingencies Act 2004, s20(3).
[739] Civil Contingencies Act 2004, s20(4).
[740] Civil Contingencies Act 2004, s22(1).
[741] Civil Contingencies Act 2004, s22(3).
[742] Civil Contingencies Act 2004, s22(3)(a) states confer a function on a Minister of the Crown, on the Scottish Ministers, on the National Assembly for Wales, on a Northern Ireland department, on a coordinator appointed under s24 or on any other specified person.
[743] Civil Contingencies Act 2004, s22(2)(a).
[744] Civil Contingencies Act 2004, s22(2)(b).
[745] Civil Contingencies Act 2004, s22(2)(g).

place[746] and prohibit, or enable the prohibition of, travel at specified times.[747] The Government's Covid-19 response saw restrictions placed upon travel, particularly in national lockdowns when the regulations only permitted citizens to leave home with a reasonable excuse.[748] The CCA2004 provides the ability to prohibit, or enable the prohibition of, assemblies of specified kinds, at specified places or at specified times[749] and prohibit, or enable the prohibition of, other specified activities.[750] The Government in its approach to the pandemic used the Public Health (Control of Diseases) Act 1984 to create regulations which prohibited gatherings, including concerts, sports and socialising, with weddings and funerals permitted with strict maximum capacities.[751] These prohibitions again were achievable under the existing provisions. The CCA2004 also allowed for the creating of an offence for failing to comply with a provision of the regulations, failing to comply with a direction or order given or made under the regulations,[752] obstructing a person in the performance of a function under or by virtue of the regulations.[753] We have seen an array of offences created[754] in dealing with the Covid-19 pandemic. Penalties and fines have been issued for failure to comply with the lockdown regulations, including organising or partaking in gatherings, travelling without a reasonable excuse, and opening premises for business. An offence was created in 2021 with regards to travelling back to the UK from high-risk areas. A failure to quarantine in a designated hotel could result in a £10,000 fine while a 10-year jail term would be the maximum penalty for anyone found to have falsified their travel history.[755] Finally, the last relevant regulation available under the existing legislative provisions, that the government could have utilised for the Covid-19 pandemic is the ability to deploy Her Majesty's armed forces. Another aspect of the government's approach to the pandemic is that the army has been used to assist with supply chains and medical operations.

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[746] Civil Contingencies Act 2004, s22(3)(d).
[747] Civil Contingencies Act 2004, s22(3)(g).
748 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.
[749] Civil Contingencies Act 2004, s22(3)(f).
[750] Civil Contingencies Act 2004, s22(3)(h).
[751] See for instance both The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, The Health Protection (Coronavirus) Regulations 2020. Both were created via the Public Health (Control of Diseases) Act 1984.
[752] Civil Contingencies Act 2004, s22(3)(i)(ii).
[753] Civil Contingencies Act 2004, s22(3)(i)(iii).
[754] Coronavirus Act 2020, sch21.
[755] Forgery and Counterfeiting Act 1981, s22.

These powers demonstrate that there already exists notably wide delegated powers and Henry VIII clauses. Which as outlined in chapter 3 are factors of excessive executive dominance. The CCA2004 therefore satisfies step one of the two-step test for determining excessive executive dominance. The powers available under the CCA2004 are evidently as wide-ranging as those of the Coronavirus Act 2020. They enable the restriction of movement, assembly, travel and enable actions necessary to the preventing, controlling, or mitigating of emergencies. The only provision visibly absent from the CCA2004 and which has been part of the government's approach to the Covid-19 pandemic is the ability to alter procedure in relation to criminal proceedings.[756] The CCA does not permit the use of the emergency regulations to alter such proceedings.

6.3.2 Scrutiny afforded under existing legislation

The CCA2004 provides sufficient legislative tools for the government to tackle the Covid-19 pandemic. The CCA2004 also compares favourably to its Covid-19 legislative rivals in its protection of political constitutionalism. The emergency powers utilised, and regulations made under this Act, according to S26 of the Act, will lapse after 30 days.[757] There is nothing to stop the regulations being remade, yet short time lapse and the requirement to remake the regulations under the CCA2004 protects political constitutionalism and grants Parliament oversight and control of the process. Naturally, if the regulations are remade then such regulations must be reviewed by Parliament.[758] This allows for both parliamentary and public accountability,[759] protecting and preventing the undermining of constitutional principles while preventing executive overreach and the unnecessary prolonged existence of powers. The CCA2004's heightened scrutiny can also be seen in the requirement of each House having to approve expressly a regulation within seven days of being laid, otherwise, it falls. The Commons and Lords can also later, by resolution, annul or amend a regulation.[760] If Parliament is prorogued or the Commons or Lords adjourned when a

[756] Civil Contingencies Act 2004, s23(4)(d).
[757] Or before if so, specified by regulation s26(1)(b).
[758] Civil Contingencies Act 2004, s26.
[759] Clive Walker and Andrew Blick, Coronavirus Legislative Responses in the UK: Regression to Panic and Disdain of Constitutionalism (Just Security 2020).
[760] Civil Contingencies Act 2004, s27.

regulation is issued and would be unable to consider it, the Monarch, or the relevant Speakers, respectively, must reconvene the sitting.[761] The scrutiny afforded under this Act is therefore adequate and diminishes the scope for the powers undermining constitutional principles and subsequently satisfising the second step of the two-step test for determining excessive executive dominance.

Had the CCA2004 been used rather than the CA2020 and the Public Health (Control of Disease) Act 1984, then the emergency regulations created under the CCA2004 would have been treated as 'subordinate legislation' under the Human Rights Act 1998, even if 'they amended primary legislation'.[762] Therefore, a court could annul a regulation if found incompatible with the European Convention on Human Rights. This creates yet another check and balance upon the executive under this approach.

In addition to the CCA2004, there are also powers under the Health and Social Care Act 2008.[763] Powers that allow for the medical examination, detention, isolation, or quarantine of a suspected infectious person to reduce a significant risk to human health. The powers are also able to require persons to provide information or answer questions related to their health under the threat of detention. It is therefore entirely reasonable to question whether the CA2020 and associated provisions are necessary. The CCA2004 and HSCA2008 would provide better protection for civil liberties, and more importantly in the context of this thesis, ensure sufficient accountability and scrutiny of the government, mitigating excessive executive dominance.

The approach that could have been taken, utilising existing legislative provisions fits with natural executive dominance. It does not satisfy the two-step test for excessive executive dominance. Step one of the test is fulfilled, since the existing public health legislation does contain wide delegated powers, which is a factor of excessive executive dominance and thus this step is satisfied. The second step however is not satisfied. The public health legislation that the government could have utilised to deal with the pandemic contained several safeguards. These safeguards compensate for the wide delegated powers and subsequently prevented the undermining of

[761] Civil Contingencies Act 2004, s28.
[762] Civil Contingencies Act 2004, s30.
[763] Health and Social Care Act, s129-130.

constitutional principles. The provisions thus do not amount to excessive executive dominance. Therefore, had the government used these existing public health provisions and the wide delegated powers these provisions contain to deal with the pandemic, this would have been accepted as both appropriate and necessary according to the central premise of this thesis.

The existing public health legislation was more than adequate for dealing with the Covid-19 pandemic. Prior to the enactment of the CA2020 and accompanying regulations, the Government relied upon the Public Health (Control of Diseases) Act 1984,[764] for all regulations covering "lockdown". However, powers within the CCA2004 and the HSCA2008 (as will be outlined shortly), empower the government sufficiently and in a way that is necessary and acceptable, fitting with natural dominance and avoiding excessive executive dominance. The existing legislation allows for the same approach in terms of strategy as the one taken by the government, however, with more Parliamentary influence and accountability.

6.4 The Coronavirus Act 2020 and the approach the government has taken

The Coronavirus Act 2020 and associated regulations[765] form part of the UK's response to the Covid-19 outbreak. The Act contains over 100 sections, many of which concern complex matters. Despite this, it was an Act of Parliament passed in something of a hurry, receiving Royal Assent on the 25th March 2020, just 6 days after it was introduced and only two weeks after the WHO declared Covid-19 a global pandemic. The Act was tasked with managing the pandemic's effects in the UK and implementing the Government's Coronavirus Action Plan seeking to "Contain, Delay,

[764] These have been introduced pursuant to, what is described as an "urgent procedure", s45R. Under this procedure, statutory instruments are made immediately and must be approved by both Houses within 28 days or they shall cease to have effect.
[765] Including but not limited to: The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, The Health Protection (Coronavirus, Restrictions) (No. 3) (England) Regulations 2020, The Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020, The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020, The Health Protection (Coronavirus, International Travel) (England) Regulations 2020, The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020.

Research, and Mitigate".[766] It contains temporary measures to amend existing legislative provisions or introduce new statutory powers to mitigate the impact of the outbreak.[767] The Act enables action in five areas. Firstly, it increases the available health and social care workers.[768] Secondly, it eases the burden of frontline staff.[769] Thirdly, it implemented measures which help to contain and slow the virus,[770] whilst fourthly, the Act manages the process for the deceased.[771] Finally, the Act will also be used to support citizens. This will be done in ways such as allowing statutory sick pay to be claimed from the first day and supporting the food industry.[772]

Parliament's approach, a Parliament dominated by the executive via the fusion of powers and strong numerical advantage (see chapter 2), has been subject to criticism,[773] particularly the decision to not use existing legislation, a decision that has resulted in an approach lacking scrutiny. The approach taken has empowered the executive to an unnecessary extent, particularly via the width of powers granted to the executive and the side-lining of Parliament.[774] It is the aim of this section to explore each factor with reference to the CA2020, illustrating the fulfilment of step one and step two of the test – ultimately demonstrating the Act results in excessive executive dominance.

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[766]Policy Paper, 'Coronavirus action plan: a guide to what you can expect across the UK' (published 3rd March 2020) <https://www.gov.uk/government/publications/coronavirus-action-plan/coronavirus-action-plan-a-guide-to-what-you-can-expect-across-the-uk> accessed 5th march 2020.
[767] Explanatory Notes to the Coronavirus Act 2020, para 1.
[768] Coronavirus Act 2020, s2.
[769] Coronavirus Act 2020, s14.
[770] Coronavirus Act 2020, s37, s51, s52.
[771] Coronavirus Act 2020, s18-21.
[772] Coronavirus Act 2020, s39, s75, s77, s81.
[773] Clive Walker and Andrew Blick, Why did the Government not use the Civil Contingencies Act? (Law Gazette, 2 April 2020) <https://www.lawgazette.co.uk/legal-updates/why-did-government-not-use-the-civil-contingencies-act/5103742.article> accessed 2nd April 2020, Adam Lent, We have special legislation to cope with crises like Covid – so why didn't the government use it? (Civil Service World, 5th June 2020) <https://www.civilserviceworld.com/news/article/we-have-special-legislation-to-cope-with-crises-like-covid-so-why-didnt-the-government-use-it> accessed 5th June 2020, Adam Wagner, Taking liberties: Covid-19 and the anatomy of a constitutional catastrophe (Prospect, 26th March 2021) <https://www.prospectmagazine.co.uk/essays/adam-wagner-covid-lockdown-law-democracy-essay> accessed 26th march 2021.
[774] Rosalind English, The latest critique of the Coronavirus Act 2020 (UK Human Rights Blog, 13 May 2020)<https://ukhumanrightsblog.com/2020/05/13/the-latest-critique-of-the-coronavirus-act-2020/> accessed 20th May 2020.
Maximillian Shreeve-McGiffen, The Coronavirus Act 2020: Unprecedented Powers, But Are They Necessary? (Oxford University Undergraduate Law Journal, 7 May 2020) <https://www.law.ox.ac.uk/ouulj/blog/2020/05/coronavirus-act-2020-unprecedented-powers-are-they-necessary> accessed 20th May 2020.

It will be shown in the following section that the implementation of the CA2020 is a manifestation of excessive executive dominance. The CA2020 satisfies the two-step test. Step one is fulfilled by the presence of one or more of the various excessive executive dominance factors. Factors that include wide delegated powers, Henry VIII clauses and a lack of parliamentary scrutiny. The CA2020 encompasses all these factors. The CA2020 is over 300 pages, 102 sections and 29 schedules long, and therefore, the following section is very selective in its analysis, focusing on illustrating the existence of excessive executive dominance within the government's approach to the pandemic. This will be achieved through the following steps: i) illustrating the Act is unnecessary, it hinders the constitution's efficient functioning, undermining constitutional principles and or preventing other branches performing their constitutional role. Existing legislative provisions could have achieved the same outcome without such hinderance; ii) exploring the Act's wide delegated powers and Henry VIII clauses; iii) outlining the lacking scrutiny afforded to the Act and the powers it grants; and iv) illustrating the failure of political constitutionalism via the executive's approach to the pandemic.

The second step of the test is concerned with the combination or extension of the factors hindering the efficient functioning of the constitution by undermining constitutional principles or preventing another branch of the state performing their constitutional role. Such a hinderance and prevention is witnessed in the UK's approach to managing the pandemic. The satisfying of this second step will be illustrated throughout the forthcoming analysis of the Act and associated regulations and the impact they have upon constitutional principles, namely parliamentary accountability, parliamentary sovereignty, and the rule of law. This is in addition to the Act preventing constitutional organs performing their constitutional role.

The undermining of these constitutional principles is unnecessary, as is the Act, particularly when considering the existing legislation and the ability for said legislation to deal with the pandemic. As outlined in chapter 3, excessive executive dominance is by its very definition executive dominance that is more or higher than is necessary

or reasonable.[775] The key difference between natural and excessive executive dominance is that natural dominance is necessary for the constitution's efficient operation. Natural dominance can be witnessed in the CCA2004 and HSCA2008, a dominance of the executive that is necessary in times of emergency. To put it differently, this is a dominance that does not hinder the functioning of the constitution. The alternative approach outlined above did not side-line Parliament but instead enabled proper parliamentary scrutiny and oversight.

The Covid-19 pandemic falls within the range of situations under which it is constitutionally acceptable for both Bills to be fast-tracked and for an increase in the executive's powers over other branches of the state. This is because such emergencies require quick legal responses. However, neither the enactment of the CA2020 or the use of the Public Health Act 1984 are necessary.[776] As was outlined earlier, the use of existing legislative provisions, i.e., the CCA2004, would have been constitutionally acceptable. These existing legislative provisions empowered and subsequently allowed the government to deal with the pandemic and deal with it in such a way that protects constitutional principles. Instead, the Government has acted in a way that does not protect constitutional principles. Take for instance the array of offences created in dealing with the Covid-19 pandemic as spoken about in the previous section. The introduction of these offences, despite their severity, were not voted upon by MPs. This lack of parliamentary oversight prevents the legislature from performing its constitutional role of enacting and or scrutinising legislation. Furthermore, the creation of such an offence without parliamentary oversight undermines parliamentary sovereignty and parliamentary accountability, not to mention the rule of law. The latter due to the fact the government are in their announcements and information, blurring the line between law and guidance and subsequently undermining the constitutional principle of the rule of law.[777] This therefore begins to demonstrate the presence of excessive executive dominance, satisfying both step one and two of the test, step one by the existence of such wide delegated powers, step two by the side-lining of Parliament and the consequential failure of political constitutionalism illustrates the hindering of the efficient functioning

[775] See chapter 3 for further exploration.
[776] Particularly regulations passed via s45R.
[777] Jonathan Sumption, '*Democracy and the Rule of Law in the age of Covid-19'* (Prospect Webinars 2021).

of the constitution by undermining constitutional principles or preventing other branches performing their constitutional role.

6.5 Wide Delegated Powers

The CA2020 contains various examples of such powers, which were considered by the Delegated Powers and Regulatory Reform Committee in its report[778] which detailed specific powers worth attention. Concerning S34 of the Act,[779] the Committee rightfully points out that "clause 32 [*which became S34 of the Act*] is not limited to circumstances occasioned by the coronavirus outbreak… Clause 32 is too widely drawn and should be related to coronavirus". In drafting the legislation in such a wide manner, the Act empowers the executive beyond what is necessary, and in such a way that will ultimately result in the undermining of constitutional principles, namely parliamentary accountability, and oversight. In the emergency legislation tackling the Covid-19 pandemic, it is not necessary for the executive to have a power extending to circumstances beyond the coronavirus outbreak. Consequently, it is disproportionate in the powers it transfers to the executive and the oversight it provides for Parliament – undermining constitutional principles and subsequently preventing constitutional organs (Parliament) performing their constitutional role. This also demonstrates the inability and consequently failure of political constitutionalism.

The wide delegated powers in the CA2020 enable the executive to make regulations.[780] The use of these wide delegated powers mean that parliamentary oversight is reduced, a factor of excessive executive dominance. The content of the regulations demonstrates the extension of this lack of oversight. For example, the

[778] Delegated Powers and Regulatory Reform Committee, *Ninth Report* (HL 2019-21, 42).
[779] 34 Temporary disapplication of disclosure offences: Scotland (1) The Scottish Ministers may issue a direction that disapplies or modifies— (a)s 35 of the 2007 Act (organisations not to use barred individuals for regulated work); (b)s 36 of the 2007 Act (personnel suppliers not to supply barred individuals for regulated work).(2) In this section and s35, "the 2007 Act" means the Protection of Vulnerable Groups (Scotland) Act 2007 (asp 14). (3) A direction under subsection (1)— (a) may be of general application or specify particular persons or descriptions of persons to whom the direction applies; (b) may be framed by reference to particular kinds of regulated work with children or protected adults (within the meaning of s 91 of the 2007 Act); (c) may be framed by reference to any other matters the Scottish Ministers consider appropriate; (d) may make different provision for different purposes; (e) may make such other provision as the Scottish Ministers consider appropriate in connection with the giving of the direction.
[780] An example being Health (Coronavirus) Regulations 2020.

empowering of the executive to detain individuals for 48hrs or longer for screening purposes.[781] The time limit of detention is vague, arguably going beyond that which is necessary. Under the Regulations, there is also the possibility that a person could be detained in circumstances where rather than health professionals determining that the test for detention was not met, a Minister disagreeing with an expert medical assessment can regard the test being met.[782]

6.6 Henry VIII Clauses

The Act also contains various Henry VIII clauses, including S22 concerning a regulation making power to modify section 227(4) of the Investigatory Powers Act 2016,[783] S34 concerned the temporary disapplication of disclosure offences in Scotland,[784] S78 concerning local authority meetings [785] and Schedule 29 concerned with the interpretation of the 'relevant period'.[786] The width of these powers is particularly evident in the wording, such as '*opinion*'[787] and '*appropriate*'[788] being used. These clauses are an extension of the executive's ability to make delegated legislation, contributing to excessive executive dominance, in their fulfilment of step one of the test. The extension is found in the nature of Henry VIII clauses. The lacking legislative oversight prevents the legislature from performing its constitutional role,

[781] Health (coronavirus) regulations 2020, s4.
[782] Jim Duffy, Corona-vires: Has the Government exceeded its powers? (UK Human Rights Blog, 13th February 2020) <https://ukhumanrightsblog.com/2020/02/13/corona-vires-has-the-government-exceeded-its-powers/ > accessed 21st February 2020.
[783] Coronavirus Act, s22.
784 The Section states: 1) The Scottish Ministers may issue a direction that disapplies or modifies—(a)s 35 of the 2007 Act (organisations not to use barred individuals for regulated work); (b)s 36 of the 2007 Act (personnel suppliers not to supply barred individuals for regulated work). See, Coronavirus Act, s34 (1).
785 The Section states that Ministers have: (4) The power to make regulations under this section includes power—(a)to disapply or modify any provision of an enactment or subordinate legislation; See, Coronavirus Act, s78(4).
786 The Schedule states: 1(1) In this Schedule "the relevant period" means the period— (a)beginning with the day after the day on which this Act is passed, and (b)ending with 30 September 2020. (2) The relevant national authority may by regulations made by statutory instrument amend sub-paragraph (1)(b) to specify a later date than the date for the time being specified there. See, Coronavirus Act, schedule 29 (1).
[787] Coronavirus Act, s22 - Appointment of temporary Judicial Commissioners (1) The power in subsection (2) is exercisable if the Investigatory Powers Commissioner notifies the Secretary of State - (b) that in the Commissioner's *opinion* the power needs to be exercised in order to deal with that shortage.
[788] Coronavirus Act, s34 Temporary disapplication of disclosure offences: Scotland – (3) A direction under subsection (c) may be framed by reference to any other matters the Scottish Ministers consider *appropriate*.

thereby risking harm to constitutional principles fulfilling step two of the test. Chapter 3 explores these clauses in further detail. The Donoughmore Committee[789] in 1932, despite sternly warning against the use of Henry VIII clauses, did identify that the clauses were permissible in the 'most exceptional cases'. One may argue that Covid-19 is an exceptional case, and therefore, the clauses under the Act are permissible. However, the Committee argued that their use should be subjected to safeguards to protect constitutional principles. According to the Donoughmore Report,[790] Henry VIII clauses should always contain a maximum time limit of one year, after which these powers should lapse, unless Parliament approves an extension. They should only be used for the sole purpose of bringing an Act into operation,[791] and ministers' actions under such clauses should be justified and approved by Parliament. [792] None of the Henry VIII clauses under the Coronavirus Act satisfy all these safeguards. Schedule 29 and S78 for instance, are for a specified time periods and therefore satisfy the "no more than a year" safeguard,[793] however, S78 is subject to the negative procedure, therefore, Ministers' actions under the clause does not require approval by Parliament (unlike if it was subject to the affirmative procedure). Schedule 29 is also subject to the negative procedure, similarly S22 is assigned the negative procedure while S34 is assigned no parliamentary procedure.

