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## ESSAY

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### NONDELEGATION DOCTRINE IN COMPARATIVE CONTEXT: BRITAIN'S GREAT REPEAL BILL AND THE SHADOW OF HENRY VIII

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#### INTRODUCTION

In their recent article, Keith Whittington and Jason Iuliano marshal considerable evidence for the proposition that the nondelegation doctrine is little more than a myth.<sup>1</sup> The authors review some two thousand U.S. federal and state cases, and acknowledge that “American courts have long recognized a basic constitutional principle that legislative powers cannot be delegated to other political actors.”<sup>2</sup> Yet the authors also show that this principle has had remarkably little impact in practice: delegations of lawmaking authority have been upheld at high rates throughout American history by federal and state courts alike.<sup>3</sup> At the Supreme Court level, “[a] review of the Court’s treatment of challenges to federal and state statutes on the grounds that they had impermissibly delegated legislative power to nonlegislative actors does not provide much basis for thinking that there was ever a seriously confining nondelegation doctrine as part of the effective constitutional order.”<sup>4</sup> In sum, notwithstanding its supposed basis in the American structural commitment to separation of powers among coequal

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<sup>1</sup> See generally Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017).

<sup>2</sup> *Id.* at 417.

<sup>3</sup> See *id.* at 426-27 (finding a total historical invalidation rate of 18% for state cases and 12% for federal cases between the Founding and 1940).

<sup>4</sup> *Id.* at 404.

branches of government,<sup>5</sup> nondelegation doctrine has never been of much practical significance in the context of U.S. constitutional law.

But in this Response, I argue that nondelegation principles may prove to be of far greater practical significance in a different context—namely, in U.K. constitutional law. In doing so, I demonstrate that the origins of the nondelegation doctrine long predate the structural constitutional provisions and pre-New Deal cases highlighted by Whittington and Iuliano.<sup>6</sup> Indeed, questions about legislative delegations of power extend back at least as far as the reign of King Henry VIII.<sup>7</sup> The Tudor monarch’s shadow is so long that parliamentary delegations of authority to amend primary legislation continue to be known as “Henry VIII clauses,”<sup>8</sup> and the prospect of including such delegations in Prime Minister Theresa May’s Great Repeal Bill<sup>9</sup> may well complicate Britain’s ongoing exit from the European Union. Thus, while the nondelegation doctrine may merely be a myth in the United States, it is poised to play a key role in one of the most important constitutional debates in recent memory in the United Kingdom.

## I. FOUNDATIONS

Whittington and Iuliano locate the foundations of nondelegation doctrine in American law in the Constitution’s separation of powers among three branches of government.<sup>10</sup> Article I vests the federal legislative powers in Congress;<sup>11</sup> Article II vests the executive power in the President;<sup>12</sup> and Article III vests the judicial power in the courts.<sup>13</sup> The authors further observe that “[t]o the extent that the Constitution departs from a pure separation-of-powers model and allows some sharing of powers across the branches of

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<sup>5</sup> See *id.* at 388–90 (“Consolidating the legislative and executive functions in the same hands has long been seen as a serious threat to liberty, and a core principle of liberal constitutional theory was to separate those distinct governmental functions in distinct governmental organs.”).

<sup>6</sup> See *id.* at 383, 406–14 (“[T]he pre-New Deal tradition of nondelegation jurisprudence has largely been left in obscurity. This Article seeks to recover that tradition and examine its contours.”)

<sup>7</sup> See Statute of Proclamations 1539, 31 Hen. 8 c. 8 (Eng.) (granting the King the power to issue proclamations carrying the same effect as an act of Parliament).

<sup>8</sup> See HENRY VIII CLAUSES, <http://www.parliament.uk/site-information/glossary/henry-viii-clauses/> [<https://perma.cc/CWR7-VSB9>].

