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Unprincipled Delegation: The Health Resources and Services Administration and Future of the Nondelegation Doctrine

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I. Introduction

In Shakespeare's *King Lear,* the eponymous Lear chooses to stop being king and abdicate his authority to his two daughters, expecting

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to enjoy a retirement accompanied by the privileges of his former position.[1] Lear's decision throws the human and natural world into chaos; he is left without food and shelter while his daughters proceed to engage in a power struggle and a great storm rages for the remainder of the play.[2] The tragedy of *King Lear* is that as king, Lear was essentially all-powerful, but he was not powerful enough to give up his authority. He could not choose to stop being king.

King Lear illustrates the basic idea behind the nondelegation doctrine. Congress is the supreme legislative authority in the United States ("US"), but it is not powerful enough to give up that authority.[3] Over the past several decades, the nondelegation doctrine has remained relatively dormant on a federal level.[4] But with the Supreme Court's recent trend towards curtailing agency authority,[5] and its now dominant conservative majority with the addition of Justice Barrett, the future of the doctrine is in question.[6]

i. Background

In Justice Thomas' plurality opinion in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania,* the Court questioned multiple agencies' authority regarding the Patient Protection and Affordable Care Act ("ACA").[7] More specifically, the Court questioned whether the Departments of Health and Human Services, Labor, and Treasury had authority under the Health Resources and Services Administration's ("HRSA") Preventative Care Guidelines to create a religious exemption to coverage mandated by the ACA.[8] Justice Thomas quickly addressed this claim, but then proceeded on a substantial tangent to analyze whether HRSA's guidelines were a constitutional delegation of power.[9] He suggested that while Congress provided a boundary to contain HRSA's exercise of authority, there was not a sufficient "intelligible principle"[10] within that boundary for a

1. WILLIAM SHAKESPEARE, KING LEAR (1877).

2. *Id.*

3. U.S. CONST. art. I, § 1.

4. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 596 F. Supp. 3d 691 (N.D. Tex. 2022).

5. West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

6. *Current Members*, SUP. CT. U.S., http://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/TX6F-AJWT].

7. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2370 (2020).

8. *Id.* at 2380.

9. *Id.*

10. Mistretta v. U.S., 488 U.S. 361, 372–73 (1989) (explaining that a delegation is constitutionally sufficient if, "Congress [(1)] clearly

constitutional delegation.[11] Justice Thomas' analysis represents a departure from the traditional concept of the nondelegation doctrine, which does not distinguish between boundaries and principles.[12] Because neither party raised a constitutional challenge, Thomas tabled the issue for a later date.[13]

While the Supreme Court has not yet addressed a formal challenge to the nondelegation doctrine or HRSA's authority, the Fifth Circuit Court of Appeals has.[14] On September 7, 2022, the Fifth Circuit ruled on a nondelegation challenge by plaintiffs concerning the constitutionality of the preventative care mandate for HRSA, as well as the Preventative Care Task Force ("PSTF") and Advisory Committee on Immunization Practices ("ACIP").[15] The Court rejected the plaintiff's nondelegation claims, but not before devoting a substantial amount of dicta to explain that while the Supreme Court has indicated that it agrees with the plaintiff's position,[16] existing Fifth Circuit precedent controls and leans in favor of the defendant.[17] Other district courts within the Fifth Circuit have made a similar observation: "[The Supreme] Court might well decide—perhaps soon—to reexamine or revive the nondelegation doctrine. But we are not supposed to read tea leaves to predict where it might end up."[18]

ii. Issue

The relevant text that delegates authority to HRSA is 42 U.S. Code §300gg-13(a)(4).[19] It states that, with respect to women, a health insurance issuer offering group or individual health insurance coverage shall provide coverage for, "such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph."[20] The boundary of HRSA's authority is clearly defined, to recommend "preventative care and screenings," but Justice Thomas argues the

delineates [its] general policy, [(2)] the public agency which is to apply it, and [(3)] the boundaries of th[at] delegated authority.").

11. *Little Sisters*, 140 S. Ct. at 2370.

12. Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp.3d 624, 651–652 (N.D. Tex. Sept. 7, 2022).

13. *Little Sisters,*104 S. Ct. at 2382.

14. *Braidwood,* 627 F. Supp. 3d at 634.

15. *Id.* at 639.

16. *Id.* at 649.

17. *Id.* at 650.

18. Big Time Vapes, Inc. v. FDA, 963 F.3d 436, 447 (5th Cir. 2020).

19. 42 U.S.C. § 300gg-13.