6.7 Inadequate Scrutiny of Delegated Legislation

The UK's approach to the pandemic has been one with limited scrutiny. After being fast-tracked through Parliament, the CA2020 was passed in just four sitting days – decidedly quicker than usual, and particularly so given the length and complexity of the Act. One MP[794] stated that there simply was not enough time to scrutinise the Bill. However, even at a quick glance, it was easy to see objectionable powers.[795] While this lacking parliamentary scrutiny is of an Act of Parliament, and not delegated

[789] Committee on Ministers' Powers Donoughmore Report (Cmd 4060, 1932).
[790] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932).
[791] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 14.
[792] Committee on Ministers' Powers, Donoughmore Report (Cmd 4060, 1932) 14.
[793] Coronavirus Act 2020, explanatory notes.
[794] Steve Baker MP.
[795] Maximillian Shreeve-McGiffen, 'The Coronavirus Act 2020: Unprecedented Powers, But Are They Necessary?' (Oxford University Undergraduate Law Journal, 7 May 2020) <https://www.law.ox.ac.uk/ouulj/blog/2020/05/coronavirus-act-2020-unprecedented-powers-are-they-necessary> accessed 9th May 2020.

legislation (the latter and not the former is a factor of excessive executive dominance, see chapter 3, the Act does grant various wide powers to the executive, described as the 'most sweeping powers ever taken by the UK Government outside of wartime'.[796] The point here is that these powers are not subject to sufficient scrutiny and so you have a double lack of scrutiny. This is what makes the Act so objectionable. The lack of scrutiny the Act therefore received is problematic when considering the empowerment of the executive that stems from it. The shortage of time spent debating the Act, reduces the ability for the implementation of considered and necessary safeguards, against the use of delegated powers, to protect constitutional principles.

The lack of scrutiny and subsequently limited nature of parliamentary oversight afforded to the CA2020 is evident under S98 of the Act, where there is a requirement that the Commons will debate and vote on the continuation of the Act every 6 months. The standard at which the powers under the CA2020 are considered is whether 'the temporary provisions of the Coronavirus Act 2020 should not yet expire'. This review power is confined, and the wording of the provision is in favour of renewal. Therefore, the renewal does nothing in terms of rebalancing the power of the legislature and executive, to counter the tipping of balance in favour of the latter at the expense of the former. The provision also gives the House of Lords no legislative role in the process.[797]

The CA2020 and accompanying regulations have resulted in concerns from various MPs surrounding the limited parliamentary oversight, scrutiny, and breadth of the powers. For example, more than 40 MPs signed an amendment (the Brady amendment) calling for ministerial powers conditional on MPs getting a vote on any future coronavirus-related restrictions.[798] Although Sir Lindsay Hoyle (the Speaker) did not allow a vote on the amendment, the political significance was clear. Parliamentarians recognised they are being side-lined, at the expensive of

[796] Ronan Cormacain, 'Rule of Law Monitoring of Legislation – Coronavirus Bill (Bingham Centre Rule of Law 2020).
[797] Clive Walker and Andrew Blick, Coronavirus Legislative Responses in the UK: Regression to Panic and Disdain of Constitutionalism (Just Security, 12 May 2020) <https://www.justsecurity.org/70106/coronavirus-legislative-responses-in-the-uk-regression-to-panic-and-disdain-of-constitutionalism/> accessed 15th May 2020.
[798] Whether made under the Coronavirus Act itself or other legislation.

constitutional principles, and the executive is not subject to sufficient scrutiny – a factor of excessive executive dominance.

This side-lining illustrates not only excessive executive dominance by undermining constitutional principles, namely parliamentary accountability but it also demonstrates the preventing of other branches performing their constitutional role, therefore satisfying the second step. The executive's excessive dominance and circumventing of scrutiny can be witnessed in the myriad of Statutory Instruments (SI) they have laid before Parliament. The government have so far laid over 370 Covid-19 related SIs. Since 6 March 2020 Covid-19 related SIs have been laid at an average rate of seven per week. Nearly 95%[799] of all the Covid related SIs have thus far been subject to a 'made procedure' (including 'made negative' and 'made affirmative'),[800] meaning the SIs are laid before Parliament after they have been made into law. A Statutory Instrument may come into effect as soon as it has been made. There is, however, 'the 21-day rule' convention, which requires wherever possible, an SI which is subject to the negative procedure is laid before Parliament at least 21 calendar days before it comes into effect. However, of the 250+ Covid-19 related SIs laid before the UK Parliament subject to the negative procedure (including 'made negative'), over 150 of them breach the 21-day rule.[801] It is this lack of prior and ongoing scrutiny that distinguishes the CA2020 and the accompanying regulations from other 'emergency' legislation and is the most forceful representation of excessive executive dominance.

[799] Accurate as of February 2020.
[800] Hansard Society, 'Coronavirus Statutory Instruments Dashboard' (Hansard Society, 9 April 2020) <https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard> accessed 15th June 2020.
[801] Hansard Society, Coronavirus Statutory Instruments Dashboard <https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard > accessed 15th June 2020. If an SI comes into effect before it is even laid before Parliament, a requirement is triggered under S 4 of the Statutory Instruments Act 1946 that the government formally notify the Speakers of the two Houses of this fact and explain the need for such urgency. (This applies to both 'made negative' and 'made affirmative' SIs.) Such notifications are recorded in the official record of parliamentary proceedings. So far, over 50 Coronavirus-related SIs have come into effect before they were laid before Parliament and have had notifications recorded accordingly (in the House of Commons' Votes and Proceedings.

The lack of parliamentary scrutiny is evident in the various SIs passed to date under the CA2020,[802] all of which have been subject to the 'made negative procedure'.[803] One of the very real problems here is that often this legislation is 'laid as made' with the debate/scrutiny to follow later. By the time MPs come to debate the measures, there have been further changes and amendments and fresh legislation that make the debate rather fruitless. The 'made negative' procedure requires no prior scrutiny at all and offers a minimal opportunity for parliamentary input. The Commons has not prayed against an SI since 1979[804] and the Lords since 2000.[805] A prayer submitted by the official opposition is likely to be debated, however, not guaranteed. Whereas a motion submitted by a backbench MP is unlikely without the support of a large number of other MPs.[806] Therefore, the use of this procedure is particularly problematic when considering the fusion of powers between the executive and legislature. The ability to successfully pray is dependent upon the executive allocating time to the motion and the motion receiving sufficient support - which is unlikely when there is a strong majority. The 'made negative' procedure is far less stringent than the negative, affirmative, and super-affirmative procedures. This illustrates the lack of correlation between heightened executive power stemming from the CA2020 and heightened parliamentary oversight. A lack of parliamentary scrutiny contributes to excessive executive dominance by preventing the executive from being held to account. The made negative procedure under the CA2020 bypasses the authority of Parliament and thus hinders the legislature in upholding its constitutional role. In addition to those under the made negative procedure, over 90 of the SIs laid have been subject to the

[802] The Local Government (Coronavirus) (Structural Changes) (Consequential Amendments) (England) Regulations 2020,The Local Government and Police and Crime Commissioner (Coronavirus) (Postponement of Elections and Referendums) (England and Wales) Regulations 2020, The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020,The Coronavirus (Retention of Fingerprints and DNA Profiles in the Interests of National Security) Regulations 2020, The Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations (Northern Ireland) 2020The Investigatory Powers (Temporary Judicial Commissioners and Modification of Time Limits) Regulations 2020, The Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020.

[803] This means that the SI is laid before Parliament after it has been made – signed – into law by the minister but may be annulled if a motion to do so – known as a 'prayer' – is passed by either House within 40 days of it being laid before Parliament.

[804] The paraffin (maximum retail prices) (revocation) order 1979, SI 1979/797.

[805] The Greater London authority elections rules 2004, SI 2000/208.

[806] Parliament, 'Negative Procedure' <https://guidetoprocedure.parliament.uk/collections/PtBJuBiU/negative-procedure> accessed 15th May 2020.

'made affirmative' procedure. Following this procedure, the SI is laid before Parliament after it has been made and signed into law by the minister but cannot remain law unless it is approved by the House of Commons and in most cases also the House of Lords within a statutory period – usually 28 or 40 days.[807] Despite this procedure offering slightly more scrutiny than the made negative procedure, it still falls short of the scrutiny and parliamentary control that is available under existing legislative provisions under the CCA2004. For instance, the fact the regulations lapse after 30 days, and that under the CCA2004 there is the requirement of each House having to expressly approve a regulation within seven days of being laid, otherwise, it falls. There is also the ability for the Commons and Lords, by resolution, to annul or amend a regulation.[808] A point that was explored in more detail in the previous section and is discussed in the forthcoming section.

An example of the lacking scrutiny of delegated legislation and the undermining of constitutional principles was raised by the Public Administration and Constitutional Affairs Committee, who noted that the requirement to wear masks on public transport was announced in a Downing Street press conference on 4 June, coming into force 11 days later. Yet it was not debated in the Commons until 6 July.[809] This is a clear demonstration of the lack of scrutiny, and Parliament's side-lined role, undermining their constitutional role and thus constitutional principles. Accusations from Lord Sumption support this argument of Parliament's constitutional role being undermined. He suggested that the Government was strategic in its timing at the beginning of the pandemic, so that the initial decisions were made during parliamentary recess. Lord Sumption stated the fact the Government announced the first national lockdown on the 23rd March 2020, but did not make their first regulations until 3 days later on the 26th March, 1 day after Parliament adjourned for the Easter recess on 25th. Lord Sumption argued that the Government deliberately delayed their urgent regulations so that there would be no opportunity to debate them before the recess.[810] Parliament cannot recall itself, so it was, effectively, stymied. Therefore, unable to perform their constitutional role, undermining parliamentary accountability. Although he recognised

[807] Parliament Glossary, 'Made Affirmative Procedure' <https://www.parliament.uk/site-information/glossary/made-affirmative/> accessed 15th May 2020.
[808] Civil Contingencies Act 2004, s27.
[809] HC deb 6 Jul, vol 698.
[810] Lord Sumption, 'This is how freedom dies': The folly of Britain's coercive Covid strategy The Spectator (London, 28th October 2020).

it was doubtful that Parliament would have prayed against the regulations, it is most constitutional for the executive to explain their drastic decisions to Parliament. The absence of that has significantly reduced the actual quality of law-making. A position Baroness Hale second.[811] He argued that this allowed the Coronavirus Act to be 'steamrollered through with no real scrutiny'.[812]

This side-lining of Parliament is also obvious when looking at the regulations on self-isolation[813] and the ability for £10,000 fines to be issued, which came into effect only 7 hours after they were published.[814] These regulations were not debated in Parliament before coming into force. That is despite media reports a week prior to their coming into effect, declaring the fines.[815] This, therefore, rebuts the notion expressed in S45R …that only when measures are so urgent that there is no time for debate can ministers bypass Parliament.[816] This goes against established convention that major government policy announcements should be made first in Parliament– to be examined and debated by the UK's sovereign body. Ministers have frequently gone against this convention, announcing major Covid-19 policies at Downing Street press conferences.[817] One example is the Prime Minister announcing the 'rule of six'[818] by press conference,[819] the regulations for which were not published until four days later, just 30 minutes before they came into effect.[820] The Speaker of the House of

[811] Select Committee on the Constitution, 'Corrected oral evidence: Constitutional implications of Covid 19' (Oral Evidence, Select Committee on the Constitution 2020).
[812] Lord Sumption, 'attacks government over coronavirus restrictions' Financial Times (London, 27th October 2020)
[813] The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations
[814] The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations, Introductory Text.
[815] Toby Helm, '£10,000 fines warning for failing to self-isolate as England Covid infections soar' The Guardian (London, 20 September 2020).
[816] Public Health (Control of Disease) Act 1984, s45R
[817] Meg Russell, Lisa James, 'MPs are right. Parliament has been sidelined' (The constitutional Unit, 28 September 2020) <https://constitution-unit.com/2020/09/28/mps-are-right-parliament-has-been-sidelined/> accessed 15th November 2020.
[818] The rule of six was a measure implemented to prevent the spread of covid, it means that – apart from a set of limited exemptions including work and education – any social gatherings of more than six people will be against the law. Rule applies across indoor and outdoor settings, with the police able to disperse gatherings of over six people and fine individuals involved.
[819] Prime Minister's Office, 10 Downing Street (9 September 2020) <https://www.gov.uk/government/speeches/pm-press-conference-statement-9-september-2020 > accessed 9th September 2020.
[820] Chris York, Rule of Six laws were published just 30 minutes before they came into force (Huffington Post, 14 September 2020) <https://www.huffingtonpost.co.uk/entry/rule-of-six-laws-published-30-minutes_uk_5f5f17a7c5b62874bc1f2eb3?guccounter=1>accessed 16th September 2020.

Commons has been fairly vocal on this practice, speaking at prime minister's questions, Sir Lindsay said: *"The way in which the Government has exercised its power to make secondary legislation during this crisis has been totally unsatisfactory".* And that, *"All too often important statutory instruments have been published a matter of hours before they come into force and some explanations as to why important measures have come into effect before they can be laid before this house has been unconvincing and shows a total disregard for the House."*[821]

The CCA2020's impact upon mass surveillance is another noteworthy example regarding the expansion of executive powers and the reduction of scrutiny of delegated legislation. The CA2020 relaxes rules surrounding urgent surveillance warrants, found in the Investigatory Powers Act 2016, by increasing the approval time *ex post facto* by a judicial commissioner from 3 days[822] to 12.[823] Suppose such surveillance measures are considered 'necessary' in a coronavirus response, the stricter time limits of the CCA2004 would have counterbalanced the wide executive powers with stricter oversight. These measures could open the floodgates to the erosion of privacy rights in more general legal discourse.

There are arguments that the approach taken by government is mitigated by the fact this is a legislative response to an emergency and the executive is typically best placed to respond quickly in the initial phases of an emergency. However, this has been rebutted in this chapter by demonstrating that the legislative scheme was unnecessary. There are existing legislative provisions that could have been used, which offered much better parliamentary oversight and scrutiny. The emergency legislation defence is further weakened when considering that parliamentary oversight is still lacking despite it now being more than a year since the passing of the CA2020.

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[821] Speaker Statement, Volume 681: debated on Wednesday 30 September 2020.
[822] Investigation Powers Act, s109
[823] Coronavirus Act 2020, s23 The Secretary of State may by regulations made by statutory instrument modify the Investigatory Powers Act 2016 so as to alter, for the purposes of any of the specified provisions of that Act (see subsection (3)), the length of a period referred to in that Act as "the relevant period".(3) The specified provisions are—(a) ss24(3), 109(3), 180(3) and 209(3) (period within which Judicial Commissioner must decide whether to approve decision to issue urgent warrant); (b)ss 32(2)(a), 116(2)(a), 184(2)(a) and 213(2)(a) (period at end of which urgent warrant ceases to have effect); (c) ss33(5)(a), 117(5)(a), 185(3)(a) and 214(3)(a) (period during which urgent warrant may be renewed); (d) ss38(5), 122(5), 124(3), 147(3), 166(3), 188(3) and 217(3) (period within which Judicial Commissioner or other appropriate person must decide whether to approve decision to make urgent modification of warrant).

It is therefore unjustifiable for the government to continue side-lining Parliament, particularly when the pandemic management has moved from reaction to control.[824] Democratic oversight in the form of parliamentary scrutiny and external engagement can lead to better quality law and policy,[825] yet the current Government is avoiding it as much as possible. Even the limited oversight Parliament managed to secure, in the enacting of the CA2020 seems inadequate and demonstrates the failure of political constitutionalism in the face of excessive executive dominance. Following criticism of the sunset clause's length, two years with the option of 6-month extensions with Parliament's approval, the government accepted a concession for a parliamentary review every six-months. The effectiveness of the review has been questioned[826] to reject the Act is a rather nuclear option, not likely to be invoked particularly when considering the consequence would be for *temporary provisions expire not later than the end of the period of 21 days beginning with the day on which the rejection takes place*.[827] While the government's side-lining of Parliament regarding the pandemic has been striking, it fits with the increasing trend of the current government to avoid parliamentary scrutiny.[828] In the first six months of his premiership, the Prime Minister and his Government cancelled or indefinitely postponed three Liaison Committee evidence sessions, unlawfully prorogued Parliament[829] and introduced a Withdrawal Agreement Act which, unlike its predecessor, gave Parliament little to no real oversight of the Brexit negotiations. A point that will be discussed in much more detail in chapter 7 concerning a Brexit case study.

6.8 Comparison of Approaches

[824] Joelle Grogan, Parliament still does not have the power to scrutinise the Coronavirus Act 2020 properly (LSE, 30 October 2020) <https://blogs.lse.ac.uk/covid19/2020/10/30/parliament-still-does-not-have-the-power-to-scrutinise-the-coronavirus-act-2020-properly/> accessed 2nd November 2020.
[825] Joelle Grogan, Parliament still does not have the power to scrutinise the Coronavirus Act 2020 properly (LSE, 30 October 2020) <https://blogs.lse.ac.uk/covid19/2020/10/30/parliament-still-does-not-have-the-power-to-scrutinise-the-coronavirus-act-2020-properly/> accessed 2nd November 2020.
[826] For instance, see Fiona de Londras, 'Six-Monthly Votes on the Coronavirus Act 2020: A Meaningful Mode of Review?' (UKCLA, 25 March 2021) <https://ukconstitutionallaw.org/2021/03/25/fiona-de-londras-six-monthly-votes-on-the-coronavirus-act-2020-a-meaningful-mode-of-review/> accessed 27th March 2021.
[827] Coronavirus Act 2020, s98(1).
[828] Meg Russell, Lisa James, 'MPs are right. Parliament has been sidelined' (The constitutional Unit, 28 September 2020) <https://constitution-unit.com/2020/09/28/mps-are-right-parliament-has-been-sidelined/ > accessed 2nd November 2020.
[829] See *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41.

The case study thus far has outlined two approaches to dealing with the pandemic. The first approach is in the form of the CCA2004, a statutory provision already available to tackle a pandemic such as Covid-19, an approach that is also fitting with natural dominance and therefore acceptable and necessary. Although the CCA2004 contains wide delegated powers, a factor of excessive executive dominance, therefore fulfilling step one of the two step test, the Act does not satisfy the second step of the test. The other approach outlined is the one the UK has taken in tackling the pandemic, namely through the CA2020, an Act that does satisfy the two-step test and therefore represents excessive executive dominance. It is therefore helpful to compare the two approaches and illustrate the differences, particularly highlighting how the CA2020 fulfils the second step of the test and how the CCA2004 does not. Particular attention will be paid to the safeguards the CA2020 avoids in comparison to the CCA2004.

The crucial difference in the powers granted under the CCA2004 is that unlike the CA2020, the powers are subject to much more stringent safeguards. By discarding the CCA2004 and pursuing a course of action that relies upon new legislative provisions being made, the government has evaded the various important safeguards the Act instilled. The crucial difference in the powers granted under the CCA2004 is that unlike the CA2020, the powers are required to be reviewed every 30 days by Parliament. This requirement protects political constitutionalism, a protection not afforded by the CA2020. When considering the extensive nature of the powers and the liberties they curtail, the requirement of a vote every 30 days provides an essential safeguard against the exercise of arbitrary power. It is a safeguard that prevents excessive executive dominance, as it prevents the second step of the test being satisfied. It is the heightened scrutiny afforded under the CCA2004 which prevents the undermining of constitutional principles. The CCA2004 short time limits and Parliamentary review provisions are a better way to ensure executive accountability. They provide the assurance that the powers under the Act will be regularly scrutinised and will lapse automatically when no longer necessary. These time limits are much more fitting with natural dominance, particularly as they have an emphasis on the powers only existing while necessary. Unlike the CA2020 which is unnecessary and

subsequently fitting with excessive executive dominance.[830] The safeguards under the CA2020 are undoubtedly much weaker than the alternative in the CCA2004. One example is S97 CA2020. It requires a report to be published every two months by the Secretary of State, in which they should include a statement declaring they are satisfied that the provisions are appropriate.[831] The criteria of what is "satisfactory" however is not clear.[832]

Parliamentarians from both Labour and the Conservatives criticised the length of the sunset clauses within the CA2020, which is two years[833] with the option of 6-month extensions with Parliament's approval. [834] Jeremy Corbyn stated that: *'Given how far-reaching these [powers] are proposed to be, people's elected representatives must be able to decide whether they renew the legislation at least every six months, up to its expiration after two years. We will carefully scrutinise the Bill in areas that affect our civil liberties'.*[835] With a spokesperson for the Government addressing these concerns, stating: *We have heard the concerns about the need for periodic review of the powers in the bill…. We have, therefore, this morning, tabled a government amendment to the bill to require the House of Commons to renew the legislation every 6 months'.*[836] Therefore, the concession made by government in the face of this criticism was a parliamentary review of the powers every six-months. However, the six-month review

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[830] Maximillian Shreeve-McGiffen, The Coronavirus Act 2020: Unprecedented Powers, But Are They Necessary? (Oxford University Undergraduate Law Journal, 7 May 2020) <https://www.law.ox.ac.uk/ouulj/blog/2020/05/coronavirus-act-2020-unprecedented-powers-are-they-necessary> accessed 10th June.

[831] See Corporate report, 'Two monthly report on the status on the non-devolved provisions of the Coronavirus Act 2020: July 2020' (Published 31 July 2020) <https://www.gov.uk/government/publications/coronavirus-act-report-july-2020/two-monthly-report-on-the-status-on-the-non-devolved-provisions-of-the-coronavirus-act-2020-july-2020> accessed 14th August 2020.

[832] Clive Walker and Andrew Blick, Coronavirus Legislative Responses in the UK: Regression to Panic and Disdain of Constitutionalism (Just Security, 12 May 2020)

<https://www.justsecurity.org/70106/coronavirus-legislative-responses-in-the-uk-regression-to-panic-and-disdain-of-constitutionalism/> accessed 10th June 2020.

[833] Coronavirus Act 2020, s89.

[834] Coronavirus Act 2020, s90.

[835] See, Ashley Cowburn, 'Coronavirus: Labour demands Boris Johnson give MPs votes every six months on emergency powers' (the Independent, 18 March 2020) <https://www.independent.co.uk/news/uk/politics/coronavirus-boris-johnson-uk-government-response-mps-vote-labour-a9410306.html> accessed 20th March 2020.