<sup>9</sup> European Union (Withdrawal) Bill 2017–19, HC Bill 57/1 cl. 7(4) (giving government ministers power to issue regulations making “any provision that could be made by an Act of Parliament” in order to address deficiencies in retained E.U. law after Brexit). “The Great Repeal Bill” is the popular name for the European Union (Withdrawal) Bill. See generally *Repeal Bill: All You Need to Know*, BBC NEWS (July 13, 2017), <http://www.bbc.com/news/uk-politics-39266723> [<https://perma.cc/27TJ-CE6B>].

<sup>10</sup> See Whittington & Iuliano, *supra* note 1, at 388–89 (“There is no explicit textual prohibition on the delegation of legislative power to other actors, but such a rule has long been thought implicit in the U.S. Constitution.”).

<sup>11</sup> U.S. CONST. art. I, § 1.

<sup>12</sup> U.S. CONST. art. II, § 1.

<sup>13</sup> U.S. CONST. art. III, § 1.

government, those exceptions are spelled out in the text.”<sup>14</sup> Constitutional language and structure thus imply that each branch is to exercise its own enumerated powers unless otherwise noted. Nondelegation doctrine arises in turn from this implication. The U.S. Supreme Court has remarked upon the structural elements of the doctrine, writing that nondelegation principles are “vital to the integrity and maintenance of the system of government ordained by the Constitution.”<sup>15</sup> Other courts have likewise recognized “that if the branches of government could delegate their powers however they saw fit, then the carefully constructed system of checks and balances would disintegrate, and the people would quickly find their liberties curtailed.”<sup>16</sup>

The British experience, however, suggests that nondelegation principles do not necessarily arise from or depend upon the structural arrangements set forth in the U.S. Constitution. Whereas the American Congress has been “granted” its legislative powers by the sovereign people in Article I,<sup>17</sup> the British Parliament does not depend upon any such textual conferrals for its authority. Rather, Parliament itself is sovereign.<sup>18</sup> The maxim *delegata potestas non potest delegari*<sup>19</sup> is therefore inapposite: legislative power has not been delegated to Parliament, but is an inherent attribute of parliamentary sovereignty. And the scope of Parliament’s legislative power is vast indeed. As summarized recently by the U.K. Supreme Court, parliamentary sovereignty has been understood to mean that “Parliament has ‘the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation.’”<sup>20</sup>

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<sup>14</sup> Whittington & Iuliano, *supra* note 1, at 389.

<sup>15</sup> *Field v. Clark*, 143 U.S. 649, 692 (1892). *See also* Whittington & Iuliano, *supra* note 1, at 396-97 (quoting and discussing *Field*).

<sup>16</sup> *See* Whittington & Iuliano, *supra* note 1, at 409 (illustrating this point with *In re Borough of W. Phila.*, 5 Watts & Serg. 281, 283 (Pa. 1843)).

<sup>17</sup> *See* Whittington & Iuliano, *supra* note 1, at 417 (“Having received the legislative power from the sovereign people, the elected representatives sitting in a legislature were expected to exercise it themselves.”).

<sup>18</sup> *See* *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [43] (appeal taken from N. Ir., Eng., and Wales) (noting that “Parliamentary sovereignty is a fundamental principle of the UK constitution”); *see also* René Reyes, *Legislative Sovereignty, Executive Power, and Judicial Review: Comparative Insights from Brexit*, 115 MICH. L. REV. ONLINE 91 (2017) (analyzing *Miller* and arguing that parliamentary sovereignty is an evolving rather than fixed concept in British constitutional law); René Reyes, *May Britain Trump America When it Comes to Democracy?*, 56 VA. J. INT’L L. DIGEST (forthcoming 2017) (noting that Parliament is accountable to the electorate and therefore shares sovereignty with the people).

<sup>19</sup> According to Whittington and Iuliano, this maxim (which roughly means that delegated power cannot be redelegated) has been one of the most influential justifications for nondelegation in American cases discussing the doctrine. *See* Whittington & Iuliano, *supra* note 1, at 406, 408.