20. *Id.*

phrase "provided for" grants HRSA sweeping authority within that boundary to not only define what preventative care health plans are required to cover, but also to "identify and create exemptions from its own guidelines."[21] He suggests that because HRSA is only constrained by its own guidelines, the statute lacks a constitutionally valid intelligible principle.[22]

iii. Thesis and Overview

This note focuses primarily on the application of the nondelegation doctrine to the recent HRSA litigation. The principle argument is that the nondelegation doctrine should be left as is because of existing precedent and practical considerations with respect to women's insurance coverage for preventative care services such as contraceptives or sexually transmitted infection ("STI") screening.[23] The nondelegation doctrine should, however, be reframed to allow for delegations of legislative power, so long as they are bound by an intelligible principle.

Section II explains the structure of HRSA, Section III reviews the current state of the federal nondelegation doctrine, Section IV analyzes the Supreme Court's recent trend towards shrinking the scope of the administrative state, Section V explains why the nondelegation doctrine should not be expanded to distinguish between boundaries and principles, and Section VI proposes a solution.

II. OVERVIEW OF HRSA

Congress established HRSA in 1982 as a sub-agency of the US Department of Health and Human Services ("HHS") with the merger of two separate sub-agencies, the Health Resources Administration and the Health Services Administration.[24] HRSA is directed by an

21. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2380 (2020).

22. *Id.*

23. Allison Aubrey, *Preventive Care Such as Birth Control, Anti-HIV Medicine Challenged in Texas Lawsuit*, NPR (Aug. 9, 2022, 5:00 AM), https://www.npr.org/sections/health-shots/2022/08/09/1115454627/preventive-care-such-as-birth-control-anti-hiv-medicine-challenged-in-texas-laws [https://perma.cc/38U9-K7PQ]; *see also* Eleanor Klibanoff & Karen Brooks Harper, *Religious Employers Need Not Cover PrEP in Their Health Plans, Federal Judge Rules*, TEX. TRI., (Sept. 7, 2022), https://www.texastribune.org/2022/09/07/texas-HIV-ACA-lawsuit/ [https://perma.cc/JPW5-KQAG]; Tami Luhby & Tierney Sneed, *Obamacare Can't Require Coverage for Certain HIV Prevention Drugs, Federal Judge Rules*, CNN (Sept. 7, 2022, 4:09 PM), https://www.cnn.com/2022/09/07/politics/hiv-drugs-prep-affordable-care-act/index.html [https://perma.cc/L97B-ELW2].

24. *About HRSA*, https://www.hrsa.gov/about [https://perma.cc/6YEB-ZPAM].

Administrator who reports to the Assistant Secretary of HHS.[25] The HRSA Administrator is a political appointee whose employment may be terminated at will by the agency.[26]

According to the HRSA website, the agency's purpose is to "provide equitable health care to people who are geographically isolated and economically or medically vulnerable."[27] This includes "people with HIV, pregnant people, mothers, and their families, those with low incomes, residents of rural areas, American Indians and Alaska Natives, and those otherwise unable to access high-quality health care."[28]

The authority granted to HRSA was later expanded when President Obama signed the Patient Protection and Affordable Care Act ("ACA") into law on March 23, 2010.[29] The ACA was a monumental law designed to "make health care more affordable and easier to obtain for the majority of Americans without insurance."[30] Under Section 2713 of the Public Health Service Act, which was modified by the ACA, non-grandfathered group and individual health insurance plans are required to cover specific preventative services, including preventative care and screenings for women under HRSA, without a copayment, coinsurance, deductible, or other cost sharing.[31]

HRSA's authority to mandate preventative care coverage is split into two parts: the first concerning infants, children, and adolescents, and the second with respect to women.[32] With the former, HRSA's preventative care and screenings must be both "evidence-informed" and 'provided for in their comprehensive guidelines.'[33] With the latter, HRSA's preventative care and screenings only need to be provided for in HRSA's comprehensive guidelines.[34] With respect to women, the language concerning "evidence-informed" care decisions is absent.[35]

The HRSA-supported Women's Preventative Service Guidelines ("Guidelines") were originally established in 2011 based on

25. 47 Fed. Reg. 38410 (Aug. 31, 1982).

26. 5 C.F.R. § 317.605 (1995).

27. *About HRSA*, *supra* note 24.