[836] See, Ashley Cowburn. 'Coronavirus: MPs will review new emergency measures every six months after government relents to pressure' (The Independent, 23 March 2020) <https://www.independent.co.uk/news/uk/politics/coronavirus-emergency-bill-review-boris-johnson-a9418236.html> accessed 20th March 2020.

was actually criticised by MPs, including Sir Edward Davey, for instance who proposed it should be three rather than six-month extensions.[837] While Lord Scriven questioned *if the powers are so broad, why does Parliament and this House not get a say every three months, not just to debate the issue but to get a vote on some of the issues?*[838] In addition to this, a parliamentary committee report on the government's Covid-19 response also criticised the 6-monthly review, stating the review offered little in the way of frequent and relevant debate.[839] Such debate is however better provided for by the CCA04 with monthly lapses, powers used under the alternative CCA2004 approach would have been considered 6 times in the same period. This is a more stringent sunset clause than under the CA2020 and subsequently much more accountability of the executive. However, despite the government's continuous side-lining of Parliament throughout the pandemic, the vote on the expiry of the Act passed with overwhelming favour, reflecting the failure of political constitutionalism.

The differing levels of scrutiny of delegated powers between the two approaches is also evident when considering the CA2020's Henry VIII clauses which do not satisfy the Donoughmore Committee recommendations on when such clauses are acceptable.[840] This only further demonstrates the unnecessary nature of the CA2020, a nature which satisfies the second step of the two-step test. The comparison of the two approaches exhibits the suitability of the alternative powers under the CCA2004 which are subject to much more stringent scrutiny and lapse after 30 days and subsequently do not undermine constitutional principle and or prevent another branch performing their constitutional role.

The protection of constitutional principles under the CCA2004 is very different from the CA2020 Covid-19 approach, particularly approaches reliance upon secondary legislation, often laid as made, and the executive's sheer avoidance of scrutiny at any stage. The CCA2004 would not only have ensured frequent and adequate scrutiny but also removed the significant amount of laid as made legislation. It would have therefore subsequently improved the scrutiny of the Covid-19 approach. This is

[837] See, House Commons debate of the Coronavirus Bill. HC Deb 23rd March 2020, 674.
[838] See, House of Commons debate of the Coronavirus Bill. HC Deb 24th March 2020, 802.
[839] Select Committee, *Parliamentary Scrutiny of the Government's handling of Covid-19* (HC 2019-21, 377).
[840] See above section on Henry VIII clauses, for further exploration.

because the made negative procedure under the CA2020 bypasses the authority of Parliament and thus hinders the legislature in upholding its constitutional role. In addition to those under the made negative procedure, over 90 of the SIs laid have been subject to the 'made affirmative' procedure. Following this procedure, the SI is laid before Parliament after it has been made and signed into law by the minister but cannot remain law unless it is approved by the House of Commons and in most cases also the House of Lords within a statutory period – usually 28 or 40 days. Despite this procedure offering slightly more scrutiny than the made negative procedure, it still falls short of the scrutiny and parliamentary control that is available under existing legislative provisions under the CCA2004.

Not only do these existing provisions offer the ability to achieve exactly that which has been achieved through the CA2020, but it could have achieved it in a way that allowed for greater parliamentary scrutiny and therefore better preserving the check and balances within the British constitution. Utilising these already available legislative provisions would have also better protected political constitutionalism. Without such strict guidelines and parliamentary oversight, the broad powers within the CA2020 and the accompanying regulations amount to excessive executive dominance. Consequently, the approach the government should have taken, was via the CCA2004 – as clearly outlined above. These powers are aligned with natural dominance and political constitutionalism, unlike the CA2020 and accompanying regulation which represents excessive executive dominance.

6.9 Conclusion

It has been the principal aim of this chapter to illustrate the existence of excessive executive dominance within the British constitution. The chapter demonstrates the application of the two-step test indicating that despite legislation (CCA2004) including wide delegated powers, a factor of excessive executive dominance, it does not amount to excessive executive dominance. Namely as it is both necessary and accepted in times of emergency. The CCA2004 does not satisfy the second step of the test, due to its heightened scrutiny, the CCA2004 does not undermine constitutional principles and or prevent another organ of the state performing their constitutional role. The

chapter's analysis of 'the approach that could have been taken' therefore demonstrates how excessive executive dominance factors can be present within the constitution, without resulting in excessive executive dominance. In considering the CCA2004 the chapter clearly outlines an alternative approach to that which the government took, the chapter explained why this approach is fitting with natural dominance, protecting Parliament's constitutional role, securing executive accountability, and preventing the failure of political constitutionalism. This alternative approach provided a means for the government to manage the pandemic without excessive executive dominance. In setting out this approach, the chapter detailed all the necessary sections within these key statutes that could have been used to manage the coronavirus pandemic.

The chapter then went on to consider the UK's response to the pandemic, focusing on the CA2020 and various accompanying regulations. A legislative approach that side-lines Parliament, avoids scrutiny and parliamentary oversight of executive action, despite granting exceptionally wide powers, is subject to vast time limits and which demonstrates the failure of political constitutionalism and excessive executive dominance. This approach does satisfy the two-step test. There was no need for this approach or the sweeping powers it created. To create them shows all the hallmarks of excessive executive dominance because we have sufficient powers already in existing public health legislation. The Government's approach via the CA2020 and the accompanying regulations demonstrate the presence of excessive executive dominance.

Finally, the chapter contrasts the two alternative approaches, it provides a comparison between the two approaches. This chapter illustrates how the CCA2004 could have not only managed the pandemic but managed it in a distinctly similar fashion to that taken by the current government through the CA2020. This chapter highlighted the key difference between the CCA2004 approach and the one which the UK took. There is emphasis placed upon the damage the approach taken does to constitutional principles and the inadequacy of scrutiny afforded compared with that available under the CCA2004.

The chapter is more than a comparison between the two approaches to the coronavirus pandemic. This case study pulls together various chapters of the thesis and applies them to a contemporary example to illustrate the existence of excessive executive dominance within the British constitution. It also emphasises the difference between excessive executive dominance and natural dominance. Not only does the chapter demonstrate the existence of excessive executive dominance within the British constitution but also illustrates the failure of political constitutionalism, illustrating the concerns this thesis is highlighting. Therefore, should the Coronavirus Act, come before the courts, we should expect to see more restricting of executive overreach. The courts should read down the wide delegated powers and Henry VIII clauses, as was demonstrated in chapter 5 exploring the consequences of excessive executive dominance. These concerns are similarly explored in the next chapter, concerned with the Brexit process.

Chapter 7: Brexit Case Study

7.1 Introduction

This chapter is a case study concerning Brexit. It will illustrate excessive executive dominance within the British constitution via the UK's legislative approach to the Brexit process. Similar to the coronavirus case study, the Brexit process is another instance in which the executive is expected to be empowered to act. However, the case study provides another timely example of excessive executive dominance. Brexit has been described as 'a legal undertaking of a type and scale that is unique and unprecedented.'[841] Mainly due to the scale of and limited time available for this undertaking, decisions were required to be made rapidly and with ease. It is therefore no surprise that delegated legislation is being utilised. However, as will be illustrated throughout this case study, various excessive executive dominance factors are present within the Brexit process, including wide delegated powers, Henry VIII powers and inadequate scrutiny of said legislation.

It is worth noting from the outset the parameters of this case study. The case study will not cover all aspects of the Brexit process but will focus on statutes delivering Brexit. It will illustrate excessive executive dominance within the Brexit process by applying the two-step test developed in chapter 3. The Brexit statutes are used first to illustrate the presence of various excessive executive dominance factors (fulfilling step one of the test), before, demonstrating the constitutional implications of these factors. Including the undermining of constitutional principles and hindering the functioning of the constitution (satisfying step two of the test).

The chapter begins by exploring a brief background to the Brexit process. Once this background has been set out, the focus in the second section turns to excessive executive dominance. This section will discuss three key Brexit statutes: The European Union (Withdrawal) Act 2018, the European Union (Withdrawal Agreement) Act 2020 and the European Union (Future Relationship) Act 2020. The two-step test to determine excessive executive dominance will be applied. This will determine

[841] Constitution Committee, *European Union (Withdrawal) Bill* (HL 2017-19, 69).

whether the various Brexit statutes demonstrate excessive executive dominance within the Brexit process. The test will be applied to each statute in turn. In the final section, the chapter considers the case of *Miller 2; Cherry*.[842] This will demonstrate the Supreme Court's role in upholding constitutional principles to prevent excessive executive dominance. It is therefore the aim of this final section to illustrate that the court's controversial decision in *Miller 2* can be analysed and explained considering this thesis's novel concept excessive executive dominance.

7.2 Background

Since the referendum to determine the UK's membership of the European Union on the 23rd of June 2016, Brexit has dominated the media, politics, and the national interest. The referendum result triggered several political and constitutional events that are relevant for determining the existence of excessive executive dominance within the Brexit process. The following list provides a concise overview of these key events.[843]

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[842] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41.

[843] There is a plethora of literature exist on this subject including but not limited to, Alison Young and Graham Gee, 'Regaining Sovereignty: Brexit, the UK Parliament and the Common Law' (2016) 22 European Public Law 131, Alison Young and Stephen Tierney, 'Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018' (2019) PL 37, Alison Young, 'Brexit, Miller, and the Regulation of Treaty Withdrawal: One Step Forwards, Two Steps Back?' (2017) 111 AJIL 434, Alison Young, 'R (Miller) v Secretary of State for Existing the European Union: Thriller or Vanilla?' (2017) ELJ 280, Alison Young, 'The Constitutional Implications of Brexit' (2017) EPL 757, Antonious Kouroutakis, 'The Henry VIII Powers in the Brexit Process: Justifications subject to Political and Legal Safeguards' (2021) 9 The Theory and Practice of Legislation 97, Harold Clarke, Matthew Goodwin and Paul Whiteley, *Brexit: why Britain voted to leave the European Union* (CUP 2017), Joanna Hunt, Rachel Minto and Jayne Woolford, 'Winners and losers: the EU Referendum vote and its consequences for Wales' (2016) 12 Journal of Contemporary European Research 824, Mark Elliott and Stephen Tierney, 'Political pragmatism and constitutional principle: The European Union (Withdrawal) Act 2018 (2018) Cambridge Faculty of Law Legal Studies Research Paper 58, Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): from Griffith to Brexit' (2019) 30 KLJ 125, Michael Gordon, 'Referendums in the UK Constitution: Authority, Sovereignty and Democracy after Brexit' (2020) 16 European Constitutional Law Review 1, Michael Gordon, 'The European Union (Withdrawal Agreement) Bill: Parliamentary Sovereignty, Continuity and Novelty' (UKCLA, 22nd October 2019) <https://ukconstitutionallaw.org/2019/10/22/mike-gordon-the-european-union-withdrawal-agreement-bill-parliamentary-sovereignty-continuity-and-novelty/> accessed 17th November 2020, Michael Gordon, *Constitutional Overload in a Constitutional Democracy: The UK and the Brexit Process* in Sacha Garben, Inge Govaere and Paul Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart 2019), Nick Barber, Tom Hickman and Jeff King, 'Pulling the Article 50 "Trigger": Parliament's Indispensable Role', (UKCLA,27th June 2016) <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-triggerparliaments-indispensable-role/> accessed 16th November 2020 and Pavlos Eleftheriadis, 'Constitutional illegitimacy over Brexit' (2017) 88 Political Quarterly 183.

- 7th December 2016: The Commons voted on Theresa May's plan to trigger Article 50 TEU by the end of March 2017,[844]
- 24th January 2017: The UK Supreme Court ruled in *Miller*[845] that Parliament must pass legislation to authorise the triggering of Article 50 TEU,
- 26th January 2017: The UK Government introduced the European Union (Notification of Withdrawal) bill to Parliament, a 137-word bill that empowered Theresa May to initiate Brexit by triggering Article 50 TEU,
- 29th March 2017: The UK triggered Article 50 TEU,
- 18th April 2017: Theresa May announced a snap election,
- 8th June 2017: The election produced a hung Parliament and Theresa May lost her Commons majority,
- 26th June 2018: The European Union (Withdrawal) Act 2018 is granted royal assent,
- 15th January 2019: The Brexit Withdrawal Agreement proposed by Theresa May lost the first of its three 'meaningful votes',
- 12th March 2019: The Brexit Withdrawal Agreement proposed by Theresa May lost the second of its three 'meaningful votes',
- 29th March 2019: The Brexit Withdrawal Agreement proposed by Theresa May lost the third of its three 'meaningful votes',
- 1st April 2019: A round of indictive votes failed to secure direction or agreement for the Brexit process,
- 24th May 2019: Theresa May announced her resignation,
- 9th September 2019: Parliament passes the European Union (Withdrawal) (No. 2) Act 2019, known as the 'Benn Act'. This is an Act of Parliament that provided a statutory obligation for the Government to prevent a no deal Brexit on 31 October 2019,[846]
- 9th September 2019: Parliament is prorogued by Boris Johnson,

[844] 7th December 2016.
[845] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[846] The Act requires the prime minister to ask the EU for an extension to the Article 50 negotiating period. If MPs haven't approved a deal in a meaningful vote or approved leaving the EU without a deal by 19 October, then the prime minister must send a letter to the president of the European Council seeking an extension to Article 50 until 31 January 2020. This prevents the UK leaving the EU without a deal.

- 24th September 2019: The UK Supreme Court rules in *Miller 2; Cherry*[847] that the prorogation was unlawful,
- 31st October 2019: The Early Parliamentary General Election Act 2019 was introduced, and an early general election is called,
- 13th December 2019: Boris Johnson's Government secure a landslide victory,
- 23rd January 2020: The European Union (Withdrawal Agreement) Act 2020 is granted royal assent,
- 31st January 2020: The transition period begins and finally the UK leaves the EU.

7.3 Brexit process and Excessive Executive Dominance

The focus of this section is to demonstrate the presence of excessive executive dominance within the Brexit process. In doing so, attention will be paid on the European Union (Withdrawal) Act 2018, the European Union (Withdrawal Agreement) Act 2020 and the European Union (Future Relationship) Act 2020. Each Act will be explored separately, firstly outlining the excessive executive dominance factors present within each Act, which fulfils step one of the two-step test for determining excessive executive dominance. The analysis will then turn to the constitutional implications of the Acts. This is to illustrate the satisfying of step two of the test.

Brexit is the most extensive legislative task ever undertaken by the UK legislature.[848] The UK's decision to leave the EU is an unprecedented challenge, requiring the transferring, preserving, and amending of vast amounts of EU law stemming from over four decades of membership. Like Covid the referendum outcome was unexpected, though unlike Covid-19 it does not constitute an emergency, namely as it was a process actively brought about. However, due to the very nature of Brexit, the legislative task involves the need to tackle complex and technical matters. Therefore, a real need for flexibility and pace exists. Due to the needs of this process, there has been a reliance on the use of delegated legislation which allows flexibility and quick action. Despite there being a clear need and place for delegated legislation in the

[847] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41.
[848] Changing Europe, 'Brexit and beyond how the United Kingdom might leave the European Union' (Political Studies Association of the UK 2016).

Brexit process, the way in which delegated legislation has been used in this process is problematic. Both Covid-19 and Brexit have demonstrated extraordinary law-making needs in times of urgency and under time pressure. There is a vast amount of delegated legislation stemming from Brexit primary legislation and evidence of wide delegated powers, tackling some of the most constitutionally important matters, yet subject to marginal scrutiny. The sheer volume of delegated legislation illustrates the problematic nature of this system, particularly when considering Parliament's limited scrutiny capabilities, in addition to inadequate scrutiny measures, as will be explored shortly. By the end of 2020, more than 950 Brexit-related SIs had been laid by Ministers before Parliament. More Brexit SIs will be laid in 2021 and beyond due to the powers conferred on Ministers in the various Brexit Acts. This is not only problematic from a scrutiny perspective as will be discussed shortly, but it is obvious that rapid law-making leads to mistakes, and consequently, we are seeing more of those than normal. In the last Parliamentary session in 2017 to 2019, the proportion of instruments needing withdrawal and relaying to address basic errors more than doubled from any of the previous parliamentary sessions in the last ten years.[849]

Many of the Brexit bills (some now Acts) have included broad delegated powers. Such powers have been a noteworthy feature of the Brexit process. Numerous Brexit bills have been 'skeleton bills', which are bills where broad delegated powers are sought to fill in policy details at a later date.[850] These bills have allowed ministers to create new policy regimes and public bodies for the UK after Brexit with little or no detail about what policy would be implemented, or the nature of institutions that would be created.[851] Skeleton bills are problematic because they ask Parliament to approve powers without knowing how they might be used. Due to the lack of detail, the true impact of the provisions is yet unknown. Some examples of the wide delegated powers included in Brexit bills, including the Healthcare (International Arrangements) Bill which was described as 'inappropriately wide' and having 'breath-taking scope'.[852] The Agriculture Bill (now Act) saw the DPRRC 'dismayed at the Government's approach

[849] Alexandra Sinclair, 'Delegated powers and statutory instruments' (Public Law and Brexit conference, 2021).
[850] Select Committee on the Constitution, *The Legislative Process: The Delegation of Powers* (HL 2017-19, 225).
[851] House of Lords Select Committee, *Brexit legislation: constitutional issues* (HL 2019–21, 71).
[852] Delegated Powers and Regulatory Reform Committee, *Thirty Ninth Report* (HL 2017–19, 226) 10-13.

to delegated powers' with the Bill containing so little detail.[853] Similarly, the DPRRC was not encouraging of the Haulage Permits and Trailer Registration Act, which they described as 'wholly skeletal, more of a mission statement than legislation.'[854] Finally, the Immigration and Social Security Co-ordination (EU Withdrawal) Act saw the DPRRC find that 'Parliament is being asked to scrutinise a clause so lacking in any substance whatsoever that it cannot even be described as a skeleton.'[855] The Sanctions and Anti-Money Laundering Act[856] contains a power that could be used to create an offence for which a sentence of imprisonment for up to 10 years could be imposed.[857] The House of Lords Select Committee on the Constitution Brexit legislation expressed concerns over these powers, with the House of Lords proposing amendments to constrain these broad provisions, yet they were subsequently reinstated by the House of Commons.[858] The Committee held that it is 'constitutionally unacceptable' that such powers are not afforded the same scrutiny as primary legislation. [859]

This use of wide delegated powers has been described as 'driving a coach and horses through the core principle of accountability of Government to Parliament'.[860] The unexpected events of both Brexit and Covid-19 have put the inadequacies of Parliament's capacity to hold the Government to account into sharp focus. Both demonstrate the flaws of the UK's system of delegated legislation, flaws that have remained constant for the last 100 years.[861] These flaws include the limited scrutiny of delegated legislation, which alongside delegated legislation and Henry VIII clauses, is a factor of excessive executive dominance.

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[853] Delegated Powers and Regulatory Reform Committee, *Agriculture Bill* (HL 2017–19, 194) 4.
[854] Delegated Powers and Regulatory Reform Committee, *Haulage Permits and Trailer Registration Bill* (HL 2017–19, 84) 2.
[855] Delegated Powers and Regulatory Reform Committee, *Immigration and Social Security Co-ordination (EU Withdrawal) Bill* (HL 2017–19, 275) 48.
[856] Sanctions and Anti-Money Laundering Act 2018.
[857] Sanctions and Anti-Money Laundering Act 2018, s17(5)(a).
[858]House Of Lords Select Committee, *Brexit legislation: constitutional issues* (HL 2019–21, 71) 27.
[859] Select Committee on the Constitution, *The Legislative Process: The Delegation of Powers* (HL 2017-19, 225) 50.
[860] Ruth Fox, 'Delegated powers and statutory instruments' (Public Law and Brexit conference, 2021).
[861] See chapter 2 for exploration of the historical literature on executive dominance and delegated legislation.

7.4 European Union (Withdrawal) Act 2018

The European Union (Withdrawal) Act 2018 (hereafter the EUWA 2018) provided for both the repeal of the European Communities Act 1972 (hereafter the ECA) and the making of other provisions in connection with the withdrawal of the United Kingdom from the European Union.[862] The Act addresses the impact that leaving the EU has upon law in the UK. These laws may be assessed and then, as appropriate, repealed, revoked, or retained, depending upon their relevance and significance.[863] The Act also provides for Parliamentary approval for any Withdrawal Agreement negotiated between the Government and the European Union.[864]

7.4.1 Wide Delegated Legislation

The EUWA 2018 set the tone early on regarding how the government would approach the Brexit process. It set a precedent for the breadth of powers to be used within this process, giving Ministers extraordinary legislative powers. The House of Lords addressed the width of the powers bestowed upon Ministers in their interim report on the (then) Withdrawal Bill. They stated:

> *The number, range and overlapping nature of the broad delegated powers would create what is, in effect … unlimited powers upon which the Government could draw. They would fundamentally challenge the constitutional balance of powers between Parliament and Government and would represent a significant—and unacceptable—transfer of legal competence.*[865]

The leading example of wide delegated powers conferred upon Ministers within this Act is found in S8.[866] The provision states that:

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[862] European Union (Withdrawal) Act 2018, introductory text.
[863] Mark Elliott, Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018' (2018) University of Cambridge Faculty of Law Research Paper 58.
[864] European Union (Withdrawal) Act 2018, s13.
[865] House of Lords Select Committee, *Constitution European Union (Withdrawal) Bill* (HL 2017–19, 69).
[866] S8 European Union (Withdrawal) Act 2018, which has since been amended by the European Union (Withdrawal Agreement) Act 2020, Article 8A. This will be discussed in more detail in the section on the European Union (Withdrawal Agreement) Act 2020.

a Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU.