<sup>20</sup> *Miller*, [2017] UKSC 5 at [43] (quoting A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 38 (8th ed. 1915)). *See also* Reyes, *Comparative Insights from Brexit*, *supra* note 18, at 92-93 (analyzing scope of parliamentary power); Reyes, *May Britain Trump America*, *supra* note 18 (discussing same).

This sovereignty also means that Parliament is not merely coequal with the other branches of British government. While both the executive branch (i.e., ministers of the government) and an independent judicial branch are among “the three principal organs of the state,”<sup>21</sup> neither is on constitutional par with the legislature. Ministers may not exercise their own executive powers or the administrative powers of the Crown in a manner that is incompatible with parliamentary legislation,<sup>22</sup> and judges may not “apply or develop the common law in a way which is inconsistent with the law as laid down in or under statutes, i[.]e[.] by Acts of Parliament.”<sup>23</sup> The judiciary is thus not constitutionally empowered to strike down a delegation authorized by parliamentary statute.<sup>24</sup> Stated simply, there is no British equivalent to America’s “carefully constructed system of checks and balances”<sup>25</sup> that would be implicated by parliamentary delegations of power.

Nevertheless, delegations of legislative power have long been controversial in Britain. In the 16<sup>th</sup> Century, English judges began to question the validity of royal proclamations issued in the absence of authorizing legislation.<sup>26</sup> Parliament responded by passing the Statute of Proclamations of 1539, which authorized King Henry VIII and his council to set forth proclamations that “shall be obeyed, observed, and kept as though they were made by act of parliament,” provided that the people should not have “their inheritances, lawful possessions, offices, liberties, privileges, franchises, goods, or chattels taken from them.”<sup>27</sup> While it was within Parliament’s purview to make this delegation of lawmaking authority, the prospect of giving the Crown authority to legislate without further parliamentary action raised significant concerns and was long debated.<sup>28</sup> The act provoked sufficient opposition that it was repealed by Parliament during the reign of Henry’s successor, Edward VI, in 1547.<sup>29</sup>

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<sup>21</sup> *Miller*, [2017] UKSC 5 at [41].

<sup>22</sup> *See id.* at [45] (explaining that “administrative powers are now exercised by the executive, i[.]e[.] by ministers who are answerable to the UK Parliament” and that “the exercise of those powers must be compatible with legislation and the common law.”).

<sup>23</sup> *Id.* at [42].

<sup>24</sup> *See Reyes, Comparative Insights from Brexit*, *supra* note 18, at 96 (“Whereas it has long been ‘emphatically the province and duty of the judicial department to say what the law is’ in the United States, the same is not necessarily true for the judicial department in the U.K.—at least not when Parliament says otherwise.”) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

<sup>25</sup> Whittington & Iuliano, *supra* note 1, at 409.

<sup>26</sup> *See* Sir John Baker, *Human Rights and the Rule of Law in Renaissance England*, 2 NW. J. INT’L HUM. RTS. 3, 6 (2004).

<sup>27</sup> 31 Hen. 8 c. 8 (1539) (spelling modernized from the original).

<sup>28</sup> *See* Baker, *supra* note 26, at 6.

<sup>29</sup> 1 Edw. 6 c. 12 (1547). *See also* Baker, *supra* note 26, at 6; Noga Morag-Levine, *Agency Statutory Interpretation and the Rule of Common Law*, MICH. ST. L. REV. 51, 58 (2009) (“The strategy faced considerable opposition, however, both within and outside Parliament, resulting in the repeal of the Proclamations Statute soon after Edward VI’s coronation in 1547.”).