28. *Id.*

29. *Women's Preventative Service Guidelines*, HRSA, https://www.hrsa.gov/womens-guidelines [https://perma.cc/XY9S-DQ8E].

30. Michael Barone Jr., *Delegation and Destruction of American Liberties: The Affordable Care Act and the Contraception Method*, 29 TOURO L. REV. 795, 796 (2013).

31. *Women's Preventative Service Guidelines*, *supra* note 29.

32. Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 651 (N.D. Tex. Sept. 7, 2022).

33. *Id.*

34. *Id.*

35. *Id.*

recommendations from an HHS study by the Institute of Medicine, which is now known as the National Academy of Medicine ("NAM").[36] NAM was established in 1970 by the National Academy of Sciences ("NAS") to secure the services of members of relevant professions to examine public health policy.[37] NAS describes itself as a private, nonprofit organization dedicated to the "furtherance of science and technology and to their use for the general welfare."[38] In 1863, Congress granted NAS a charter mandating the organization "advise the federal government on scientific and technical matters."[39] NAM acts under the authority given to NAS by its Congressional charter to be an adviser to the federal government and also to identify issues of medical care, research, and education on its own initiative.[40]

In 2016, HRSA awarded a five-year cooperative agreement, the Women's Preventative Services Initiative ("WPSI"), to the American College of Obstetricians and Gynecologists ("ACOG") to review and develop recommendations to update the Guidelines in accordance with the model created by NAM, explained above.[41] ACOG formed an expert panel, also called WPSI, for the same purpose.[42]

In 2021, HRSA awarded ACOG a cooperative agreement to review and update the Guidelines.[43] Under ACOG, WPSI reviews the Guidelines biennially or upon the introduction of new evidence or preventative service topics.[44] WPSI considers new topics submitted through their website on a rolling basis.[45]

After review of new evidence and topics, the WPSI-awardee organization, which is currently ACOG, informs HRSA of their proposed updates.[46] HRSA then initiates the rulemaking procedure described in the Administrative Procedure Act ("APA").[47] HRSA publishes the proposed updates in the Federal Register, which allows

36. *Women's Preventative Service Guidelines*, *supra* note 29.

37. *Id.*

38. INST. MED. NAT. ACAD., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS iv (2001).

39. *Id.*

40. *Id.*

41. *Women's Preventative Service Guidelines*, *supra* note 29.

42. *Id.*

43. *Id.*

44. *Id*

45. *Id.*

46. *Preventative Guidelines and Screenings for Women, Children, and Youth*, HRSA, https://mchb.hrsa.gov/programs-impact/programs/preventive-guidelines-screenings-women-children-youth [https://perma.cc/59TU-Y66Y].

47. *Id.*

the public an opportunity to comment on the proposed update.[48] The awardee organization reviews the public's comments and may implement changes to their proposed update.[49] The awardee organization then submits its recommendation to the HRSA Administrator, who can either accept or reject the proposed update.[50] If accepted, the proposed update is published in the Federal Register.[51] The proposed update is considered to be issued "on the date it is accepted by the HRSA Administrator."[52]

The most recent update to the Guidelines approved by HRSA was in December 2022, which revised the screening procedure for diabetes during and after pregnancy.[53] Other screenings covered by the Guidelines currently include screening for breast cancer, anxiety, cervical cancer interpersonal and domestic violence, urinary incontinence, and HIV.[54] Preventative care services covered by the Guidelines include obesity prevention, breastfeeding support and supplies, contraception, and counseling for STI's.[55]

Section 300gg-13(a) of Title 42 of the U.S. Code is the statute that grants HRSA authority to mandate group or individual insurance coverage without cost-sharing requirements.[56] Paragraph (4) specifically addresses coverage for women.[57] It allows HRSA to mandate insurance coverage for, "with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph."[58] Paragraph (1) mandates insurance coverage for "evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force."[59] Justice Thomas identified the phrase "provided for" in Paragraph (4) as a potential violation of the nondelegation doctrine

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41318, 41322 (July 14, 2015).

53. *Women's Preventive Services Guidelines*, *supra* note 29.

54. *Id.*

55. *Id.*

56. 42 U.S.C. § 300gg-13.