The width of the power is evident in its wording. The word 'appropriate', for instance, creates a far-reaching and subjective remedial power for Ministers.[867] Whilst the terms 'failure' and 'deficiency' do little to mitigate the scope of the power available to Ministers. These terms like 'appropriate' are subjective. Consequently, S8 of the EUWA 2018 gives considerable discretion to the Minister so empowered. Parliamentary criticism focused upon the width of this power and, in particular, upon the 'appropriateness' criterion. [868] This makes the power much wider than it could have been had the criterion for Ministers exercising this power been a 'necessity' test. The House of Lords during the scrutiny of the Bill did amend the power to one that could have been exercised by Ministers to "make such provision as is necessary".[869] However, the amendment did not survive, and the Bill became an Act with an appropriate rather than necessary criterion.[870] The breadth of S8 also becomes apparent when considering the definition given of "deficiency" in Sections 8(2) and 8(3) of the Act.[871]

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[867] Mark Elliott, 'Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018' (2018) University of Cambridge Faculty of Law Research Paper 58.
[868] House Of Lords Select Committee, *Constitution European Union (Withdrawal) Bill* (HL 2017–19, 69).
[869] An amendment by Lord Lisvane, crossbench peer which was rejected by the Commons. This amends clause 7 – which gives ministers powers to amend retained EU law using delegated legislation – so that ministers can only use these powers where "necessary" rather than where they think it is "appropriate".
[870] Mark Elliott, 'Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018' (2018) University of Cambridge Faculty of Law Research Paper 58.
[871] *Deficiencies in retained EU law are where the Minister considers that retained EU law— (a) contains anything which has no practical application in relation to the United Kingdom or any part of it or is otherwise redundant or substantially redundant, (b) confers functions on, or in relation to, EU entities which no longer have functions in that respect under EU law in relation to the United Kingdom or any part of it, (c) makes provision for, or in connection with, reciprocal arrangements between— (i) the United Kingdom or any part of it or a public authority in the United Kingdom, and (ii) the EU, an EU entity, a member State or a public authority in a member State, which no longer exist or are no longer appropriate, (d) makes provision for, or in connection with, other arrangements which— (i) involve the EU, an EU entity, a member State or a public authority in a member State, or (ii) are otherwise dependent upon the United Kingdom's membership of the EU, and which no longer exist or are no longer appropriate, (e) makes provision for, or in connection with, any reciprocal or other arrangements not falling within paragraph (c) or (d) which no longer exist, or are no longer appropriate, as a result of the United Kingdom ceasing to be a party to any of the EU Treaties, (f) does not contain any functions or restrictions which— (i) were in an EU directive and in force immediately before exit day (including any power to make EU tertiary legislation), and (ii) it is appropriate*

The width of this section has been described as '… *a power that, in legal terms, can be used to achieve a wide range of legislative changes, including establishing new public bodies, substantive policy changes and amendments to constitutional legislation in order to prepare for Brexit*.'[872] The extent of the delegated powers conferred on Ministers from the EUWA 2018 is further evident in the number of statutory instruments created as a result of the Act. Over 600 SIs have been passed with the general purpose of facilitating the UK's orderly withdrawal from the EU.[873] Other wide delegated powers include S23(1) EUWA 2018 which allows for the making of consequential provisions and S23(6) which allows for the making transitional, transitory, or saving provision considered by Ministers to be appropriate in connection with the coming into force of any provision of the Act. S5(6) and Sch1 which empowers ministers to authorise challenges to the validity of retained EU law, like S23(6) this is due to the language used within the provision, namely the lacking parameters of the challenge that a Minister can bring. The section simply states it is a challenge described or provide for in regulations by a Minister.[874] Sch5 para4 is another example. The schedule empowers Ministers to provide for the admissibility of evidence in legal proceedings.

The wide delegated powers conferred on ministers in the EUWA 2018 fulfil step one of the two-step test for establishing the presence of excessive executive dominance. The powers illustrate the problematic, inadequate, and undemocratic nature of wide delegated legislation. They are however, not the only excessive executive dominance factor present within the EUWA 2018.

7.4.2 Henry VIII Clauses

to retain, or (g) contains EU references which are no longer appropriate. (3) There is also a deficiency in retained EU law where the Minister considers that there is— (a) anything in retained EU law which is of a similar kind to any deficiency which falls within subsection (2), or (b) a deficiency in retained EU law of a kind described, or provided for, in regulations made by a Minister of the Crown.

[872] Jack Simson Caird Vaughne Miller and Arabella Lang, 'European Union Withdrawal Bill', (Briefing Paper No 8079, September 2017) 59.

[873] Alexandra Sinclair and Joe Tomlinson, 'Brexit Delegated Legislation: Problematic Results' (UKCLA, 9th January 2020) <https://ukconstitutionallaw.org/2020/01/09/alexandra-sinclair-and-joe-tomlinson-brexit-delegated-legislation-problematic-results/ > accessed 12th February 2020.

[874] sch1(1)(2)(b).

In addition to the wide delegated powers discussed above, the EUWA 2018 also contains Henry VIII clauses, another factor of excessive executive dominance. The Act contains these powers to fulfil its purpose of amending primary legislation to facilitate the UK's withdrawal from the European Union.[875] S8, as explored above, does allow for changes to be made to primary legislation.[876] It is a Henry VIII clause. The width of the section has already been outlined. An example of its use in amending primary legislation is seen in the Government's abolishing of the operation of the state aid regime that existed pre-Brexit. This was achieved via the State Aid (Revocations and Amendments) (EU Exit) Regulations 2020. The regulations disapply and/or revoke retained EU law on state aid insofar as it forms part of domestic law by virtue of S3(1) of the Withdrawal Act,[877] save as far as necessary to give effect to the Withdrawal Agreement.[878] The regime limited the financial assistance the government could give to companies and prevented the government from favouring particular industries or individual companies.[879] The use of S8 to bring about such a change has been criticised by the House of Lords Secondary Legislation Scrutiny Committee. The Committee stated that *secondary legislation is being used to introduce policy changes about important issues which should more properly be the subject of primary legislation, thus affording a higher degree of Parliamentary scrutiny. This is another such occasion and one on a subject that appears central to the UK's negotiation position with the EU. We take the view that it is neither a welcome nor indeed acceptable use of secondary legislation and would be disappointed if further instances were to occur. [880]* The Committee's criticism is of the use of the power in this instance as a wide delegated power being used for matters that are better dealt with by primary legislation.

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[875] Good Law Project, 'Relegating Parliament' (Good Law Project, 2021).
[876] s8(5).
[877] These include but are not limited to: Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty; Commission Regulation (EC) No 1627/2006 of 24 October 2006 amending Regulation (EC) No 794/2004 as regards the standard forms for notification of aid; Commission Regulation (EC) No 1935/2006 of 20 December 2006 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty. For all the revocations see, S 5 The State Aid (Revocations and Amendments) (EU Exit) Regulations 2020.
[878] Explanatory memorandum, The State Aid (Revocations and Amendments) (EU Exit) Regulations 2020.
[879] See, The State Aid (Revocations and Amendments) (EU Exit) Regulations 2020, schedule 1.
[880] House of Lords Secondary Legislation Scrutiny Committee, *Draft State Aid (Revocations and Amendments) (EU Exit) Regulations 2020 Audiovisual Media Services Regulations 2020* (HL 2019–21, 146) 8.

S9 of the EUWA 2018 also contains a broad delegated power. Like S8 of the Act, this power enables the modification of primary legislation and is, therefore, a Henry VIII clause.[881] Again, like S8 EUWA 2018, the width of the power can be witnessed in the use of 'appropriate'. The power however is not as wide as the government initially intended when drafting the Bill. The phrase 'subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the European Union' was added to the original bill. [882] This is an example of how political constitutionalism can act against the excesses of government; however, it has to be noted at a time when there was a hung Parliament and therefore a reduced numerical advantage. There was also a commitment by the Government for a Withdrawal Agreement Bill (now Act) to legislate for the outcome of the negotiations with the European Union,[883] resulting in more input by Parliament. This addition to the original Bill has been regarded as removing the sting from S9.[884]

Other Henry VIII clauses within the EUWA 2018 include S20(4) which states:

> *A Minister of the Crown may by regulations (a) amend the definition of "exit day" in subsection (1)[885] to ensure that the day and time specified in the definition are the day and time that the Treaties are to cease to apply to the United Kingdom, and (b) amend subsection (2)[886] in consequence of any such amendment.*

[881] *(1) a Minister of the Crown may by re gulations make such provision as the Minister considers appropriate for the purposes of implementing the Withdrawal Agreement if the Minister considers that such provision should be in force on or before exit day, subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the EU. (2) Regulations under this section may make any provision that could be made by an Act of Parliament.*
[882] An amendment by Dominic Grieve MP.
[883] Department for Exiting the European Union, Legislating for the Withdrawal Agreement between the United Kingdom and the European Union, (Cm 9674, 2018).

[885] European Union (Withdrawal) Act 2018, s20(1).
[886] European Union (Withdrawal) Act 2018, s20(2).

The ability to change 'exit day', is evidently a Henry VIII clause, as it allows the amendment of primary legislation by a minister.[887] S23 is to make consequential provisions, which states:

> *(1)A Minister of the Crown may by regulations make such provision as the Minister considers appropriate in consequence of this Act (2) The power to make regulations under subsection (1) may (among other things) be exercised by modifying any provision made by or under an enactment.*

These Henry VIII clauses are another factor of excessive executive dominance present within the EUWA 2018. Both the wide delegated powers and Henry VIII clauses *grant ministers 'overly-broad powers to do whatever they think is 'appropriate' to correct 'deficiencies' in retained EU law', giving them 'far greater latitude than is constitutionally acceptable'.*[888] It is the combination of the width and scope of these powers, alongside their constitutional importance, that highlight why the inadequate scrutiny process, which I will discuss in the next subsection, has such a devastating effect on parliamentary oversight.

7.4.3 Scrutiny of Delegated Legislation

The Brexit process has seen a considerable increase in the use of delegated legislation. There is certainly an irony to the fact that a government that promised the British people that leaving the EU would return sovereignty to the UK Parliament, is seeking to govern the process using legislation that denies effective Parliamentary control.[889]Due to the huge increase in the use of delegated legislation, the system of scrutiny is inadequate for the magnitude of the task. This is particularly enhanced and therefore problematic when considering the amount of delegated legislation made under and since the passing of the EUWA 2018. Between the granting of Royal assent

[887] A Henry VIII clause utilised due to Brexit negotiations.
[888] House of Lords Select Committee, *Brexit legislation: constitutional issues* (HL 2019–21, 71).
[889] Dick Newby, 'Ministers are trying to ram through major Brexit changes using Henry VIII powers' (Left Foot Forward, 11 September 2020) <https://leftfootforward.org/2020/09/ministers-are-trying-to-ram-through-major-brexit-changes-through-henry-viii-powers/> accessed 15th October 2020.

for the EUWA 2018 and up to exit day,[890] of the 622 Brexit SIs laid, 418 were laid solely under powers in the EUWA 2018, 142 of the 622 SIs amended primary legislation.[891] Despite the huge amount of secondary legislation, none of these politically salient regulations were really ever at risk of being rejected, as explored in chapter 3. That is because, ultimately, neither House can amend a statutory instrument. The scrutiny process facilitates expressions of concern but little more than that. Parliament is essentially presented with a take it or leave it proposition and invariably decides to take it. Parliamentary scrutiny of secondary legislation is rarely substantive or meaningful. It is scrutiny in name only. This is because a regulation may pass through its scrutiny stages, not being rejected but also not being looked at by a majority of MPs or Peers. Even those who are in the joint committee on statutory instruments, have limited time to debate and may not actually understand the Bill before them.[892]

Parliamentary scrutiny of secondary legislation should minimise the risk of the powers being abused. However, in reality, the scrutiny is not rigorous.[893] Both the Commons and the Lords have a maximum of 90 minutes to spend debating a statutory instrument.[894] This is regardless of the width, constitutional importance, or breadth of the instrument.[895] However, on average, only 30 minutes was spent on the review of SIs laid in the delegated legislation committee.[896] The limited time dedicated to scrutinising statutory instruments only further exemplifies the inadequacy of scrutiny. There are various examples of lengthy and complex instruments created via the EUWA 2018 that were debated for inadequately short periods. For instance, the Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019 – this statutory instrument stands at 619 pages yet was debated for only 51 minutes in

[890] The 31st January 2020.
[891] Alexandra Sinclair and Dr Joe Tomlinson, 'Plus ça change? Brexit and the flaws of the delegated legislation' (public law project 2020).
[892] Ruth Fox, 'Delegated powers and statutory instruments' (Public Law and Brexit conference 2021).
[893] House Of Lords Select Committee, *Brexit legislation: constitutional issues* (HL 2019–21, 71).
[894]Institute for Government, 'Secondary Legislation: How is it scrutinised?' <https://www.instituteforgovernment.org.uk/explainers/secondary-legislation> accessed 12 September 2020.
[895] Dick Newby, 'Ministers are trying to ram through major Brexit changes using Henry VIII powers' (Left Foot Forward, 11 September 2020) <https://leftfootforward.org/2020/09/ministers-are-trying-to-ram-through-major-brexit-changes-through-henry-viii-powers/> accessed 12th October 2020.
[896] Jack Simson Caird Vaughne Miller and Arabella Lang, 'European Union Withdrawal Bill', (Briefing Paper No 8079, September 2017) 59.

the House of Lords, with the House of Commons only debating it for a minute more at 52 minutes.[897] Another example is the Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019, which is 26 pages long, made 36 amendments to existing legislation and yet was only debated for 11 minutes in the House of Commons.[898] It is not surprising that very few Brexit instruments have been prayed against.[899] This also follows a general trend as explored in Chapter 3 when considering the inadequate scrutiny of delegated legislation.

The scrutiny of the delegated powers within the EUWA 2018 varies depending upon the power. SIs adopted according to S8, 9 and 23(1) of the EUWA 2018 can pass via the negative procedure,[900] which is one of the least stringent of scrutiny procedures.[901] This means that the widest delegated power available under the EUWA 2018 (S8) can be exercised subject to the least stringent procedure (negative procedure). There are a limited number of exceptions to this, in which instances the use of S8 is subject to the affirmative procedure.[902] The same exceptions apply to the use of S9.[903] The House of Lords Select Committee on the Constitution stated that '*In exceptional circumstances when broad delegated powers are necessary, they should be constrained as far as is possible and subject to the affirmative resolution procedure.'*[904] The breadth of S8 was outlined above, yet despite this, the power is not constrained. Instead, this power is exercisable while being subjected to minimal scrutiny under the negative procedure. There is no correlation between the enhancement of power for the executive under these powers and the strength of scrutiny attached to them. The inadequacy of the scrutiny is also apparent when considering sunset clauses within the EUWA 2018 and specifically its S9. The broad scope of the Henry VIII powers within the EUWA 2018 means that sunset clauses are not an efficient safeguard. This is particularly so when the Act contains Henry VIII clauses that can amend the sunset

[897] Alexandra Sinclair and Joe Tomlinson, 'How abuse of delegated legislation makes a mockery of lawmaking' Prospect Magazine (London, 8th December 2020).
[898] Alexandra Sinclair and Dr Joe Tomlinson, 'Plus ça change? Brexit and the flaws of the delegated legislation' (public law project 2020).
[899] Only 10 instruments were prayed against up to April 2020, this is according to the Hansard Society. (See, Hansard Society, 'Brexit delegated legislation: the challenges, and how they should be addressed' (2020).
[900] Sch 7 s1(3), Sch 7 s10(3), Sch 7 s15(1).
[901] See chapter 3 for further exploration on this topic.
[902] European Union (Withdrawal) Act 2018, Explanatory Notes.
[903] Sch 7 s10(3).
[904] House Of Lords Select Committee, *Brexit legislation: constitutional issues* (HL 2019–21, 71).

clause within the Act. This means that Henry VIII powers in S9 of the EUWA 2018, can be used to undermine safeguards within the Act.

During the scrutiny of the EUWA 2018, the government had no working majority and as a result a number of concessions were made.[905] One such concession was a governmental amendment entitled 'Explanatory statements for certain powers: appropriateness, equalities etc.'[906] This requires Ministers to submit explanatory memoranda alongside each SI laid under S8(1), 9 or 23(1) or paragraph 1(2) or 12(2) of Schedule 2 EUWA 2018, explaining the reasons for the instrument.[907] The requirement of explanatory statements for these provisions, however, does not increase the scrutiny of the delegated legislation under the EUWA 2018. The language used in Schedule 7 S28 illustrates the lacking increased scrutiny, it is subjective and refers to the Minister's 'opinion', therefore granting the minister discretion while also referencing what the Minister believes to be 'appropriate' – a criterion much less restrictive than a 'necessity' criterion. The increased level of scrutiny these statements provide is also questionable when considering that instruments under the sections these statements apply to can be passed using the negative procedure. Therefore, even with the concessions made, the legislative oversight of the SIs falls well short of that for a bill through Parliament, a process in which MPs play a far greater role. Significant differences between the two are found in the ability for MPs to propose amendments to a Bill, in addition to the time that is devoted to reviewing a bill in comparison to delegated legislation.

Another concession was the introduction of the sifting process. During the passage of the Withdrawal Act through Parliament, an amendment was made to improve the scrutiny of the delegated legislation. This improvement was the creation of a sifting process.[908] Schedule 7 of the EUWA 2018 sets out the sifting process. It requires SIs made under Sections 8, 9 and 23(1) of the Act to be published in draft with accompanying explanatory documents.[909] The SIs will be subject to either the negative

[905] The impact of the hung Parliament will be considered in the forthcoming analysis of constitutional implications of this Act.
[906] Sch 7 s28 EUWA 2018.
[907] Sch 7 s28.
[908] Charles Walker MP proposed the implemented amendment. (Commons Select Committee, *Chair tables amendments to EU (Withdrawal) Bill on scrutiny powers for Commons* (7th December 2017).
[909] Sch 7 s28.

or affirmative scrutiny procedure. Those under the negative procedure will be subject to the sifting process.[910] Under the sifting process, the Committees[911] have ten sitting days, starting the day after the instrument is laid to consider the instrument and decide whether the subject matter of the instrument and scope of the policy change render the instrument significant enough for the affirmative procedure.[912] After the ten days pass, the Government can lay the instrument in its final form stating the procedure they will follow.[913] If the Government disagree with the recommendation of the Committee and continue with the negative procedure, they have committed to explain the disagreement. However, this is a political and not legal commitment.[914]

The sifting process does not, have the ability to legally require ministers to upgrade the scrutiny procedure. They are legally able to ignore the recommendations made by the committee. The process was intended, to have considerable political influence, constraining the political freedom of Ministers to override the committee's recommendations.[915] Schedule 7 paragraph 3 (7) states 'before the instrument is made, the Minister must make a statement explaining why the Minister does not agree with the recommendation of the Committee'. Paragraph 3 (8) deals with the failure to abide by (7), requiring a minister to 'make a statement explaining why the Minister has failed to do so'. However, paragraph 3 (9) begins to show the demise of political influence. It states: 'A statement under sub-paragraph (7) or (8) must be made in writing and be published in such manner as the Minister making it considers appropriate'. It is the final element of paragraph 3 (9) that begins to show the cracks in the Committee's ability to uplift scrutiny. Even the sifting Committee, a supposed limit on the executive provides the executive with yet further discretion and is yet

[910] The House of Lords Secondary Legislation Scrutiny Committee and the House of Commons European Statutory Instruments Committee.
[911] European Statutory Instruments Committee and Secondary Legislation Scrutiny Committee.
[912] Whereby there is a debate and vote before they become law. Some instruments are required to be affirmative for instance where it creates or widens the scope of a criminal offence, or creates or amends a power to legislate.
[913] UK Parliament, 'Role of European Statutory Instruments Committee' <https://committees.parliament.uk/committee/393/european-statutory-instruments-committee/role/ > accessed 8th May 2021.
[914] House of Commons Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018* (HC 2017-19, 1395).
[915] Mark Elliott, 'Executive law-making and Brexit: Are Parliament's hard-won safeguards being undermined?' (Public Law for everyone, 20th September 2018) <https://publiclawforeveryone.com/2018/09/20/executive-law-making-and-brexit-are-Parliament s-hard-won-safeguards-being-undermined/> accessed 3rd October 2018.

another 'appropriate' criterion for Ministers. In the event of the Government agreeing with the recommendation, they are required to withdraw the negative instrument and re-lay it in the affirmative form.[916] This then requires debate and approval by both Houses prior to it becoming law. Of the 246 statutory instruments laid as proposed negative instruments under the EUWA 2018, 70 were recommended for upgrade by the sifting process.[917] The government accepted all recommendations for upgrade. However, the extent to which the sifting process secures heightened scrutiny is questionable, especially when considering that Brexit statutory instruments created outside the EUWA 2018 and the EUFRA 2020 circumvent the sifting process. Meaning that those created under the EUWAA 2020 are not subject to the sifting process.[918] This becomes particularly questionable when considering that the sifting process has not been included in all subsequent primary legislation that facilitated the UK's withdrawal from the EU.[919]

The sifting process attempts to offer a heightened scrutiny approach. MPs across the Commons expressed worries that the powers bestowed upon the executive within the EUWA 2018 could be misused.[920] Former Conservative Attorney General Dominic Grieve stated the (then) Bill represented the 'most extraordinary arrogation of powers' by the executive that he had seen during 20 years in Parliament.[921] The reviewing of instruments subject to the negative procedure and recommendations for an upgrade to the affirmative procedure, somewhat heightens the scrutiny process. Only somewhat however, as the reality is that the affirmative procedure is the 'the best of a bad bunch',[922] when considering the other factors of natural and excessive executive dominance, the scrutiny the affirmative procedure offers is not much better. The

[916] UK Parliament, 'Role of European Statutory Instruments Committee' <https://committees.parliament.uk/committee/393/european-statutory-instruments-committee/role/> accessed 16th November 2020.
[917] Alexandra Sinclair and Dr Joe Tomlinson, 'Plus ça change? Brexit and the flaws of the delegated legislation' (public law project 2020).
[918] For instance, The Challenges to Validity of EU Instruments (Amendment) (EU Exit) Regulations 2020
[919] For further exploration of this point and data on the delegated legislation within the Brexit process, see Alexandra Sinclair and Dr Joe Tomlinson, 'Plus ça change? Brexit and the flaws of the delegated legislation' (public law project 2020).
[920] MPS including Kenneth Clarke and Dominic Grieve (HC Debate 12th June 2018, Vol 642, Col 733).
[921] Dominic Grieve QC MP, 'A backbencher's view of Brexit' (Consoc 2018) <https://consoc.org.uk/publications/dominic-grieve-backbenchers-view-brexit/> accessed 14th January 2019.
[922] Ruth Fox, 'Delegated powers and statutory instruments' (Public Law and Brexit conference, 2021).

affirmative procedure, in comparison, is more stringent with the requirement of both a vote and debate in both Houses prior to enactment.