While the Statute of Proclamations' life may have been brief, its legacy has been enduring. Parliament has continued to delegate authority to the executive not only to issue regulations, but to amend primary legislation—delegations which, as noted above, are still referred to as Henry VIII Clauses. A U.K. government committee reviewing legislative delegations in the 1930s noted that Henry “is regarded popularly as the impersonation of executive autocracy,”<sup>30</sup> and concluded that the kinds of clauses that bear his name should rarely be used.<sup>31</sup> More recently, in response to debate over the insertion of Henry VIII powers into the Nationality, Immigration and Asylum Act of 2002,<sup>32</sup> a House of Lords Committee produced a report scrutinizing the practice of including these clauses in legislation.<sup>33</sup> The committee concluded that “there are occasions when Henry VIII powers to make incidental, consequential and similar provision are justified,” but also expressed concern about the need for such a provision in the legislation at issue and about the timing of its introduction into the bill.<sup>34</sup>

Debates over delegation of legislative authority thus have a lengthy and ongoing history in the United Kingdom. But what has been the animating concern behind these debates? As we have seen, the structural system of separation of powers and checks and balances that has driven nondelegation disputes in America does not exist in Britain. Hence, the concern in Britain is not to maintain equality among the various branches of government; it is to maintain the sovereignty of one branch in particular. Even when Parliament itself has delegated legislative power, critics have argued that “it cannot but be regarded as inconsistent with the principles of Parliamentary government that the subordinate law-making authority should be given by the superior law-making authority power to amend a statute which has been passed by the superior authority.”<sup>35</sup> In light of the limits of judicial review in Britain, it is largely up to Parliament itself to defend its own constitutional domain. The next Part applies these insights in the context of current debates over the terms of Britain's departure from the European Union (“Brexit”), and suggests that the current Parliament is up to the task of asserting its sovereignty.

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30 Sir David Williams, *The Courts and Legislation: Anglo-American Contrasts*, 8 IND. J. GLOBAL LEGAL STUD. 323, 326 (2001) (internal quotation marks omitted) (quoting REPORT OF THE COMMITTEE ON MINISTERS' POWERS, CMD. 4060 (1932)).

31 See Louis L. Jaffe, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1207 (1939) (“The Committee concludes rather negatively that the Henry VIII Clause should never be used except to bring an act into operation and be subject to a limit of one year from the passing of the act.”).

32 2002 c. 41.

33 See generally HOUSE OF LORDS, DELEGATED POWERS AND REGULATORY REFORM - THIRD REPORT (2002), <https://publications.parliament.uk/pa/ld200203/ldselect/lddelreg/21/2101.htm#n1> [<https://perma.cc/9LEA-GTFY>] (emphasis omitted).

34 *Id.*

35 Jaffe, *supra* note 31, at 1206 (quoting REPORT OF THE COMMITTEE ON MINISTERS' POWERS, CMD. 4060 at 59 (1932)).

## II. NONDELEGATION AND THE GREAT REPEAL BILL

Participants in a U.K. referendum voted to leave the European Union (EU) in June 2016.<sup>36</sup> After some debate and litigation about the mechanism by which the Brexit process was to be initiated, the U.K. Supreme Court held that Britain's formal withdrawal had to be commenced "in the only way in which the UK constitution permits, namely through Parliamentary legislation."<sup>37</sup> However, the court did not deny that such legislation could delegate the necessary authority for triggering Brexit to government ministers. The decision was thus a reaffirmation of parliamentary sovereignty: while government ministers could not give notice of withdrawal without parliamentary legislation, the scope of that legislation and the powers that it might grant to ministers was left to parliamentary discretion.<sup>38</sup> Parliament responded by promptly passing a bill of less than 150 words granting the Prime Minister authority to notify the EU of Britain's departure, and leaving most of the responsibility for negotiations with the executive.<sup>39</sup>

Theresa May's government has now put forth legislation to repeal the European Communities Act of 1972.<sup>40</sup> This Great Repeal Bill would sever the "conduit pipe" by which new EU law would be brought into effect in the U.K.,<sup>41</sup> but would also directly incorporate existing EU law into domestic law in order to smooth the Brexit process. Parliament would then be free to amend, repeal, or replace incorporated provisions of EU law in a deliberate manner that would minimize legal and economic disruptions. But even in the absence of further parliamentary legislation, the bill's Henry VIII Clauses would empower government ministers to issue regulations "as the Minister considers appropriate to prevent, remedy or mitigate any failure of retained EU law to operate effectively, or any other deficiency in retained EU law,

<sup>36</sup> See EU Referendum Results, ELECTORAL COMMISSION, <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> [<https://perma.cc/JN2H-8KFN>]; see also Reyes, *Comparative Insights from Brexit*, *supra* note 18, at 91 (discussing referendum results).