57. *Id.*

58. *Id.*

59. *Id.*

because it is self-referential.[60] It grants HRSA authority to define preventative care that health plans must cover, in addition to the authority to create exemptions from its own guidelines.[61]

If Paragraph (4) is held in violation of the nondelegation doctrine, then a substantial curtailment of insurance coverage for women would result. All preventative care covered under the Guidelines would be at risk. Under 42 U.S. Code §300gg-13 insurance coverage, without cost-sharing, of the preventative care and screening services described in the Guidelines is mandatory.[62] If Paragraph (4) is in violation, then coverage of those services will become permissive. In some cases, healthcare services covered without cost sharing will begin to require cost sharing.[63] In other cases, those services may stop being covered at all.[64] Recently, plaintiffs sued in the Fifth Circuit for the option to purchase health insurance that excludes or limits coverage of contraception, pre-exposure prophylaxis ("PrEP") drugs, the human papillomavirus ("HPV") vaccine, and screenings and behavioral counseling for STIs and drug use, citing religious and economic reasons.[65] The medication and services objected to by the plaintiffs are covered by multiple different agencies.[66] Out of the listed objections, the HRSA mandate is responsible for coverage of contraception and STI counseling.[67] Because of religious objections, these medications and services may be among the most vulnerable if HRSA is found in violation of the nondelegation doctrine.

HRSA's mandated coverage for children is addressed in Paragraph (3) and will likely not be impacted if Paragraph (4) is found in violation of the nondelegation doctrine.[68] Paragraph (3) is written with marginally more guidance than Paragraph (4), and should comfortably satisfy the current or a more restrictive version of the intelligible principle test.[69]

60. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2380 (2020).

61. *Id.*

62. 42 U.S.C. § 300gg-13.

63. *Id.*

64. *Id.*

65. Braidwood Mgmt. v. Becerra, 627 F. Supp. 3d 624, 633 (N.D. Tex. 2022).

66. *Id.* at 634.

67. *Women's Preventative Service Guidelines*, *supra* note 29.

68. 42 U.S.C. § 300gg-13.

69. *Id.*; Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).

III. STATE OF FEDERAL NONDELEGATION

The nondelegation doctrine comes from Article 1 Section 1 of the US Constitution, vesting all legislative power, "in a Congress of the United States, which shall consist of a Senate and House of Representatives."[70] The Supreme Court has interpreted this provision to prohibit Congress from delegating legislative power to other branches of the federal government, which is particularly relevant with respect to federal agencies.[71] In general, the Supreme Court has avoided an absolutist or strictly literal interpretation of what constitutes a delegation of legislative power.[72]

i. General Rule

In early interpretations of the nondelegation doctrine, constitutional delegations of power from Congress to the executive branch were characterized as not legislative.[73] In 1892, when Congress authorized the President to suspend "for a time he shall deem just" an act allowing the free importation of certain goods if any country "impose" on the products of the US in a way that he "may deem reciprocally unequal and unreasonable," the Supreme Court found this was not a delegation of legislative power.[74]

The modern concept of the nondelegation doctrine emerged in 1928 with the development of the "intelligible principle" test.[75] The Supreme Court rejected a nondelegation challenge to the President's authority to administer a tariff established by Congress.[76] Rather than characterize the delegation of authority as "not legislative" as they had previously, the Court stated: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[77] The Court later clarified

70. U.S. CONST. art. I, § 1.

71. Randolph J. May, *Justice Ginsburg's Replacement Won't Decimate the Administrative State*, YALE J. REGUL. (Sept. 25, 2020), https://www.yalejreg.com/nc/justice-ginsburgs-replacement-wont-decimate-the-administrative-state-by-randolph-j-may/ [https://perma.cc/263X-VMSQ]; Am. Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946); Yakus v. United States, 321 U.S. 414, 420, 423–26 (1944); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943); New York Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932).

72. May, *supra* note 71.

73. Marshall Field & Co. v. Clark, 143 U.S. 649, 683 (1892).

74. *Id.* at 680.

75. May, *supra* note 71.

76. J.W. Hampton & Co. v. United States, 276 U.S. 394, 401 (1928).

77. *Id.* at 409.

the rule in *American Power & Light Co. v. SEC*, stating that a delegation is, "constitutionally sufficient if Congress [(1)] clearly delineates [its] general policy, [(2)] the public agency which is to apply it, and [(3)] the boundaries of th[at] delegated authority."[78] Given the above standard, "a nondelegation analysis always begins and often ends with statutory interpretation."[79]