The sifting procedure is not as robust as it could be.[923] The Committee adds little to prevent the executive's ability to use the delegated powers within the EUWA 2018 to make policy changes with little to no Parliamentary oversight. The Committee's recommendations do not mitigate the inadequacy of scrutiny. The Hansard Society stated that the new sifting procedure is unlikely to meet Member's expectations for a meaningful and effective oversight of the statute book with regards to Brexit.[924]

7.4.4 Step-Two: Constitutional Implications

Now that it has been established that the EUWA 2018 encompasses various excessive executive dominance factors, and therefore, fulfils the first step of the two-step test to determine excessive executive dominance, attention turns to the second step of the test. In this section it will be considered whether these factors, hinder the efficient functioning of the constitution by undermining constitutional principles or by preventing another branch of the state from performing their constitutional role.

The 2017–19 session saw a minority Government with a fragile confidence and supply agreement,[925] who struggled to operate effectively in a hung Parliament, in which there was no clear majority for any model of Brexit and yet which was increasingly seeking to set the agenda for the UK's withdrawal from the EU. The hung Parliament saw a much more powerful legislature, not under the same controls of the executive that might normally be expected.

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[923] It is established by a temporary standing order and non-binding in terms of its recommendations. Unlock Democracy, 'Government's sifting committee "built on rotten foundations"' (Unlock Democracy, 2017) http://www.unlockdemocracy.org/press-releases/governments-scrutiny-committee-built-on-rotten-foundations <accessed 12th November 2020>

[924] Joel Blackwell, 'EU (Withdrawal) Act SIs: will sifting make a difference?' (Hansard Society 2018).

[925] This was a Confidence and Supply Agreement between the Conservative and Unionist Party and the Democratic Unionist Party that followed the 2017 general election. See, Cabinet Office, 'Confidence and Supply Agreement between the Conservative and Unionist Party and the Democratic Unionist Party' (Policy Paper) <https://www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland/agreement-between-the-conservative-and-unionist-party-and-the-democratic-unionist-party-on-support-for-the-government-in-parliament > accessed 15th October 2020.

Consequently, the hung Parliament resulted in various concessions and amendments to the Brexit process, which was arguably due to the heightened input from Parliamentarians resulting from the government having no working majority to control the Commons.[926] The EUWA 2018 saw amendments and concessions as outlined above. One example of the strength of political constitutionalism borne out of the hung Parliament is found in the 'Benn Act'[927], as initiated by Backbench MPs.[928] The passing of a Private Members Bill is typically almost impossible to achieve particularly as there are very strict rules of when you can introduce Private Members Bills.[929] Private Members Bills traditionally only succeed if the Government back them.[930] This is because of Standing Order No.14, which stipulates that the government controls the business of Parliament. The executive also controls the Common's timetable, deciding the time that is spent on matters.[931] The Benn Act was unprecedented – it was enacted quickly, was a Private Members Bill and shows the legislature pushing back against the executive during the period the EUWA 2018 was enacted. The way in which the Act was introduced was of particular importance, for the reason listed above and in particular its link with this thesis and excessive executive dominance. It wrestled the process from Government as well as the content of the Bill being important. It illustrates the legislature performing their constitutional role of holding the executive to account. Therefore, considering the legislature's strength at this time, questions may be raised over whether the EUWA 2018 hinders the efficient functioning of the constitution by undermining constitutional principles or preventing another branch of the state from performing their constitutional role. However, it must be noted that at this time there was a hung Parliament and therefore the executive did not have the same numerical advantage and subsequently the same fusion of powers. This has a significant impact upon their control of the parliamentary process, and as has been demonstrated, increased political constitutionalism.

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[926] See chapter 2 for exploration of the fusion of powers and numerical advantage.
[927] European Union (Withdrawal) (No. 2) Act 2019.
[928] MPs who are either members of the governing party but not part of the government or MPs who are part of the opposition.
[929] Like other public bills, Private Members' bills can be introduced in either House and must go through the same set stages. There are three ways of introducing Private Members' bills in the House of Commons: the Ballot, the Ten-Minute Rule and Presentation. For further discussion see, UK Parliament, Private Members' Bills' <https://www.Parliament .uk/about/how/laws/bills/private-members/ > accessed 12th November 2020.
[930] For instance, the Assaults on Emergency Workers (Offences) Act 2018.
[931] See chapter 2 for further exploration of this and the fusion of powers between the executive and legislature.

It is submitted, that despite the hung Parliament and the increased political constitutionalism stemming from it, and despite unprecedented situations such as the Benn Act and its amendment of the EUWA 2018,[932] there is not a mitigation of the excessive executive dominance factors within the EUWA 2018. The EUWA 2018 still has wide delegated powers, limited scrutiny of delegated legislation and Henry VIII clauses, despite the hung Parliament. The government have since strengthened their position while reducing the legislature's oversight of the executive – a notion explored in the subsequent analysis of the European Union (Withdrawal Agreement) Act 2020. The powers within the EUWA 2018 continue to be used throughout the Brexit process. The legislature's strength in political constitutionalism within the hung Parliament session does not mitigate the constitutional or lasting damage of the Act. The Act still prevents the legislature from performing their *ongoing* constitutional roles – namely to hold the executive to account, while the wide delegated powers and plethora of Henry VIII powers tips the legislative power in favour of the executive at the expense of the legislature.

Therefore, despite the hung Parliament at the time of the EUWA 2018 and the arguably strengthened political constitutionalism possessed by the legislature; the factors considered above within the Act continued to hinder the efficient functioning of the constitution. The factors undermined constitutional principles such as the rule of law, in particular the requirement for the law to be accessible, intelligible, clear and predictable.[933] The delegated legislation explored within this case study thus far cannot be described as meeting any of those requirements found under principle 1 of Bingham's conception of the Rule of Law.[934] Particularly when you consider the width of the powers, both in their discretion for Ministers and their scope, not to mention the inadequate scrutiny to which they are subject, despite in some instances being complex and far reaching, with some making over 30 amendments to existing legislation. You cannot describe law as clear and or predictable when a SI subject to very little oversight and or scrutiny can amend over 30 existing legislative provision. The powers within the EUWA 2018 to amend, retain and or repeal all EU-derived

[932] European Union (Withdrawal) (No. 2) Act 2019, s4(1).
[933] Principle 1 of Bingham's Rule of Law. (Tom Bingham, *The Rule of Law* (Penguin 2011) 37-48.
[934] Principle 1 of Bingham's Rule of Law. (Tom Bingham, *The Rule of Law* (Penguin 2011) 37-48.

primary and secondary legislation are delegated powers within the Act, therefore are without sufficient Parliamentary scrutiny and oversight. This runs contrary to not only the rule of law[935], but also the ultimate supremacy of Parliament itself.[936] It becomes questionable whether Parliament can make or unmake any law whatever, when delegated powers are being used to make a huge number of changes to existing legislation yet being subjected to little parliamentary scrutiny. The EUWA 2018 also prevents another branch of the state from performing their constitutional role. The legislature is prevented from enacted law in the Brexit process due to expansive Henry VIII clauses. In theory and in a vacuum the legislature is supreme and therefore could remove all Henry VIII clauses. However, in reality, Parliament is set up in a way which makes this extremely unlikely and or achievable. Particularly so when considering the numerical advantage, the control of the executive over parliamentary business etc.[937] The Benn Act is seen as extraordinary, illustrating the inability for Parliament to pass any law it likes. It was passed under a hung Parliament, therefore the numerical advantage is missing and yet still described as extraordinary. Parliamentary procedures have been circumvented through the EUWA 2018, and Parliament is deprived of its constitutional role. This not only calls into question the ultimate sovereignty of Parliament but also the constitutional principle of parliamentary accountability, a fundamental constitutional principle.[938]

7.5 The European Union (Withdrawal Agreement) Act 2020

Attention now turns to the European Union (Withdrawal Agreement) Act 2020 (EUWAA 2020). This Act has the purpose of implementing and making other provision in connection with the agreement between the United Kingdom and the EU.[939] The same factors of excessive executive dominance explored above for the EUWA 2018 are now to be explored for the EUWAA 2020.

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[935] In particular principle 1 of Bingham's Rule of Law. (Tom Bingham, *The Rule of Law* (Penguin 2011) 37-48.

[936] Ross Taylor, 'The (not so) Great Repeal Bill, part 2: How Henry VIII clauses undermine Parliament' (LSE, 5th June 2017) <blogs.lse.ac.uk /brexit/2017/06/05/the-not-so-great-repeal-bill-part-2-how-henry-viii-clauses-undermine- Parliament /> accessed 24th September 2020.

[937] See chapter 2 for further exploration of the fusion of powers.

[938] As recognised by the UKSC in *Miller 2; Cherry*, see chapter 7 (section 7.7) for further exploration.

[939] European Union (Withdrawal Agreement) Act 2020, Introductory Text.

7.5.1 Wide Delegated Powers

The EUWAA 2020, like the EUWA 2018, gives ministers various extremely broad powers to implement the UK's withdrawal from the EU. Amongst these powers included amendments to the EUWA 2018. The EUWAA 2020 Act amends the EUWA 2018 in a way that actually increases the power of ministers, further increasing the scope of the powers of the EUWA 2018. For instance, the amendments by S26 of the EUWAA 2020 to S6 of the EUWA 2018 concerning the Interpretation of retained EU law. This section amends the EUWA 2018 by allowing a Minister to make regulations to determine the relevant court or tribunal that is not bound by retained EU case law. It states that in subsection (4) of the EUWA 2018, after paragraph (b) (but before the "and" at the end of the paragraph) insert—"(ba) a relevant court or relevant tribunal is not bound by any retained EU case law so far as is provided for by regulations under subsection (5A)". While S5A states, "A Minister of the Crown may by regulations provide for—(a) a court or tribunal to be a relevant court or (as the case may be) a relevant tribunal for the purposes of this section, (b) the extent to which, or circumstances in which, a relevant court or relevant tribunal is not to be bound by retained EU case law…"[940] In essence, Ministers are empowered under this section to determine which courts may depart from CJEU (Court of Justice of the European Union) case law.[941]

Another example of wide delegated powers within the EUWAA 2020 is found in its S21, which amends S8 of the EUWA 2018. S21 inserts S8C to the EUWA 2018, which states that "A Minister of the Crown may by regulations make such provision as the Minister considers appropriate - (a) to implement the Protocol on Ireland/Northern Ireland in the Withdrawal Agreement, (b) to supplement the effect of S7A in relation to the Protocol, or (c) otherwise for the purposes of dealing with matters arising out of, or related to, the Protocol (including matters arising by virtue of S7A and the Protocol)." This power allows for the whole Northern Ireland protocol to be laid out in regulations

[940] s5A goes on to state that (c) the test which a relevant court or relevant tribunal must apply in deciding whether to depart from any retained EU case law, or (d)considerations which are to be relevant to—(i)the Supreme Court or the High Court of Justiciary in applying the test mentioned in subsection (5), or (ii)a relevant court or relevant tribunal in applying any test provided for by virtue of paragraph (c) above.
[941] European Union (Withdrawal Act) 2018, s5A.

made by Ministers. Again, this section contains an "appropriate" criterion for the ministers to exercise the power.[942] For the same reasons as above, this is problematic. The 'appropriateness' criterion makes the power much wider than it could be if the criterion had been a 'necessity' test.

Arguably the widest of the delegated powers within the EUWAA 2020 is found in S41, which is a 'catch-all' power. This section concerns consequential and transitional provision etc, and states that "A Minister of the Crown may by regulations make such provision as the Minister considers appropriate in consequence of this Act. (2) The power to make regulations under subsection (1) may (among other things) be exercised by modifying any provision made by or under an enactment."[943] The breadth of this provision is evident in the language used. Like S8 of the EUWA 2018, this provision is wide open for ministerial discretion, as indicated by the 'appropriate' criterion for the Minister to exercise these powers. This demonstrates the width of the power and the lack of parameter or gauge to the power. Having said that, the problem is not solely the appropriate criterion. The appropriate criterion gives discretion but had the subject matter of this section been extremely small, the discretion over a small subject area would not be so problematic. The subject matter of S41 however is extremely wide. This subject matter combined with the discretion of the appropriate criterion, is a real problem. This section clearly illustrates that the EUWAA 2020 incorporates wide delegated powers as a factor of EED.

7.5.2 Henry VIII Clauses

In addition to the various wide delegated powers outlined above, the EUWAA 2020 also has a significant number of Henry VIII powers.[944] Firstly, S3 of the EUWAA 2020

[942] European Union (Withdrawal Act) 2018, s8C.
[943] European Union (Withdrawal Agreement) Act 2020, s41(2).
[944] Including: s8(3) regarding frontier rights, s9(4) regarding restrictions of rights of entry and residence, s11(4) regarding appeals etc. against citizens' rights immigration decisions, s12(6) regarding Recognition of professional qualifications, s13(5) regarding Co-ordination of social security systems, s14(5) regarding Non-discrimination, equal treatment and rights of workers etc., s18 regarding main power in connection with other separation issues and its implementation of s8B(3) of the EUWA 2018, s19 regarding Powers corresponding to s 18 involving devolved authorities and its implementation of s11G(5) of Sch 2 of the EUWA 2018, s22 regarding Powers corresponding to s21 involving devolved authorities which introduces s11M (3) of Sch 2 of the EUWA 2018, s27 regarding dealing with deficiencies in retained EU

amends S8 of the EUWA 2018, inserting S8A[945] which give ministers a supplementary power in connection with the implementation period. S8A (1)(e) and S8A (2) and (3) are of interest as they contain Henry VIII clauses. S8A (1)(e) allows a Minister "to make such provision … as the Minister considers appropriate for any purpose of, or otherwise in connection with, Part 4 of the Withdrawal Agreement." S8A (2) and (3) are much broader: 'The power to make regulations under subsection (1) may (among other things) be exercised by modifying any provision made by or under an enactment.' This does not extend to modifying primary legislation passed after the implementation period completion day."

The typical phrasing used in the EUWAA 2020 with regards to its Henry VIII clauses is that a Minister may make regulations that they 'consider appropriate'. The term appropriate provides the Minister with discretion. As explored earlier this is particularly problematic when the delegated power is also wide in its scope. The width of the Henry VIII clause, here "any purpose of …" is particularly broad. A Parliament Committee on regulation took issue with the wide Henry VIII powers the EUWA 2018 gave Ministers.[946] Despite this, the Johnson Government is continuing with the same broad approach in the EUWAA 2020, which gives ministers significant discretion. This is interesting when considering the fusion of powers[947] and the strength of the legislature in the hung Parliament. The legislature is now arguably less able to succeed in making amendments due to Johnson's huge majority. This further illustrates the point made earlier, that the hung Parliament did not mitigate the executive's power despite a stronger legislature. Like the wide delegated powers, the presence of these Henry VIII clauses within the EUWAA 2020 fulfils the first step of the test.

7.5.3 Scrutiny of Delegated Legislation

law, s39(4) regarding the ability for a Minister to amend IP completion day, s41(2) and (5) regarding Consequential and transitional provision etc., s40(1) and (3) regarding power to limit the functions of, or abolish, the Independent Monitoring Authority.

[945] For instance, The Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2020 utilises the powers in s8A.

[946] House of Lords, *Delegated Powers and Regulatory Reform Committee* (HL 2017–19, 73) 4.

[947] See chapter 2 for further exploration of this factor.

From the various sections discussed in the EUWAA 2020 analysis, S3, S8 (3), S9 (4), S11 (4), S12 (6), S13 (5), S14 (5), S18 and S19, are subject to the draft affirmative procedure, but in limited circumstances. For instance, many of these sections are subject to the draft affirmative procedure for the first set of regulations or where amending, repealing, or revoking primary legislation or retained direct principal EU legislation; otherwise, they are subject to the negative resolution procedure. Chapter 3 explained that inadequate scrutiny of delegated legislation is another factor of excessive executive dominance. In the EUWAA 2020 specifically, a lot of the delegated powers (including Henry VIII clauses) are subject to the negative procedure, except for in specific instances. For instance, S41 is subject to the negative procedure despite the fact it is a 'catch-all' power. This power is particularly wide and enables the amendment of primary legislation. The use of the negative procedure, one of the least stringent scrutiny procedures, with little to no parliamentary input is concerning, particularly when considering the width of the power.

The EUWAA 2020 actually removed scrutiny and oversight capabilities that the EUWA 2018 gave Parliament. For instance, unlike the EUWA 2018, the EUWAA 2020 does not have the sifting process. This is despite recommendations for such a procedure in line with the EUWA 2018 by the Lords Select Committee.[948] The sifting process acted as a further check on the statutory instruments laid using the negative procedure, therefore its absence further diminishes the scrutiny under the EUWAA 2020. This is despite arguably even wider powers. The Act therefore satisfying yet another factor of excessive executive dominance. This neatly illustrates the combination of factors, namely that the increased numerical advantage and fusion of powers enabled a further reduction in scrutiny by the executive not accepting a sifting process. This not only further diminishes scrutiny but also combines this diminished scrutiny with other excessive executive factors i.e., wide delegated powers and Henry VIII Clauses.

In addition to not having a sifting process under the EUWAA 2020, further amendments to the EUWA 2018 by the EUWAA 2020 exist, which reduces the scrutiny and oversight of the Brexit process by Parliament. S31 of the EUWAA 2020, for instance, repeals S13 of the EUWA 2018. That latter section empowered the

[948] House of Lords Select Committee, *Brexit legislation: constitutional issues* (HL 2019–21, 71).

Commons to have debates and votes on the Withdrawal Agreement. Under the EUWA 2018, Parliament had to agree to the Withdrawal Agreement that the executive negotiated with the EU, however, under the EUWAA 2020 they did not have to agree it. Consequently, this provision meant less power for Parliament and more for the executive. There is not the same ability for Parliament to vote upon the discussions and therefore Parliament's oversight over the Brexit process and negotiations because of this amendment was reduced. Another example of amendments that reduced Parliament's role within the Brexit process is S33 of the EUWA 2020, which removed the ability for an extension to the withdrawal negotiations. The EUWAA 2020 stated a minister could not agree to an extension, allowing for a no-deal scenario. The expected consequence of a "no-deal" scenario for the UK were serious, particularly the constitutional and economic consequences.[949] The decision of an extension had significant constitutional relevance. Significance which only furthers the problematic nature of the taking away executive accountability from Parliament - the ability to scrutinise the executive i.e., Parliamentary accountability, which in the *Miller 2; Cherry* decision was recognised by the Supreme Court as a constitutional principle.

7.5.4 Step Two: Constitutional Implications

In considering the second step of the two-step test, it is worth noting early on that unlike the EUWA 2018, at the time of passing of the EUWAA 2020, there was a strong majority for the Conservative Government under Prime Minister Boris Johnson. This is worth noting in regard to the second step, as the Johnson Government has reversed some of the scrutiny and oversight mechanisms that existed under the EUWA 2018. Scrutiny and oversight mechanisms that arguably existed due to the lacking numerical advantage, that allowed Parliament to install additional oversight and amend the

[949] See, Michelle P Scott, 'The Economic Consequences of a No-Deal Brexit' (Investopia, 24th December 2020) <https://www.investopedia.com/economic-consequences-of-a-no-deal-brexit-4584605> accessed 9th January 2021, What could a no-deal Brexit look like for the UK? (The Week, 10th December 2020) <https://www.theweek.co.uk/fact-check/95547/fact-check-what-a-no-deal-brexit-really-means Office for Budget Responsibility, Brexit Analysis https://obr.uk/forecasts-in-depth/the-economy-forecast/brexit-analysis/#assumptions > accessed 9th January 2021.
Catherine Haddon, 'The Brexit battle is fundamentally changing the constitution' (Institute for Government, 2nd September 2019) <https://www.instituteforgovernment.org.uk/blog/brexit-battle-fundamentally-changing-constitution > accessed 9th January 2021, Nicholas Wright and Oliver Patel, 'The Constitutional Consequences of Brexit: Whitehall and Westminster' (UCL Constitution Unit Briefing Paper) <https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/briefing-paper-1.pdf > accessed 9th January 2021.

EUWA 2018 to a degree incapable of doing so with the EUWAA 2020. This reversal only further undermines constitutional principles and the constitutional role of the legislature, particularly Parliament's constitutional role of holding the executive to account.

The strength of the majority is of particular relevance when considering the concessions and amendments that were made to the EUWA 2018. Unlike the EUWA 2018, however, the Government was disinclined to accept any amendments to the EUWAA 2020. The Government's numerical advantage[950] has witnessed it becoming unwilling to engage productively in addressing significant constitutional concerns with the Bill (now Act).[951] The concerns relevant for this thesis being those centred around delegated powers.[952] The strength of the government and its subsequent ability to refuse amending the EUWAA 2020 has reduced parliamentary oversight and the safeguards within the Act.

Similar to the EUWA 2018, the EUWAA 2020 undermines the constitutional principles of Parliamentary accountability and the rule of law. It also undermines Parliamentary sovereignty. Like the EUWA 2018 analysis above and regarding the ultimate sovereignty of Parliament, for which Dicey[953] stated there is no body in the British constitution that can override or set aside. The vast array of Henry VIII powers with the EUWAA 2020, means that the executive has the power to do just that, set aside and override Acts of Parliament,[954] albeit with the permission of a Parliament with a close fusion of powers between the executive and legislature.[955] The reduction of accountability via the numerous amendments and the lacking Parliamentary scrutiny over delegated legislation means that the legislature is prevented from performing their constitutional role of holding the executive to account.