<sup>37</sup> *Miller*, [2017] UKSC 5 at [121].

<sup>38</sup> See *id.* at [122] ("What form such legislation should take is entirely a matter for Parliament.").

<sup>39</sup> European Union (Notification of Withdrawal) Act 2017, c. 9. See also Reyes, *Comparative Insights from Brexit*, *supra* note 18, at 98-99.

<sup>40</sup> See European Union (Withdrawal) Bill 2017-19, *supra* note 9.

<sup>41</sup> For analysis of the conduit pipe metaphor and its connection to Brexit, see *Miller*, [2017] UKSC 5 at [65, 80] ("Upon the United Kingdom's withdrawal from the European Union, EU law will cease to be a source of domestic law for the future . . . , decisions of the Court of Justice will . . . be of no more than persuasive authority, and there will be no further references to that court from UK courts."). See also Reyes, *Comparative Insights from Brexit*, *supra* note 18, at 93 ("Withdrawal from the European Union would effectively sever the 'conduit pipe' through which EU law is imported into the U.K. and would therefore result in changes to domestic rights and responsibilities.").

arising from the withdrawal of the United Kingdom from the EU.”<sup>42</sup> Notably, the bill emphasizes that such regulations “*may make any provision that could be made by an Act of Parliament.*”<sup>43</sup>

There are signs that the inclusion of these Henry VIII powers may be too much for members of Parliament and other political leaders to bear. The First Ministers of Scotland and Wales have described the Great Repeal Bill as a “naked power grab,” and have stated that they will withhold their support unless the bill is redrafted.<sup>44</sup> Labour leader Jeremy Corbin has insisted that his party would not “sit there and hand over powers to this government to override parliament, override democracy and just set down a series of diktats on what’s going to happen in the future,” adding that he did not believe “the record of Henry VIII on promoting democracy, inclusion and participation was a very good one.”<sup>45</sup> The bill has also helped inspire a group of MPs—including members of Theresa May’s own Conservative Party—to form an alliance in opposition to some elements of May’s Brexit agenda.<sup>46</sup> Given that May lost her outright majority in the June 2017 parliamentary elections,<sup>47</sup> it would take only a few defecting Conservatives to significantly complicate the terms of Britain’s departure from the EU.<sup>48</sup> Public figures in Britain and abroad have even begun to question whether Brexit will necessarily go through at all.<sup>49</sup>

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<sup>42</sup> European Union (Withdrawal) Bill 2017–19, *supra* note 9, at 7(1) (internal subsections omitted).

<sup>43</sup> *Id.* at 7(4) (emphasis in original).

<sup>44</sup> Heather Stewart, Ewen MacAskill, & Peter Walker, *Brexit Bill to Cause Constitutional Clash with Scotland and Wales*, *GUARDIAN* (July 14, 2017), <https://www.theguardian.com/politics/2017/jul/13/scotland-wales-brexit-great-repeal-bill-naked-power-grab-nicola-sturgeon-carwyn-jones> [<https://perma.cc/4D85-7ADH>].

<sup>45</sup> Andrew Sparrow, *Labour to Oppose ‘Henry VIII Powers’ Being Used to Rewrite EU Laws*, *GUARDIAN* (Mar. 26, 2017), <https://www.theguardian.com/politics/2017/mar/26/labour-opposes-henry-viii-powers-rewrite-eu-laws-great-repeal-bill> [<https://perma.cc/94YS-9BNN>].