The Supreme Court has traditionally interpreted the intelligible principle test as a permissive standard, generally deferring to Congress except in the case of highly unbounded delegations of authority.[80] Although Congress has delegated authority to the executive since the beginning of government, the Court has only ever found two delegations to be unconstitutional,[81] the most recent of which was in 1935.[82] Both of the unconstitutional delegations were rejected because they failed to articulate any policy or standard to confine the exercise of authority.[83] In *Panama Refining Co. v. Ryan*, Congress failed to provide any guidance whatsoever.[84] In *A.L.A. Schechter Poultry Corp. v. U.S.*, Congress conferred authority to the President to approve and prescribe codes, effectively enabling the President to regulate the entire economy, only limited by the principle of promoting "fair competition."[85]

In *Panama Refining Co.*, Congress authorized the President to prohibit the interstate transportation of petroleum produced in quantities above limits set by the states.[86] The Court held that, because the statute delegating authority to the President did not contain any language on the circumstances in which the transportation of petroleum should be prohibited, the delegation lacked an intelligible principle.[87] The limitations on what commodity the President could regulate (petroleum) and when it could be regulated (above limits set by the states) were not sufficient.[88]

In *A.L.A. Schechter Poultry Corp.*, Congress authorized the President to approve "codes of fair competition" for a trade or

78. Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946).

79. Gundy v. United States, 139 S. Ct. 2116, 2119 (2019).

80. *See* Panama Refining Co. v. Ryan, 293 U.S. 338, 415 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 534 (1935).

81. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 596 F. Supp. 3d 691 (N.D. Tex. 2022).

82. *Id.*

83. *Id.*

84. *Panama Refining Co.*, 293 U.S. at 415.

85. *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 535.

86. *Panama Refining Co.*, 293 U.S. at 406.

87. *Id.* at 415.

88. *Id.*

industry.[89] Rather than delegate authority with no guidance, Congress directed the President to promote fair competition.[90] The Supreme Court held that because fair competition was such an abstract concept, this essentially provided the President with unlimited discretion, and thus Congress' delegation lacked an intelligible principle.[91]

ii. Current State

The nondelegation doctrine has remained relatively unchanged since its conception. However, conservative justices on the Supreme Court have indicated they are looking to expand the doctrine.

a. US Supreme Court

In *Whitman v. American Trucking,* the Supreme Court addressed whether §109(b)(1) of the Clean Air Act delegated legislative power to the Environmental Protection Agency ("EPA").[92] Congress granted the EPA authority to promulgate standards of air pollutants, set at a level "requisite to protect the public health" and with an "adequate margin of safety."[93] The Court held that this was a constitutional grant of authority bounded by a sufficient intelligible principle.[94] In separate concurrences by Justice Thomas and Stevens both justices argue that the authority delegated to the EPA was "legislative" but still bound by an intelligible principle.[95] Justice Thomas extrapolated that the Court's delegation jurisprudence had "strayed too far from our Founder's understanding of the separation of powers," but because no party asked the Court to reconsider precedent, he stated that he would address the issue later.[96]

The Supreme Court has found an intelligible principle in several other delegations. In *American Power & Light Co.*, the Court upheld a part of the Public Utility Holding Company Act of 1935, which gave the Securities and Exchange Commission ("SEC") authority to modify the structure of holding company systems to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders."[97] In *Yakus v. United States*, the Court approved a delegation during wartime to fix the prices of commodities at a level that " 'will be generally fair and

89. *A.L.A. Schechter Poultry Corp.,* 295 U.S. at 534.

90. *Id.*

91. *Id* at 532.

92. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 462 (2001).

93. *Id.* at 465.

94. *Id.* at 472.

95. *Id.* at 487–90.

96. *Id.* at 487.

97. Am. Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946).

equitable and will effectuate the [in some respects conflicting] purposes of th[e] Act.'"[98] The Court found an intelligible principle in statutes authorizing regulation in the "public interest," such as authorizing the Federal Communications Commission to regulate airwaves in *National Broadcasting Co. v. United States,*[99] and the Interstate Commerce Commission's power to approve railroad consolidations in *New York Central Securities Corp. v. United States.*[100] In sum, the Supreme Court has rarely questioned Congress concerning the degree of authority it grants to those executing or applying the law.