For similar reasons as outlined above regarding the EUWA 2018, the EUWAA 2020 impacts upon the rule of law. Due to the amount of delegated legislation present in the

[950] See chapter 2 for further exploration of fusion of powers and numerical advantage.
[951] European Union (Withdrawal Agreement) Act 2020.
[952] House Of Lords Select Committee, *Brexit legislation: constitutional issues* (HL 2019–21, 71).
[953] AV Dicey, *Introduction to the study of the Constitution* (8th edn, Liberty Fund 1982) 3-4.
[954] For a more detailed discussion on the interaction between Parliamentary sovereignty and the Henry VIII clauses see Nicholas Barber and Alison Young 'The Rise of Henry VIII Clauses and their Implications for Sovereignty' (2003) PL 113.
[955] See chapter 2 for further analysis.

Brexit process, its scrutiny is crucial for safeguarding the rule of law. While the executive branch accumulates increasingly sweeping powers to legislate, Parliament's processes remain too weak to provide meaningful scrutiny. Proper scrutiny of delegated legislation is not just a procedural nicety. It can impact the clarity and overall quality of our laws.[956] In this way, scrutiny, when done well, can promote the rule of law. The ability to provide sufficient scrutiny in normal times is difficult enough due to the inadequate process of scrutiny.[957] However, Brexit has only heightened this due to the sheer volume of new legislation. One example of the EUWAA 2020's ability to undermine the rule of law is found in the Act's empowering of Ministers to determine which courts may depart from CJEU case law. There is a significant risk that the use of this ministerial power could undermine legal certainty and exacerbate the existing difficulties for the courts when dealing with retained EU law.

The EUWAA 2020, like the EUWA 2018 undermines various constitutional principles including the rule of law, parliamentary sovereignty, and parliamentary accountability. This has the effect of hindering the efficient functioning of the constitution and prevents Parliament from performing its constitutional roles namely holding the executive to account and scrutinising legislation. It is for these reasons that alike the EUWA 2018, the EUWAA 2020 also satisfies the second step of the two-step test for determining excessive executive dominance.

7.6 European Union (Future Relationship) Act 2020

The following analysis concerns the European Union (Future Relationship) Act.[958] The EUFRA 2020 and the powers within the Act have been designed to implement the Trade and Cooperation Agreement ready for the end of the transition period. The Act is also responsible for putting the powers and frameworks in place to deal with future matters arising in relation to the Agreements, as part of the ongoing relationship with the EU.[959] Attention will now turn to outlining applying the two-step test to the EUFRA 2020, firstly focusing on step one and the various factors of excessive executive

[956] Alexandra Sinclair and Joe Tomlinson, 'How abuse of delegated legislation makes a mockery of lawmaking' Prospect Magazine (London, 8 December 2020).
[957] See chapter 3 for further exploration.
[958] the European Union (Future Relationship) Act 2020.
[959] Explanatory memorandum, European Union (Future Relationship) Act 2020.

dominance that exist within this Act. This section will then consider the second step of the test and the constitutional implications of the factors within the Act.

7.6.1 Wide Delegated Powers

This Act alike the two already discussed within this case study contains wide delegated powers. An example of such powers within the EUFRA 2020 can be found in S21:

> *confers powers on the Commissioners for Her Majesty's Revenue and Customs (HMRC) for the purposes of (a) monitoring, or controlling, the movement of goods that pose, or might pose, a risk to public health or public safety, national security, or the environment (including the health of animals or plants); (b) implementing any international obligation of the United Kingdom relating to the movement of goods.*

Here it is the scope of the powers (rather than the discretion and or width due to the language of the power) which are wide. The powers permit the regulations to include provision authorising persons or vehicles to be searched, authorise samples of goods to be taken, and authorise goods to be seized, detained, or disposed. The powers also allow fees to be charged in respect of the exercise of functions by HMRC, the Treasury or another public body. In addition, the regulations may make provision for enforcement too.[960] The powers are therefore substantial, considering they are also for the most part subject to the negative procedure.[961] By virtue of this wide delegated power, the EUFRA 2020, in common with the EUWA 2018 and EUWAA 2020, contains factors of excessive executive dominance.

7.6.2 Henry VIII Clauses

The Act gives incredibly wide delegated powers to Ministers to make secondary legislation and override Acts of Parliament via Henry VIII powers.[962] The Act has been described by Mark Elliott as "the hoarding of power by the Government at the expense

[960] Delegated Powers and Regulatory Reform Committee European Union (Future Relations) Act 2020.
[961] The powers are only subject to the affirmative power, where they amend or repeal primary legislation.
[962] In addition to those discussed in this section, the Act also contains Henry VIII clauses in s32, s33. This is not a conclusive list of the Henry VIII powers within this Act.

of respect for any part of the constitution that threatens its hegemony."[963] The EUFRA 2020 was essentially presented to Parliament in the final hours of 2020. The Act empowers Ministers to rewrite the rules on everything with any area of law touched on by the EU is now in the scope of Ministers powers, this is from rights at work to environmental protections.[964]

The first example of these wide Henry VIII powers within the Act is found in S29[965] which is an implementation power to make regulations to implement the Agreements, or to deal with matters arising from the Agreements.[966] The width of this clause is extraordinary. Another example of Henry VIII clause within the EUFRA 2020 is found in S31, another implementation power, this time empowering a relevant national authority to *by regulation, make such provisions as the relevant national authority considers appropriate.*[967] The language of the clause, similar to the exploration above regarding appropriate and necessary, is what illustrates the width of the power. The inclusion of "any relevant" provides significant discretion to the authority using the power.

A final example of Henry VIII clauses within the Act is found in S39 of the EUFRA 2020 which empowers a Minister of the Crown to:

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[963] See, Mark Elliott commentary <https://twitter.com/profmarkelliott/status/1344223779736707073?lang=en-gb>

[964] Good Law Project, 'Relegating Parliament' (Good Law Project, 2021) <https://goodlawproject.org/news/relegating-Parliament /> accessed 21st October 2021.

[965] 'General implementation of agreements'.

[966] *Existing domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement or the Security of Classified Information Agreement so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.* Professor King noted, the provision can be translated as '*We don't know what changes to the law are in fact required by this EU-UK agreement, but whatever they are, Parliament by operation of this clause makes them effective from the date this law comes into force*.' Professor King goes on to state that 'this is deeply unsatisfactory, arguably worse than broad delegated powers that entail some Parliamentary scrutiny.' Jeff King, Looking back at the EU Future Relationship Act (UCL Blog, 11th January 2021) <https://ucleuropeblog.com/2021/01/11/looking-back-at-the-eu-future-relationship-act/ > accessed 11th January 2021.

[967] *to (a) implement the Trade and Cooperation Agreement, the Nuclear Co-operation Agreement, the Security of Classified Information Agreement or any relevant agreement, or (b) otherwise for the purposes of dealing with matters arising out of, or related to, the Trade and Cooperation Agreement, the Nuclear co-operation Agreement, the Security of Classified Information Agreement or any relevant agreement.* The Henry VIII power is found in subsection 2 which states *Regulations under this section may make any provision that could be made by an Act of Parliament (including modifying this Act).* The width of this Henry VIII clause is evident in the discretion it bestows upon the relevant authority, for instance the reference to 'or any relevant agreement'.

by regulations make such provision as the Minister considers appropriate in consequence of this Act. A Minister exercising this power can *make regulations under subsection (1) may (among other things) be exercised by modifying any provision made by or under an enactment.* This is an extremely wide power. There is again use of the "appropriate" criterion and similar to S41 of the EUWAA 2020 this is worded as a 'catch-all' clause evident in the 'consequence of this Act' element of the power. The presence of these powers, therefore, means this Act possess various Henry VIII clauses, and therefore contains a factor of excessive executive dominance.

7.6.3 Scrutiny of Delegated Legislation

The delegated powers are subject to inadequate scrutiny. The Future Relationship Bill was laid before Parliament in late December 2020. The Bill stood at 80 pages and the Explanatory Notes ran to 77 pages, was published by the Government less than 24 hours before Parliament started to debate its contents. Once the Bill was laid before Parliament, the Commons Speaker confirmed that there would be no time to debate any amendments to the Bill.[968] Therefore, Parliament was left with two options, pass the Bill, or reject it with the consequence of a 'no-deal' outcome. This is because Parliament was considering a Bill (Future Relationship Bill) which would become the legislation responsible for implementing the Trade and Cooperation Agreement (TCA), with less than 48 hours before it was to be applied, this is so late, that the only alternative would be a no-deal scenario. With only two options available, Parliament passed the *European Union (Future Relationship) Act 2020***.**

The EUFRA 2020 includes the same sifting process as the EUWA 2018,[969] which in essence consists of the committees scrutinising the proposed negative instruments laid and make their recommendations. This has to be done within ten sitting days, beginning the day after the proposed negative instrument is laid. The powers are still

[968] See House of Commons debate of the European Union (Future Relationship) Bill. HC Deb 30 December 2020, 686.
[969] Parliament, 'Role - European Statutory Instruments Committee' <https://committees.parliament.uk/committee/393/european-statutory-instruments/role > accessed 3rd August 2021.

wide and subject to the existing limited scrutiny procedures. The recommendations of the sifting process are advisory only and do not bind the government. Ruth Fox stated that the sifting process represents absolutely no threat to ministers in terms of getting the regulations through Parliament. It simply bolts a 'toothless sieving process' on the front of already inadequate procedures.[970] Various of the delegated powers within this Act are subject to no procedure[971] or the negative procedure,[972] and similar to the EUWAA 2020 subject to the draft affirmative procedure only in particular circumstances, namely if the power amends primary legislation or is used within two years of the implementation period.[973] Between the wide delegated powers, the various Henry VIII clauses and the lacking scrutiny of such powers and clauses, the EUFRA 2020 therefore similar to the EUWA 2018 and EUWAA 2020 contains factors of excessive executive dominance.

7.6.4 Step Two: Constitutional Implications

The Future Relationship Act 2020 both hinders the efficient functioning of the constitution by undermining constitutional principles and prevents another branch of the state performing their constitutional role. Firstly, the undermining constitutional principles are in relation to the delegated powers the Act bestows upon the executive –S29, which has been referred to as an 'automatic Henry VIII clause' due to it requiring existing domestic law to be treated as subject to the Agreements to the extent that they have not been implemented. This creates concerns regarding both the clarity of the law and therefore legal certainty, establishing exactly what the law is.[974] The impact this section has upon legal certainty has implications for the rule of law,[975] as there is a requirement by this provision to proceed as if the domestic law has been amended by the Act, in instances where it has not been amended, but where amendments are needed for the agreement to be implemented. This is quite different

[970] Joel Blackwell, 'EU (Withdrawal) Act SIs: will sifting make a difference?' (Hansard Society 2018)
[971] Cabinet office, 'explanatory memorandum European Union (Future Relationship) Bill' <**https://publications.parliament.uk/pa/bills/cbill/58-01/0236/20201229_eufr_dpm.pdf** > accessed 3rd August 2021.
[972] Including s6(1), s6(3), s39, s40, European Union (Future Relationship) Act 2020.
[973] Including s21, s31, s32, s33, European Union (Future Relationship) Act 2020.
[974] See, Mark Elliott commentary.
<https://twitter.com/profmarkelliott/status/1344223779736707073?lang=en-gb>
[975] Principle 1 of Bingham's Rule of Law. (Tom Bingham, *The Rule of Law* (Penguin 2011) 37-48.

from having law which Lord Bingham stated should be intelligible, clear, and predictable.[976]

The Act prevents another branch of the state from performing their constitutional role, namely, the legislature's role in delivering proper scrutiny of the executive. This is evident above in the excessive executive dominance factors present within the EUFRA 2020, particularly the lacking scrutiny of delegated legislation.[977] The Government laying the Bill so late, effectively undermines the constitutional role of the legislature as they are not able to scrutinise the Bill. The executive's handling of the Act was described as 'an abdication of Parliament's constitutional responsibilities to deliver proper scrutiny of the executive and the law' and a 'farce'.[978] The extent of how far this undermines the constitutional role of the legislature is evident in the fact a single day of 'scrutiny' constituted the only formal scrutiny offered to Parliament, before the Bill became an Act and subsequently implemented a treaty that is 1,246-pages long,[979] which will govern in international law the UK's relationship with the EU. This process is a step backwards and hollows out the purpose of parliamentary scrutiny compared even with the two Acts discussed above, which in themselves were undermining of constitutional principles and preventative of Parliament's roles. Parliamentary accountability is undermined by this Act, which, as recognised in *Miller 2; Cherry* is a constitutional principle. It is undermined due to the lacking oversight and scrutiny afforded to Parliament as outlined above. In undermining the constitutional principle of Parliamentary accountability, the Act prevented Parliament from performing their constitutional role. The Act, therefore, satisfies the second step of the test and akin to the EUWA 2018 and EUWAA 2020, demonstrates excessive executive dominance.

7.7 Miller 2; Cherry

[976] Principle 1 of Bingham's Rule of Law. (Tom Bingham, *The Rule of Law* (Penguin 2011) 37-48.
[977] See chapter 7 (section 7.6.3).
[978] Brigid Fowler, 'Parliament's role in scrutinising the UK-EU Trade and Cooperation Agreement is a farce' (Hansard Society, 29th December 2020) <https://www.hansardsociety.org.uk/blog/parliaments-role-in-scrutinising-the-uk-eu-trade-and-cooperation-agreement> accessed 30th December 2020.
[979] Trade and Cooperation Agreement between the European Union and the European Atomic Energy community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part.

Apart from the increased use of wide delegated powers, Henry VIII clauses and the lacking scrutiny associated with both, Brexit has also resulted on more than one occasion in the judiciary being placed at the forefront of the constitution. In both *Miller* cases[980] the UKSC took centre stage, demonstrating that not only do we have a constitution, but we have a constitution and constitutional principles that the UKSC is willing to uphold.[981] This section will analyse the *Miller 2; Cherry* decision, which is a timely example of the UKSC's role in upholding constitutional principles to prevent excessive executive dominance. The decision can be analysed and explained considering excessive executive dominance. The case law analysis within this section demonstrates the UKSC applying the two-step test of this thesis to resolve the case. While the case does not concern one of the factors explored in chapter 2 and 3 on natural and excessive executive dominance, it does concern the power to prorogue, which as this section demonstrates can be regarded as a very specific factor of executive dominance. The use of the power to prorogue in this case was used in such a nuclear way that it prevented parliamentary oversight and scrutiny. The analysis will start by setting out the background of the case. Attention will then turn to explaining the case and the UKSC's decision by applying the two-step test for excessive executive dominance. This application provides an explanation as to why the UKSC declared the prorogation in *Miller 2 ; Cherry* unlawful. The UKSC places emphasis on the undermining of constitutional principles and preventing another branch of the state from performing their constitutional role within the judgment. Applying the test will not only illustrate the presence of the concept within this case but also the UKSC's upholding of constitutional principles to limit excessive executive dominance. This case is a judicial recognition, at the highest level, of the principles explored within this thesis.

7.7.1 Background

[980] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41.
[981] Professor Alison Young 'Brexit and the United Kingdom Constitution' (Centre for British Studies, Humboldt University Berlin 2017).

The case consists of two appeals, one from the High Court of England and Wales[982] and one from the Inner House of the Court of Session in Scotland.[983] Both the High Court and Court of Session cases are about whether the advice given by the Prime Minister to Her Majesty the Queen on 27th or 28th August, that Parliament should be prorogued from a date between 9th and 12th September until 14th October, was lawful and the legal consequences if it was not. The question arose in circumstances that have never arisen before and are unlikely to arise again. But which speak to broader principles that shape and frame the constitutional arrangements and safeguards within the UK. It is a "one-off".[984] Both cases raise the same four issues, although there is some overlap between the issues: (1) Is the question of whether the Prime Minister's advice to the Queen was lawful justiciable in a court of law? (2) If it is, by what standard is its lawfulness to be judged? (3) By that standard, was it lawful? (4) If it was not, what remedy should the court grant?[985] The High Court of England and Wales delivered judgment dismissing Mrs Miller's challenge of the prorogations lawfulness on the ground that the prorogation was not justiciable in a court of law.[986] The Inner House of the Court of Session in Scotland on the same day decided the case was justiciable due to the stymying of parliamentary scrutiny of the Government.[987]

Prorogation is defined by Parliament as the formal name given to the period between the end of a session of Parliament and the State Opening of Parliament for the next session.[988] Prorogation therefore marks the end of a parliamentary session. Prorogation is a formality carried out by the Queen on the advice of the Privy Council.[989] Prorogation generally brings parliamentary business (including most bills and all motions and parliamentary questions) to a close. Typically, Parliament is prorogued during late April or early May. This will typically occur annually. Parliament, however, can also be prorogued before it is 'dissolved' prior to a general election, this is so that parliamentary business is wrapped up and MPs can focus on the election

[982] *R (Miller) v Prime Minister* [2019] EWHC 2381 (QB).
[983] *Joanna Cherry QC MP and others v The Advocate General for Scotland* [2019] CSIH 49.
[984] Supreme Court, 'Press Summary: *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41' (Supreme Court, 24th September 2019).
[985] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [27]
[986] *R (Miller) v Prime Minister* [2019] EWHC 2381 (QB) [68].
[987] [2019] CSIH 49 [51].
[988] UK Parliament, 'Prorogation' <https://www.parliament.uk/about/how/occasions/prorogation/> accessed 9th October 2020.
[989] *Ibid.*

campaign.[990] The prorogation of Parliament in this instance was not a normal prorogation in the run-up to a Queen's Speech. It prevented Parliament from carrying out its constitutional role of holding the executive to account for five of the possible eight weeks between the end of the summer recess and exit day on 31st October. This was of particular importance because the UK and EU had not yet, at that time agreed an exit deal. Therefore, negotiations were ongoing and to remove Parliament's role from that process is problematic, considering it is the democratically elected organ of the state. While Parliament is prorogued, neither House can meet, debate, or pass legislation.[991] Nor may members ask written or oral questions of Ministers or meet and take evidence in committees. It is the Queen who announces a prorogation, on the advice of the Prime Minster. The monarch then prorogues Parliament. While under prorogation the Commons has no input and no ability to perform its constitutional role of parliamentary accountability, which is different to a recess. During prorogation, the committees within Parliament cease, meaning the committees that scrutinise what the executive does are halted. Legislation lapses unless carried over,[992] whereas if there is a recess, it does not. Prorogation also stops the House of Lords performing its scrutiny role through committees, which again, is unlike recess,[993] where the House of Lords committees can continue. In 40 years, Parliament has not been prorogued for more than 3 weeks, and typically only around a week. The length of this prorogation in this case (5 weeks) was of particular significance – due to the Brexit negotiations and the impact the prorogation would have upon said negotiations and more importantly Parliament's role in the process.[994]

7.7.2 Step One: Excessive Executive Dominance Factors

[990] Institute for Government, 'Proroguing Parliament' (Institute for Government, 2017) <https://www.instituteforgovernment.org.uk/explainers/proroguing-parliament> accessed 9th October 2020.
[991] *Ibid.*
[992] The Animal Welfare (Sentencing) Bill and the Domestic Abuse Bill (which are now both Acts) was not carried over and lapsed. They however were subsequently re introduced.
[993] Is a break during the year when a House of Parliament does not meet. Recess is technically a form of adjournment. In the Commons, MPs must vote to approve recess dates. While MPs and peers will not meet in the main chambers during recesses, other parliamentary business, such as select committee work and parliamentary questions, continue.
[994] Particularly when considering the need to secure Parliamentary approval for any new Withdrawal Agreement, as required by S 13 of the European Union (Withdrawal) Act 2018.

While this case does not concern any of the factors discussed in the previous chapter on excessive executive dominance,[995] the factors discussed within this chapter are not conclusive.[996] Other factors may also indicate the presence of excessive executive dominance within the British constitution. If this case contains such a factor, it is capable of being explained and analysed against the background of the concept of excessive executive dominance. The specific question that I will answer is whether prerogative powers to prorogue can be a factor of excessive executive dominance. These powers, when exercised within their legal boundaries, perform a necessary function within the constitution that is to bring a parliamentary session to an end in preparation for a Queens Speech and therefore can be considered a natural dominance factor, however, an extension of these powers could see them regarded as a factor of excessive executive dominance. I will show that *Miller 2; Cherry* and the UKSC's reasoning within the case can be analysed and explained against the background of the concept of excessive executive dominance, which I have developed within this thesis.

Firstly, before the unlimited power to prorogue Parliament can be considered as a factor of excessive executive dominance, it has to be established whether the power can be, or is, a factor of natural dominance. The UKSC states that 'it is undoubtedly lawful to prorogue Parliament'.[997] This fits with the notion of natural dominance, in that it is both lawful to do so and also necessary in order for the constitution to function. Without prorogation there would not be breaks between Parliamentary sessions.[998] Prorogation allows for the preparation of a Queen's Speech and subsequently the Government to outline its legislative priorities for the forthcoming session. The power to prorogue Parliament, therefore, serves a necessary function within the constitution. Now that the natural dominance factor element is made out, the question is whether the power to prorogue Parliament can be a factor of excessive executive dominance under specific circumstances. The ability for prerogative powers to be extended,

[995] See chapter 3 for more detail on said factors.
[996] The factors explored within these chapters were the substantive factors which fell within the parameters of this thesis.
[997] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [45].
[998] See, Parliament 'Prorogation' <https://www.Parliament .uk/about/living-heritage/evolutionofParliament /Parliament work/offices-and-ceremonies/overview/prorogation1/ > accessed 9th October 2020, for more detail see *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [2-6].

misused or to exceed that which is necessary is evident in the UKSC's warning that prerogative powers need to be exercised within their legal limits.[999] Although it has to be noted that it is not a requirement for excessive executive dominance factors to be unlawful, the point being made is that the UKSC is clearly warning against and identifying the ability for prerogative powers to be misused and or extended.