<sup>46</sup> See Rowena Mason, *Rebel MPs Form Cross-Party Group to Oppose Hard Brexit*, *GUARDIAN* (July 9, 2017), <https://www.theguardian.com/politics/2017/jul/10/rebel-mps-form-cross-party-group-to-oppose-hard-brexit> [<https://perma.cc/E3Q8-7V3G>] (“Anna Soubry, the former Tory minister, and Chuka Umunna, the former Labour shadow business secretary, will lead the alliance with other MPs from the Liberal Democrats, the SNP, the Greens and Plaid Cymru in a new attempt to coordinate the parliamentary fight against May’s hard Brexit plan.”).

<sup>47</sup> *Election 2017: Results*, *BBC NEWS*, <http://www.bbc.com/news/election/2017/results> [<https://perma.cc/F6AG-LJM5>].

<sup>48</sup> See Heather Stewart, *Brexit: Labour Threatens to Defeat Theresa May Over ‘Great Repeal Bill’*, *GUARDIAN* (July 13, 2017), <https://www.theguardian.com/politics/2017/jul/12/labour-tories-great-repeal-bill-brexit-eu> [<https://perma.cc/ZSK5-R6KX>] (“Labour would demand concessions in six areas. These include ensuring that workers’ rights in Britain do not fall behind those in the EU; incorporating the European Charter of Fundamental Rights into UK law; and limiting the scope of so-called ‘Henry VIII powers’, which could allow the government to alter legislation with minimal parliamentary scrutiny.”).

<sup>49</sup> See Daniel Boffey, *Maltese PM: I’m Starting to Believe Brexit Will Not Happen*, *GUARDIAN* (July 28, 2017), <https://www.theguardian.com/politics/2017/jul/28/britain-should-fight-for-second-brexit-referendum-malta-pm> [<https://perma.cc/CF2G-CTW5>]; Simon Hattenstone & Anushka Asthana, *Labour Can Stop Brexit—But Only With Fresh Vote, Says Sadiq Khan*, *GUARDIAN* (July 28, 2017),

Britain's entry into the EU has been described as having had "profound constitutional consequences."<sup>50</sup> Similarly, Britain's "complete withdrawal. . . will constitute as significant a constitutional change as that which occurred when EU law was first incorporated in domestic law by the 1972 Act."<sup>51</sup> The fact that nondelegation principles may derail a complete withdrawal (or "hard Brexit") demonstrates the continuing relevance of those principles in U.K. constitutional law. To be sure, these principles depend upon the initiative of Parliament more than the oversight of the courts to give them effect. That dynamic, however, is simply another implication of the doctrine of parliamentary sovereignty which lies behind British notions of nondelegation in the first place.

#### CONCLUSION

Nondelegation may be a myth in the United States, insofar as "there was never a time in which [American] courts used the nondelegation doctrine to limit legislative delegations of power."<sup>52</sup> But while British courts have likewise not been actively involved in limiting legislative delegations of power, nondelegation principles have long played a very real role in the United Kingdom. These principles have not been based in structural notions of separation of powers among coequal branches of government but rather in notions of parliamentary sovereignty that have been developing at least since the reign of Henry VIII. While Parliament has the authority to delegate significant legislative powers to government ministers, it also has the authority to deny those powers and to insist upon more comprehensive oversight of executive decisions. As the debate over Brexit and the Great Repeal confirms, denial of those powers can have dramatic constitutional consequences indeed.

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<https://www.theguardian.com/politics/2017/jul/28/labour-can-stop-brexite-but-only-with-fresh-vote-says-sadiq-khan> [<https://perma.cc/6VBC-UT3E>] ("Sadiq Khan has set out the possibility of Britain remaining within the EU, arguing that Brexit could be legitimately stopped if the Labour party included the pledge in an election manifesto or committed to a second referendum.").

<sup>50</sup> ANTHONY KING, *THE BRITISH CONSTITUTION* 110 (2007).

<sup>51</sup> *Miller*, [2017] UKSC 5 at [81].

<sup>52</sup> Whittington & Iuliano, *supra* note 1, at 381.