What is evident in the UKSC's judgment is the extension of the power to prorogue Parliament as a factor of natural executive dominance to a factor of excessive executive dominance. The court stated that an "unlimited" power to prorogue would be unlawful.[1000] The court's use of the term "unlimited" illustrates an extension of the factor from one of natural dominance to one of excessive executive dominance. An unlimited power to prorogue Parliament is therefore, for the purposes of step one of the two step test, to be regarded as an excessive executive dominance factor.
Therefore, the case contains an excessive executive dominance factor and step one is fulfilled due to the power's presence within this case. This, however, does not mean the case is one of excessive executive dominance that depends on whether step two of the test is satisfied. It is only if both steps are satisfied that excessive executive dominance exists.

7.7.3 Step Two: Constitutional Implications

In *Miller 2; Cherry*, the UKSC limited the executive prerogative power to prorogue Parliament. This was done to protect constitutional principles. In proroguing Parliament for an extended period, the executive used their prerogative power beyond that which was necessary for the constitution to function. When the executive is empowered beyond what is necessary to conduct its constitutional role, the ability of other constitutional organs to perform their constitutional roles can be diminished. This has been illustrated throughout this thesis. In considering step two of the test for the *Miller 2; Cherry* case, it is important to determine whether the extension of the natural dominance factor to prorogue Parliament to an unlimited power to prorogue hinders the efficient functioning of the constitution. This is by undermining constitutional

[999] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [35].
[1000] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [42] [44] [50].

principles and or preventing another branch of the state from performing their constitutional role. In the *Miller 2; Cherry* case, it is the legislature who is unable to perform their constitutional role as a result of the executive extending the natural dominance factor of proroguing Parliament to an unlimited power to prorogue. As has been illustrated throughout this thesis, when the executive is empowered beyond what is necessary to conduct its constitutional role, this can result in lacking accountability of the executive to the legislature. When the legislature is unable to hold the executive to account, a void is created that facilitates excessive executive dominance,[1001] and the UKSC has started to fill this void to provide the safeguard for constitutional principles. *Miller 2; Cherry* therefore illustrates that the UKSC is willing to protect constitutional principles, in this case parliamentary sovereignty and parliamentary accountability against executive power.

Like the first step of the test, the second can also be seen within the UKSC's judgment. The court affirmed that they are performing their proper function under the constitution to ensure that the executive does not use the power of prorogation unlawfully. The UKSC stated:

…the court will be performing its proper function under our constitution. Indeed, by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers.[1002]

In essence, the court is applying the second step of the excessive executive dominance test to the case. It is ensuring that the natural dominance factor of proroguing Parliament is not used unlawfully with the effect of hindering or undermining constitutional principles or preventing another branch of the state from performing their constitutional role.

The UKSC can be witnessed considering whether the excessive executive dominance factor of an unlimited power to prorogue Parliament will hinder the efficient functioning of the constitution. The UKSC in this case stated that the power to prorogue parliament is limited by the constitutional principles with which it would otherwise conflict.

[1001] See chapter 5 for further exploration of the failure of political constitutionalism.
[1002] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [34].

Therefore, for this thesis an unlimited power to prorogue or one that goes beyond which is necessary to perform its constitutional role is to be regarded as an excessive executive dominance factor. In line with the UKSC judgment, the prorogation in this case had the effect of undermining the constitutional principles of parliamentary sovereignty and parliamentary accountability and therefore hinder the proper functioning of the constitution. The second step of the test looks at whether the combination/extension hinders the efficient functioning of the constitution therefore the courts are determining whether the power in this case does have the consequence of undermining the constitution. The UKSC then goes on to state that:

> *For the purposes of the present case, therefore, the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.*

The application of the second step within the case is demonstrated in the judgment recognising that key constitutional principles are at play. The UKSC stated that two fundamental principles of the constitution are relevant to the case, firstly the sovereignty of Parliament[1003] and secondly Parliamentary accountability.[1004] Each principle will now be taken in turn, before considering whether either or both constitutional principles are undermined by the excessive executive dominance factor, the unlimited power to prorogue Parliament.

7.7.4 Parliamentary Sovereignty

The UKSC's judgment states that should there be an unlimited power to prorogue, which outlined in step one is an excessive executive dominance factor, the constitutional principle of Parliamentary sovereignty would be undermined.[1005] The

[1003] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [41].
[1004] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [46].
[1005] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [42].

court is willing to protect parliamentary sovereignty from threats posed by the use of the prerogative power. This is particularly evident in the following passage from the judgment:

> *Two fundamental principles of our constitutional law are relevant to the present case. The first is the principle of Parliamentary sovereignty: that laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply. However, the effect which the courts have given to Parliamentary sovereignty is not confined to recognising the status of the legislation enacted by the Crown in Parliament as our highest form of law. Time and again, in a series of cases since the 17th century, the courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers, and in doing so have demonstrated that prerogative powers are limited by the principle of Parliamentary sovereignty.*[1006]

The court here is explicitly recognising the relevance of Parliamentary sovereignty to this case. Noting that protection of the doctrine is not limited to the status of legislation, i.e., the supremacy of laws enacted by the Crown in Parliament, but also against the use of prerogative powers, which the power to prorogue Parliament is. The court's application of the second step of the test is clearer in its considering of the efficient functioning of the constitution and the undermining of constitutional principles, here the sovereignty of Parliament, by the prerogative power to prorogue Parliament:

> *The sovereignty of Parliament would, however, be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased. That, however, would be the position if there was no legal limit upon the power to prorogue Parliament... An unlimited power of prorogation would therefore be incompatible with the legal principle of Parliamentary sovereignty.*[1007]

[1006] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [41].
[1007] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [42].

The first and last sentence of this paragraph can be read as an example of the UKSC applying the second step of the test. The court is essentially outlining the unlimited power to prorogue (the extended factor set out in step one) as having the effect of undermining the constitutional principle of Parliamentary sovereignty. This case demonstrates the UKSC extending the principle of parliamentary sovereignty beyond the orthodox norm.[1008]The UKSC's novel approach in this case is the interpretation of parliamentary sovereignty which the judgment provides is not limited to the confides of laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply[1009] but that this principle produces implications which can also be thought of as the parliamentary sovereignty. The court on this basis articulated parliamentary accountability as a distinct and equally fundamental constitutional principle.[1010] An extension which also works with what was argued in Chapter 4 concerning parliamentary sovereignty. Namely, that parliamentary sovereignty is rooted in constitutional facts and these facts can change, resulting in a modified version of parliamentary sovereignty. While the UKSC has not adopted my modified version of parliamentary sovereignty, it has in this case departed from the orthodox definition. It does so in order to limit excessive executive dominance.

7.7.5 Parliamentary Accountability

The relevance of Parliamentary accountability is made out not only by the UKSC, but also the Court of Session, who stated that the prorogation was motivated by the improper purpose of stymying Parliamentary scrutiny of the executive.[1011] The UKSC was quite clear in establishing what the second constitutional principle was in this case:

[1008] With scholarship supporting this claim, See Mark Elliott, 'A new approach to constitutional adjudication? Miller II in the Supreme Court' (Public Law for Everyone, September 24th 2019).

[1009] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [41].

[1010] Mark Elliott, 'A new approach to constitutional adjudication? Miller II in the Supreme Court' (Public Law for Everyone, September 24th 2019) <https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new-approach-to-constitutional-adjudication/> accessed 25th September 2019.

[1011] *Joanna Cherry QC MP and others v The Advocate General for Scotland* [2019] CSIH 49 [1].

> *[T]hat of Parliamentary accountability, described by Lord Carnwath in his judgment in the first Miller*[1012] *case as no less fundamental to our constitution than Parliamentary sovereignty… As Lord Bingham of Cornhill said in the case of Bobb v Manning*[1013] *"the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy".*[1014]

The explanation of the case against the background of excessive executive dominance can be demonstrated in the UKSC consideration of Parliamentary accountability as a constitutional principle to be upheld, this is of particular interest for the second step of the two-step test to determine excessive executive dominance. The UKSC stated that:

> *The principle of Parliamentary accountability has been invoked time and again throughout the development of our constitutional and administrative law, as a justification for judicial restraint as part of a constitutional separation of powers.*[1015]

This illustrates the use of this constitutional principle as a means for the judiciary to not intervene in certain matters, as they should be resolved not by judicial intervention but political constitutionalism. However, the UKSC recognises that the principle is fundamental to the constitution[1016] and that the longer that Parliament is prorogued for, the greater the risk that responsible government may be replaced by unaccountable government.[1017] The prorogation of Parliament stymies parliamentary scrutiny, therefore prevents the functioning of political constitutionalism, leaving judicial intervention as the means of *ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions.*[1018] The court is trying to return to a position where political

[1012] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61 [249].
[1013] [2006] UKPC 22 [13].
[1014] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [46].
[1015] see, for example, *R v Secretary of State for the Environment, Ex p Nottinghamshire County Council* [1986] AC 240, 250, and as an explanation for non-justiciability *Mohammed (Serdar) v Ministry of Defence* [2017] UKSC 1 [2017] AC 649 [57].
[1016] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [46].
[1017] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [48].
[1018] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [34].

constitutionalism takes effect. It is not 'claiming ground' but making existing structures work. It can therefore be determined that the UKSC in its deciding of *Miller 2; Cherry* is protecting the constitutional principles of parliamentary sovereignty and parliamentary accountability. This is in order to prevent them being undermined by the unlimited power to prorogue. A notion that is well explained by the two-step test for establishing excessive executive dominance.

7.7.6 Undermining of Constitutional Principles

It has clearly been demonstrated within the UKSC's judgment of *Miller 2; Cherry* that constitutional principles are at play, namely parliamentary sovereignty, and parliamentary accountability. It has to now be established whether the combination and or extension of the excessive executive dominance factor(s) hinder the efficient functioning of the constitution by undermining constitutional principles or preventing another branch of the state from performing their constitutional role.

One of the consequences of excessive executive dominance (as explored in chapter 5) is that the courts should read down ouster and Henry VIII clauses. This reading down protects constitutional principles from being undermined by excessive executive dominance. It is, therefore, akin to the principle of legality[1019] - a principle of statutory interpretation requiring the clearest of language for basic common-law principle to be ousted. In essence, should Parliament wish to infringe a common law principle, it must do so through express and unequivocal language.[1020] There exists various examples from the case law where the judiciary has stated the language was not sufficiently clear and thus read down provisions to protect constitutional principles.[1021]

The UKSC referred to the principle of legality by analogy in its judgment in Miller 2. They stated that:

[1019] For further exploration of this point see chapter 5 on the consequences of excessive executive dominance. Also, scholarship including Jason NE Varuhas, 'The Principle of Legality' (2020) 3 CLJ 578. Philip Sales, 'Rights and Fundamental Rights in English Law' (2016) 75 CLJ 86. Philip Sales, 'Legislative Intention, Interpretation, and the Principle of Legality' (2019) 40 SLR 53. Jeffery Goldsworthy, 'The Principle of Legality and Legislative Intention' in D. Meagher and M. Groves (eds.), *The Principle of Legality in Australia and New Zealand* (Sydney 2017).
[1020] Jason NE Varuhas, 'The Principle of Legality' (2020) 3 CLJ 578.
[1021] See *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409. *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39. *R (Evans) v Attorney General* [2015] UKSC 21 [2015] AC 1787.

> *In answering that question [the legal limit upon the power to prorogue], it is of some assistance to consider how the courts have dealt with situations where the exercise of a power conferred by statute, rather than one arising under the prerogative, was liable to affect the operation of a constitutional principle. The approach which they have adopted has concentrated on the effect of the exercise of the power upon the operation of the relevant constitutional principle. Unless the terms of the statute indicate a contrary intention, the courts have set a limit to the lawful exercise of the power by holding that the extent to which the measure impedes or frustrates the operation of the relevant principle must have a reasonable justification. That approach can be seen, for example, in R (UNISON) v Lord Chancellor*[1022]*... A prerogative power is, of course, different from a statutory power: since it is not derived from statute, its limitations cannot be derived from a process of statutory interpretation. However, a prerogative power is only effective to the extent that it is recognised by the common law: as was said in the Case of Proclamations, "the King hath no prerogative, but that which the law of the land allows him". A prerogative power is therefore limited by statute and the common law, including, in the present context, the constitutional principles with which it would otherwise conflict.* [1023]

The link to the principle of legality within the *Miller 2; Cherry* decision can be seen in the UKSC's reading down of a broad prerogative power, here, the seemingly unlimited power to prorogue Parliament in order to protect the constitutional principles of parliamentary sovereignty and parliamentary accountability. This is similar to the way in which courts use the principle of legality to read down broad statutory provisions to protect fundamental rights.[1024] The approach by the UKSC here is akin to the principle of legality, rather than the application of the principle, evident in the UKSC recognising that the principle of legality does not apply to prerogative powers: "*A prerogative power is, of course, different from a statutory power: since it is not derived from statute, its limitations cannot be derived from a process of statutory interpretation."* However, the

[1022] [2017] UKSC 51 [2017] 3 WLR 409, [80-82] [88-89].
[1023] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [49].
[1024] Alison Young, 'Prorogation, Politics and the Principle of Legality' (UKCLA, 13th September 2019) <https://ukconstitutionallaw.org/2019/09/13/alison-young-prorogation-politics-and-the-principle-of-legality/> accessed 14th September 2019.

UKSC in formulating its approach to determining the legality of prorogation, explicitly drew on *Unison* for inspiration. It is evident from the citation above, that the approach taken by the UKSC, looks at how the courts have approached the review of statutory powers where constitutional principles were affected for assistance in how to approach situations where it is the prerogative power impacting constitutional principles.

This link with the principle of legality and the approach taken by the UKSC is of importance for explaining the *Miller 2; Cherry* decision with reference to excessive executive dominance and the two-step test which considers the concept. This is because it is evident that the UKSC is not only clearly considering the impact of the prerogative power upon constitutional principles but are prepared to deal with the prerogative power as they would deal with a wide statutory power. Namely to read the power down in order to protect constitutional principles. In this instance, the UKSC are limiting the prerogative power to the same effect as reading it down, the UKSC was right to do so, due to the presence of EED, as demonstrated in chapter 5 on the consequences of excessive executive dominance. It is evident from this judgment, that the same is true for the wide prerogative powers, only the court limit the power instead. This limiting is visible within the judgment, as outlined above, where the UKSC held that:

> *[T]he courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers, and in doing so have demonstrated that prerogative powers are limited by the principle of Parliamentary sovereignty*[1025]*…. The sovereignty of Parliament would, however, be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased…An unlimited power of prorogation would therefore be incompatible with the legal principle of Parliamentary sovereignty.*[1026]

The approach in this case by the UKSC can clearly be explained with reference to excessive executive dominance and the two-step test. The UKSC is determining

[1025] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [41].
[1026] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 [42].

whether the prorogation has undermined constitutional principles. The first sentence of the above paragraph is the epitome of step 2 of the test to determine excessive executive dominance i.e., it is unlawful if it prevents another branch from performing their constitutional role. The UKSC went on to explicitly state that the prorogation did have the effect of hindering the efficient functioning of the constitution. They stated that:

> *The answer [whether the Prime Minister's action had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account] is that of course it did. This was not a normal prorogation in the run-up to a Queen's Speech. It prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer recess and exit day on the 31st October. Even if they had agreed to go into recess for the usual three-week period, they would still have been able to perform their function of holding the government to account. Prorogation means that they cannot do that.*

It has been clearly demonstrated through the above extracts from the judgment that the UKSC can be seen applying an approach, capable of being explained by the second step of the two-step test to determine the presence of excessive executive dominance. The UKSC can be seen determining whether the unlimited power to prorogue hinders the proper functioning of the constitution. This case is therefore an example of judges performing their constitutional role, remedying what they saw as excessive executive dominance.

7.8 Conclusion

This chapter has illustrated the existence of excessive executive dominance within the British constitution via a case study of aspects of the Brexit process. In illustrating the existence of the concept within this process, the case study has firstly applied the two-step test used to determine excessive executive dominance to various Brexit statutes. Secondly the chapter has used the same two-step test to explain the UKSC judgment in *Miller 2 ; Cherry*.

In applying the two-step test, the case study has illustrated that excessive executive dominance is present within the Brexit process. The case study establishes the presence of the concept within the European Union (Withdrawal) Act 2018, the European Union (Withdrawal Agreement) Act 2020 and the European Union (Future Relationship) Act 2020. In applying the two-step test to each of these statutes individually, the case study has demonstrated that each statute not only contains factors of excessive executive dominance, including wide delegated powers and Henry VIII clauses but also that these factors undermine constitutional principles and hinder the efficient functioning of the constitution. In addition to establishing the presence of excessive executive dominance within the UK's legislative approach to Brexit, the case study has also offered an alternative explanation to the UKSC's controversial judgment in *Miller 2; Cherry.* The case study has analysed and explained the decision considering this thesis's novel concept of excessive executive dominance, establishing that the UKSC decided the case in order to uphold its role in protecting constitutional principles in order to prevent excessive executive dominance.

This case study like the chapter on Coronavirus, pulls together various chapters of the thesis and applies them to a contemporary context to illustrate the existence of excessive executive dominance within the British constitution. Not only does the chapter demonstrate the existence of excessive executive dominance within the British constitution but also illustrates the failure of political constitutionalism, illustrating the concerns this thesis is highlighting.

Chapter 8: Conclusion

This thesis has demonstrated that within the British constitution currently, there exists executive dominance. The executive therefore has the ability to possess control over or impede the other branches of the constitution. It has been the core argument of this thesis to not only acknowledge the existence of executive dominance within the British constitution, distinguishing between executive dominance which is acceptable (natural dominance) and that which is not (excessive executive dominance), but also exemplify the constitutional consequences of excessive executive dominance. The thesis considered the constitutional significance of the concept's existence within the British constitution. That is, because the thesis identified excessive executive dominance as a contemporary problem within the British constitution. The significance of the thesis is therefore its response to recognising excessive executive dominance as a contemporary constitutional problem. The thesis has examined the concepts constitutional impact accounting for the changing of constitutional facts and the push from political to legal constitutionalism. The thesis is not a defence of legal constitutionalism, instead, it recognises the failure of alternative perspectives to account for the role of excessive executive dominance within the contemporary constitutional landscape. In accounting for executive dominance within the contemporary constitutional landscape, the thesis therefore recognises the push from political to legal constitutionalism as a consequence of the existence of excessive executive dominance. The thesis utilises judicial treatment of excessive executive dominance to demonstrate the constitutional implications and in particular the impact of the concept upon the constitutional principle of parliamentary sovereignty. This thesis therefore goes beyond any exploration of executive dominance currently available.

The thesis's exploration of executive dominance and the concept's consequences within the British constitution, has shone a light on various contemporary constitutional issues. Although there exists a significant amount of academic scholarship concerning the British constitution, the concept of executive dominance, has received very little attention. The need for literature in this area has never been more pressing – both Brexit and the Coronavirus pandemic have brought into sharp focus the significance of executive dominance. The literature that does exist with regards to executive

dominance is either outdated or does not consider the constitutional consequences of the concept, and especially the impact upon constitutional principles. The existing literature surrounding executive dominance does not consider what amounts to executive dominance, nor does the literature distinguish between what is acceptable and what is not in terms of executive dominance. This lacking exploration of the concept means not only does there exist a significant gap within the current literature, but there is also no yardstick for measuring or evaluating executive dominance. Therefore, a lack of correlation between the concept of executive dominance and other contemporary constitutional issues exists. This thesis and its conclusions consequently connect with a broader set of contemporary trends and tensions that animate the study of the UK constitution. Namely, accountability, executive power, separation of powers, the modifying of orthodox parliamentary sovereignty, the changing of constitutional facts and the push from political to legal constitutionalism.

In demonstrating the existence of executive dominance within the British constitution, the exploration within this thesis has gone beyond simply defining the concept. Since the thesis highlighted a lack of distinction between executive dominance which is and is not acceptable in existing scholarship, this thesis offers not only such a distinction but establishes what amounts to both types of executive dominance. In distinguishing between executive dominance which is and is not acceptable, the thesis introduced two novel concepts of executive dominance. The first being natural dominance which the thesis demonstrated is both a necessary and acceptable level of executive dominance and the second being excessive executive dominance an unnecessary and unacceptable level of dominance.

Natural dominance is defined by the thesis as the natural ability for the executive to control or impede another branch, resulting from powers they possess. These powers are naturally possessed as they are a consequence of the constitutional landscape and therefore justifiable and or necessary in order for the UK's constitution to work. In providing the novel concept of natural dominance the thesis appreciates the broader constitutional landscape. In particular the influence of the UK's non-standard separation of powers doctrine in respect of executive dominance and the enhancement from natural to excessive executive dominance. The thesis subsequently outlines various factors which are said to amount to natural dominance

including the fusion of powers – compromising of the non-standard separation of powers doctrine and the executive's numerical advantage, delegated legislation, and the scrutiny of delegated legislation. Through these factors, the thesis acknowledged the need and reason for a powerful executive within certain aspects of the UK constitution. The exploration of these various factors appreciates the actual working of the constitution, rather than simply identifying a gap in the current literature. This appreciation is evident in the thesis demonstrating that a level of natural dominance is necessary when considering the constitutional make-up of the UK. The thesis has demonstrated through its exploration of executive dominance generally and then specifically the various factors that amount to natural dominance, that there is a need for a certain level of executive dominance in order for the executive to carry out its constitutional role. That is to formulate and implement policy. The factors contributing to natural dominance assist the executive in performing this role as they enable the constitutional cogs of the UK to turn. Take the fusion of powers between the executive and legislature, the fusion prevents deadlock, enabling the executive to implement policy and honour the mandate[1027] it was elected upon. These factors are either consequential or necessary due to the UK's constitutional landscape. The presence of these factors within the UK therefore are not taken issue with nor is issue taken with the concept of natural dominance.

The second novel concept introduced by the thesis is excessive executive dominance. This is identified as the level of executive dominance that is not acceptable or necessary for the constitution to function properly. Excessive executive dominance is executive dominance that is more than is necessary. This original conception is defined as a position of dominance the executive is placed in by a combination and, importantly, 'extension' of various factors within the UK constitutional landscape. This combination and extension disproportionately enhance the executive's position and power.

Whilst the thesis recognises natural dominance as necessary within the contemporary constitutional landscape and is linked with the constitutional principle of separation of

[1027] In essence the fusion of powers between the two organs allows for the executive to honour the mandate for which the electorate elected it.

powers, excessive executive dominance's exploration focuses upon the constitutional implications of the concept. This thesis therefore considered the impact of excessive dominance upon constitutional principles and the judicial response to such dominance. The thesis recognises the concept of excessive executive dominance as a current constitutional problem. The core of this thesis's argument is to illustrate the constitutional impact of this novel concept. The thesis and the conclusions stemming from the exploration of excessive executive dominance connect with various contemporary trends and tensions that exist and are highlighted by the current scholarship surrounding the UK constitution. This connection is particularly evident in both the factors which may amount to excessive executive dominance – wide delegated powers, Henry VIII Clauses and inadequate parliamentary scrutiny of delegated legislation and the constitutional consequences of the existence of excessive executive dominance. These factors fit with the broader trends in current public law scholarship, in particular they connect with accountability, executive power, and separation of powers.

In determining the presence of excessive executive dominance within the constitution, the thesis provided a two-step test. The two-step test is another novel contribution of the thesis, to the literature. The two-step test assisted with the distinction this thesis draws between natural and excessive executive dominance. The test acknowledges the constitutional significance of my thesis and its findings – it brings together and into sharp focus several contemporary constitutional issues including accountability and executive power shining a light on the constitutional impact of executive dominance. In making the distinction between the two concepts, acknowledges that a key difference exists between natural and excessive executive dominance, with the latter having constitutional implications.

The first step of the test concerns the existence of the factors (wide delegated powers, Henry VIII clauses and inadequate parliamentary scrutiny of delegated legislation) the thesis outlined as contributing to executive dominance. These factors are an extension of the natural dominance factors that are consequential and necessary for the functioning of the constitution. For the first step to be fulfilled it is simply required there exists excessive executive dominance factors. This was exemplified by the exploration of the executive's approach to Brexit and the Covid-19 pandemic. In both instances,

the first step was fulfilled due to the presence of wide delegated powers and Henry VIII clauses. The factors explored within this thesis were not conclusive. This was witnessed in the *Miller 2; Cherry* case analysis where it was established an unlimited power to prorogue could also be demonstrated via the novel conceptual framework of this thesis as an excessive executive dominance factor, fulfilling this step of the test. This further significance of this thesis as a response to a current constitutional problem, it also demonstrates the ability for the application of this thesis's novel two-step test to be applied to developing constitutional matters.

The second step of the test demonstrates the consequence of excessive executive dominance it concerns the combination and or extension of the factors that satisfy step one of the test, hindering the efficient functioning of the constitution by undermining constitutional principles or preventing another branch of the state performing their constitutional role. The constitutional principles this thesis established were undermined by excessive executive dominance were parliamentary sovereignty, the rule of law and parliamentary accountability. The application and satisfying of this second step subsequently highlights the constitutional significance of this thesis's concept and evidences this thesis identifying and responding to a current constitutional problem – excessive executive dominance. The two-step test has been applied to explain case law surrounding Henry VIII clauses, ouster clauses and judicial review through the lens of the novel concept excessive executive dominance. The application explains the constitutional shift in judicial attitudes and the diminishing deference of the executive. This has been demonstrated at various points throughout the thesis. For instance, in the Brexit case study, it was demonstrated how the existence of wide delegated powers, Henry VIII clauses and inadequate parliamentary scrutiny of said delegated powers (all factors fulfilling the first step of the test) resulted in the legislature unable to perform their constitutional role of holding the executive to account. Therefore, satisfying both steps of the test.

In recognising excessive executive dominance as a current constitutional problem, this thesis goes beyond any consideration of the current literature. The exploration of the various factors that amount to both natural and excessive executive dominance targets the gap in the current literature surrounding the lack of consideration of what amounts or contributes to executive dominance. This thesis demonstrated when

natural dominance turns to excessive executive dominance, as the current literature does not account for excessive executive dominance, there is no clarity or legal yardstick offered as to what might constitute “excessive dominance”. Accordingly, this thesis’s distinction between natural and excessive executive dominance is well placed in considering current constitutional issues, drawing links between excessive executive dominance and accountability, executive power and judicial deference. In addition to not distinguishing between levels of executive dominance, the current literature does not account for the constitutional impact of or respond to the constitutional problem of executive dominance. Therefore, it does not address the undermining of constitutional principles stemming from excessive executive dominance, nor the judicial treatment or modifying of parliamentary sovereignty as a consequence of the concept. Consequently, there is little linking within existing literature of executive dominance with the diminishing of the constitution’s fundamental principles. Instead of focusing on the impact upon constitutional principles, existing literature merely acknowledges executive dominance as described by Hailsham as an “elective dictatorship”. This dominance is centred around party discipline, the government’s majority and its control over the legislative programme. Amongst this acceptance, there exists a failure to recognise the dangers of natural dominance becoming excessive and therefore the existing literature unlike this thesis and its conclusions does not connect executive dominance with the broader contemporary context of the British constitution. This thesis provides links between excessive executive dominance and tensions that exist within the contemporary study of the British constitution, including lacking accountability, undermining of constitutional principles namely the rule of law, parliamentary sovereignty and parliamentary accountability and the pivotal role of the non-standard separation of powers doctrine. It is clear when considering the constitutional implications that stem from the existence of excessive executive dominance the need for the exploration this thesis provides.

The second part of the thesis concentrated on demonstrating the impact excessive executive dominance has upon the UK constitution. The three key themes explored in the second part of the thesis were the failure of political constitutionalism, the undermining of constitutional principles and the modifying of the orthodox parliamentary sovereignty doctrine by the judiciary. The consequences of the novel

concept were made out predominantly via case law analysis and two case studies, one concerning the Coronavirus Pandemic and another concerning Brexit.

In demonstrating the failure of political constitutionalism, the thesis focused on evidencing the consequential push towards legal constitutionalism within the British constitution because of this failure. That failure creates a gap and prevents proper accountability. A point that was illustrated relying upon the judgment of Lord Mustill in the *Fire Brigades Union*[1028] case, which acknowledge not only the failure of political constitutionalism and the gap in accountability but also that consequently the courts now have a pivotal role in securing accountable government, protecting constitutional principles and fundamental rights. This pivotal role of the courts is what this thesis illustrated to be the push towards legal constitutionalism.

The thesis exemplified the consequential push to legal constitutionalism in the case law analysis, the analysis exhibited the courts taking steps utilising legal constitutional tools such as the principle of legality to address the failure of political constitutionalism. The case law analysis demonstrated the failure of political constitutionalism and the judiciary's expanding role. The judiciary are gradually and progressively filling the void created by the failure of political constitutionalism and securing accountable government. The cases in this section can therefore be explained via the existence of excessive executive dominance, the subsequent failure of political constitutionalism stemming from the concept and the courts' use of legal constitutionalism to fill the void created by excessive executive dominance. The push towards legal constitutionalism was particularly evidenced in the thesis's exploration of the cases *Evans*[1029] and *UNISON.*[1030] Often the court does this to restore (rather than supplant) political constitutionalism through the mechanism of law. Both the failure of political constitutionalism and the push to legal constitutionalism was illustrated through case law analysis, the focus primarily rested upon explaining the case law considering the novel concept excessive executive dominance. The case law analysis revealed that due to the presence of excessive executive dominance there exists a failure of political constitutionalism.

[1028] *R v Secretary of State for Home Department, ex p Fire Brigades Union* [1995] 2 AC 513.
[1029] *R (Evans) v Attorney General* [2015] UKSC 21.
[1030] *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

The lacking appreciation of the judicial response to executive dominance highlighted by this thesis does not simply collapse into another defence of legal constitutionalism. Despite a link being drawn between excessive executive dominance, changing constitutional facts and the push from political to legal constitutionalism, this thesis accepts the latter as a consequence of excessive executive dominance rather than a defence of legal constitutionalism. The courts recognition of the constitutional implications and their push to legal constitutionalism to fill the void is evidenced in the exploration of case law, focusing particularly on cases surrounding judicial review, Henry VIII, and ouster clauses. Through analysis of Henry VIII and ouster clause case law the thesis evidenced the judiciary (i) using the principle of legality to protect constitutional principles and (ii) limiting the powers of the executive through said principle, by applying a restrictive approach towards Henry VIII and ouster clauses. The cases are not unique, an array of cases exists which demonstrate the judiciary is more interested in protecting constitutional principles than giving effect to the presumed parliamentary intention. The protecting of constitutional principles is according to this thesis owing to excessive executive dominance's impact upon constitutional principles.

The approach of the court in these cases cannot be explained by standard statutory interpretation or adherence to the orthodox principle of parliamentary sovereignty. The judiciary's departure from the orthodox doctrine is evident in the case law analysis. Take the judicial treatment in *Anisminic*[1031] and *Privacy International,*[1032] where the judiciary read down the ouster clauses despite the wording and thus intention being clear. Such an approach cannot be reconciled with orthodox parliamentary sovereignty. The cases can however be explained via the existence and consequences[1033] of excessive executive dominance. The focus of the case law analysis was therefore on establishing the presence of excessive executive dominance. The cases were subject to the two-step test to determine the presence of excessive executive dominance. The principles explored through this analysis

[1031] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
[1032] *R (Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22.
[1033] Failure of political constitutionalism and the subsequent push to legal constitutionalism.

provided an original and alternative explanation for various cases via the prism of excessive executive dominance. Once the presence of excessive executive dominance was established, the case law analysis substantiated how the cases could not be explained by reference to standard statutory interpretation or the orthodox doctrine of parliamentary sovereignty. The alternative explanation for the case law utilising the concept of excessive executive dominance, also demonstrated the judiciary modifying the doctrine of parliamentary sovereignty.

The case law analysis throughout the second section demonstrated the emergence of a modified understanding of parliamentary sovereignty. The judiciary can be seen applying a modified version to tackle the cases concerning excessive executive dominance. Excessive executive dominance is in no way consistent with orthodox parliamentary sovereignty. The increase in excessive executive dominance is a potential disturbance and therefore cause of a modified version of parliamentary sovereignty. This modified version of parliamentary sovereignty is owing to a change in constitutional fact, resulting from excessive executive dominance, the growth and facilitation of excessive executive dominance has reduced the effectiveness of political constraints on executive power. The thesis illustrated that this permitted the judiciary to apply a non-orthodox reading of the principle. That is because as the thesis evidenced, the orthodox principle is one based on constitutional facts. The facts have the potential to shift over time due to changing constitutional landscapes or via events that disturb the constitutional landscape and or political reality. The thesis demonstrated via the various cases featured in this thesis from *Fire Brigades Union*[1034] case through to *Miller 2*,[1035] the legislature cannot uphold constitutional standards as it once could, due to the growth of executive dominance. The changing of constitutional facts has seen a push away from the orthodox doctrine. This modified doctrine is therefore demonstrated as reflective of the changing constitutional landscape, particularly the influence of executive dominance and the consequential push from political to legal constitutionalism. The presence of and adherence to orthodox parliamentary sovereignty, has been increasingly questioned. Orthodox

[1034] *R v Secretary of State for the Home Department, Ex Parte Fire Brigades Union* [1995] UKHL 3.
[1035] *R (Miller) (Appellant) v The Prime Minister* (Respondent) *Cherry and others (Respondents) v Advocate General for Scotland* (Appellant) (Scotland) [2019] UKSC 41.

parliamentary sovereignty is presented by the thesis as appearing out of touch in the new political landscape that is developing.

The modifying of the doctrine has been done with an emphasis placed upon the combating of excessive executive dominance. The thesis revealed that due to the judiciary filling of the void created by excessive executive dominance, there has been a shift from political to legal constitutionalism, a shift that this thesis used to evidence (i) a change in constitutional facts and (ii) the judiciary is – in tackling excessive executive dominance – applying a modified version of parliamentary sovereignty (iii) the modified version of parliamentary sovereignty however is justified via the changing of constitutional facts resulting from excessive executive dominance. The thesis is not pushing for legal constitutionalism alike much of the other literature but demonstrating the consequences of excessive executive dominance. One of which is a push from political constitutionalism to legal constitutionalism due to a void in the former and its ability to secure executive accountability. Political constitutionalism reforms could also tackle this, however until such reforms are made the filling of the void in political constitutionalism is filled by legal constitutionalism. The judicial treatment of Henry VIII and ouster clauses especially demonstrated the modified version of parliamentary sovereignty. The former is used to demonstrate the narrow and strict construction, by where any doubts about the scope of the Henry VIII clauses should be resolved by a restrictive approach, as seen in the analysis of the *Public Law Project*[1036] case. This not only illustrated the modifying of parliamentary sovereignty but also the judicial treatment of executive power. Since the executive is empowered by Henry VIII clauses, the courts reading down of such clauses certainly exemplifies the judiciary limiting executive power.

The courts' willingness to modify the doctrine of parliamentary sovereignty, in face of excessive executive dominance, is most recently evident in *Miller 2 ; Cherry*.[1037] The case is illustrative of the various points made within this thesis. The UKSC applied an extended version of parliamentary sovereignty specifically to limit executive dominance. The judiciary's approach to excessive executive dominance, and their use

[1036] *R (The Public Law Project) v Lord Chancellor* [2016] UKSC 39 [21].
[1037] *R (Miller) (Appellant) v The Prime Minister* (Respondent) *Cherry and others (Respondents) v Advocate General for Scotland* (Appellant) (Scotland) [2019] UKSC 41.

of tools of legal constitutionalism is therefore understandable via the application of a modified version of parliamentary sovereignty. In applying the two-step test, the presence of excessive executive dominance within this case was illustrated whilst also demonstrating the UKSC's upholding of constitutional principles to limit excessive executive dominance. This case was a judicial recognition, at the highest level, of the themes explored within this thesis, namely it confirmed the thesis in illustrating the judiciary upholding constitutional principles in face of excessive executive dominance. The case is a validation and affirmation of the research presented in this thesis. The decision gives a true insight to the UKSC's approach to the orthodox doctrine of parliamentary sovereignty, and it has paved the way for the courts to uphold and protect the constitutional principles against an overpowering executive. The case solidifies the link drawn within this thesis between the existence of the concept 'excessive executive dominance', it illustrated the failure of political constitutionalism and the subsequent legitimising of a heightened level of scrutiny from the judiciary, in essence evidencing the push to legal constitutionalism, with the consequence being a modified version of parliamentary sovereignty.

In addition to the case law analysis, the thesis further illustrates the presence of its novel concept excessive executive dominance within the British constitution, via case studies on both Coronavirus and Brexit. Both case studies pulled together various themes of the thesis, especially in the application of the two-step test within both studies. The Coronavirus case study did more than illustrate excessive executive dominance within the British constitution it exemplified how excessive executive dominance could have been avoided in the pandemic response. The analysis of 'the approach that could have been taken' namely the CCA2004, demonstrated how excessive executive dominance factors can be present within the constitution, without resulting in excessive executive dominance. The Coronavirus case study therefore enabled the thesis to illuminate the distinction between this thesis's novel conceptions of natural and excessive executive dominance. The case study was more than a comparison between the two approaches to the coronavirus pandemic. This case study pulled together various chapters of the thesis and applied them to a contemporary example to illustrate the existence of excessive executive dominance within the British constitution. The Brexit case study on the other hand made no such comparison. Instead, it illustrated the existence of excessive executive dominance by

applying the two-step test to various Brexit statutes including the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020. The application of the two-step test to these various statutes highlighted the presence of various excessive executive dominance factors (fulfilling step one of the test), it then, demonstrated the constitutional implications of these factors. Including the undermining of constitutional principles and hindering the functioning of the constitution (satisfying step two of the test). Both case studies witnessed from the application of the two-step test, that the novel concept of excessive executive dominance exists within the British constitution, however the Coronavirus case study went further than that and demonstrated how the concept could have clearly been avoided.

Although the case law analysis illustrates both the void in political constitutionalism and the judicial modifying of orthodox parliamentary sovereignty, this thesis does not simply collapse into another defence of legal constitutionalism, just as it does not position the rule of law as the cornerstone of the constitution. Instead, it illustrates the consequences of excessive executive dominance, namely, that there exists at least a lack of confidence in elements of political constitutionalism alongside political constitutionalism's lack of command in the face of a dominant executive. The reality is that the executive dominates the legislature, a position evident in numerous select committee reports, which highlight the defects in both the legislative process and accountability of the executive. These defects have resulted in advancement in judicial control. Consequently, there is a push from political to legal constitutionalism. The judiciary and in turn legal constitutionalism offers a counterbalance to the failing of accountability of the executive via the political sphere. Legal constitutionalism therefore is attempting to fill the void that political constitutionalism's shortfalls have created. Excessive executive dominance, consequently, justifies the growing influence of legal constitutionalism within the British constitution.

There is scope for constitutional reform as an alternative or complementary means to address the challenges of excessive executive dominance. In order for political constitutionalism to combat excessive executive dominance, reform is needed as although political constitutionalists argue that Parliament can exert real control over legislation and the executive, the reality is not so clear-cut. As demonstrated through

the case law analysis there is a void in political constitutionalism and the legislature cannot uphold constitutional standards as it once could, due to the growth of executive dominance. There are various reforms available to strengthen the influence of political constitutionalism in the face of excessive executive dominance, including but not limited to tackling the fusion of powers and UK's non-standard separation of powers, the first past the post voting system and increasing parliamentary accountability and scrutiny.

Taking the fusion of powers first, there are vast overlaps between the executive and legislature stemming from the UK's non-standard separation of powers doctrine. These overlaps allow the executive control over the legislature, the thesis has illustrated they can reduce accountability of the executive, reduce scrutiny, and undermine constitutional principles. Strengthening the separation of powers between the executive and legislature would arguably increase the accountability of the executive by the legislature. It would also reduce controls the executive has over the legislature and the legislative process. Previous attempts have been made to strengthen the separation of powers doctrine within the British constitution, however, they targeted the judiciary rather than the vast overlaps between the executive and legislature.[1038] The fusion of powers between the executive and legislature is not helped by the existence of the first past the post voting system in the UK. Reforming the first past the post voting system would also alleviate the influence of the executive over the legislature and strengthen political constitutionalism. The numerical advantage that the executive enjoys within the Commons is owing to the UK's electoral system. The system has the ability to return a strong majority – particularly while the UK operates on a two-party system. The voting system enables a strong majority, and this produces the numerical advantage which helps the government of the day pass their legislation. A proportional voting system would likely reduce the executive's influence over the legislature. Political constitutionalism is strengthened when the executive does not dominate the legislature – that is because the legislature has the ability to exert real control and proper scrutiny over the executive's actions. The strengthening of political constitutionalism in the absence of a strong executive is

[1038] Constitutional Reform Act 2005.

evidenced in the Brexit case study, considering the 2017 General Election where Theresa May lost her working majority.

Despite scope for constitutional reform to strengthen political constitutionalism as a complementary means to address the challenges posed by excessive executive dominance, the prospect of such reform in reality is weak. The difficulties with these constitutional reforms are linked with the existence of executive dominance and the factors that contribute to the existence of executive dominance within the British constitution. In order for constitutional reforms targeting the fusion of powers between the legislature and executive or reforming the voting system would require the support of the executive. This is unlikely as such reforms would reduce the power of the executive. The unlikelihood of such constitutional reforms is particularly evident when considering the course of constitutional reform, the current executive has embarked upon – it is not conducive of an executive who intends on strengthening accountability. It is embarking on a legislative programme to achieve the contrary, weakening democratic safeguards.[1039]

This thesis has done more than target gaps in the current literature, it has contributed two novel concepts surrounding executive dominance within the British concept: excessive and natural executive dominance. These concepts encapsulate and connect with the broader constitutional landscape, offering an alternative explanation to current issues highlighted by contemporary studies of the British constitution. The thesis illuminates the relationship between the executive dominance within the British constitution and contributing factors such as UK's non-standard separation of power doctrine, the fusion of powers between the executive and legislature, executive power through delegated legislation and weak accountability of the executive. The contributing of the novel concepts is therefore this thesis's response to a current constitutional problem - an executive who is excessively dominant due to the constitutional makeup of the UK. This has witnessed not only the introduction of the concept excessive executive dominance, but also an exploration of what amounts to and the consequences of said concept. In exploring the consequences of excessive executive dominance, the thesis has drawn links between the concept and

[1039] Police, Crime, Sentencing and Courts Act 2022, Dissolution and Calling of Parliament Act 2022, The Elections Act 2022, Judicial Review and Courts Act 2022.

constitutional principles. For instance, the existence of excessive executive dominance has been linked with the undermining of parliamentary accountability and the rule of law. In protecting and upholding these constitutional principles, the thesis has highlighted that there exists legal constitutionalism safety valves and correcting mechanisms for when traditionally understood political constitutionalism mechanisms of accountability break down or are ineffective. The exploration of the push from political to legal constitutionalism witnessed the thesis successfully demonstrated that a link exists between the existence of excessive executive dominance within the British constitution and the UK judiciary modifying the orthodox doctrine of parliamentary sovereignty. The establishing of the concept excessive executive dominance creates a novel conceptual framework and legal yard stick which can measure the use (and abuse) of state power. The framework offers a concrete legitimising of the intervention of the court when political constitutionalism fails, while also allowing scholars to better understand and articulate what is happening in the shifting constructs of the British constitution.

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