Gundy v. United States is currently the Supreme Court's most recent case directly addressing nondelegation. The case addressed whether a provision of the Sex Offender Registration and Notification Act ("SORNA"), which authorized the Attorney General to "specify the applicability" of SORNA's registration requirement, was a valid delegation of authority.[101] The purpose of the law was to harmonize the nation's sex offender registration systems.[102] The plurality opinion by Justice Kagan held that the delegation was permissible.[103] It would not be feasible for Congress to require all pre-SORNA offenders to register instantaneously so the delegation was logistically necessary.[104] Then, based on the purpose of the statute to "'create a comprehensive national system for the registration of 'sex offenders,'" Kagan reasoned that the attorney general did not have discretion to decline to apply SORNA to pre-Act offenders.[105] Congress limited the Attorney General's authority to *how* to apply SORNA rather than *whether* to apply SORNA at all, therefore there was a sufficient intelligible principle.[106] Kagan concluded the opinion somewhat defensively, stating: "Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs."[107]

Notably, the holding in *Gundy* was a plurality of only the four liberal justices: Kagan, Ginsburg, Breyer, and Sotomayor.[108] Justice

98. Yakus v. United States, 321 U.S. 414, 420, 422–23 (1944).

99. Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–226 (1943).

100. New York Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932).

101. Gundy v. United States, 139 S. Ct. 2116, 2122 (2019).

102. *Id.*

103. *Id.* at 2130.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 2121.

Kavanaugh did not participate in the case.[109] Justice Alito concurred in the judgment, stating that although Congress' delegation in SORNA was constitutional under the Court's existing precedent, he would be willing to support an effort by a majority of the Court to "reconsider the approach we have taken for the past 84 years."[110] Justice Gorsuch's dissent, joined by Justice Roberts and Justice Thomas, focused more on the plain meaning of the text in question and less on the context and purpose discussed by Justice Kagan.[111] Beyond addressing the facts of the case, Justice Gorsuch also devoted a substantial amount of text arguing against the modern concept of the intelligible principle test.[112] He did not propose an alternative, but stated that he would willingly do so.[113]

Although *Gundy* rejected the plaintiff's nondelegation claim, the case would probably have a different result if it were heard by the Court today. Since *Gundy*, the Supreme Court has lost one liberal member–Justice Ginsburg–and gained two conservative members: Justice Kavanaugh and Justice Barrett.[114] Justice Alito had been willing to reconsider the nondelegation doctrine, provided a majority of the Court would do so as well.[115] If Justice Kavanaugh and Justice Barrett agree with the reasoning behind Justice Gorsuch's dissent, which they likely do, then Alito would have the majority necessary to reconsider the nondelegation doctrine.

b. Federal Courts

Presently, the federal court system is uniform in its interpretation of the nondelegation doctrine and the intelligible principle test.[116] Recently, the Fifth Circuit found a nondelegation violation in *Jarkesy v. Securities and Exchange Commission*.[117] The reasoning behind the decision mirrored that of *Panama Refining Co.*[118] The Fifth Circuit extrapolated that the delegation in question lacked an intelligible

109. *Id.* at 2130.

110. *Id.* at 2131 (Alito, J., concurring).

111. *Id.* at 2132 (Gorsuch, J., dissenting).

112. *Id.*

113. *Id.* at 2148.

114. *Current Members*, *supra* note 6.

115. *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring).

116. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 278 (2021).

117. Jarkesy v. SEC, 34 F.4th 446, 449 (5th Cir. 2022).

118. Panama Refining Co. v. Ryan, 293 U.S. 338, 415 (1935).

principle because the SEC itself stated that Congress did not provide any guidance.[119]

IV. EMERGING DEVELOPMENTS AND THE NARROWING SCOPE OF THE ADMINISTRATIVE STATE

The Supreme Court recently narrowed the scope of agency authority with the expansion of the "major questions doctrine," and is currently poised to expand the nondelegation doctrine in a similar fashion.

i. SCOTUS Expansion of Major Questions Doctrine

The Supreme Court recently curtailed agency authority with the formalization and expansion of the major questions doctrine, an issue tangentially related to nondelegation. The major questions doctrine is a tool of statutory interpretation that essentially places unique obstacles against agency regulations of major economic or political significance.[120] As explained by Justice Gorsuch, both the major questions doctrine and nondelegation doctrine deal with the problem of "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[121]

In *West Virginia v. Environmental Protection Agency*, the majority held that the EPA's authority to set the "best system of emission reduction" did not encompass generation-shifting measures to reduce the nation's electricity generation from thirty-eight percent to twenty-seven percent coal by 2030.[122] The EPA issued a rule that "the best system of emission reduction" for existing coal plants required the plants to reduce their own electricity production or subsidize natural gas, wind, or solar sources.[123] The Court–for the first time in its history–invoked the major questions doctrine by name and reasoned that the EPA's new regulatory measures were, essentially, too new and too significant.[124] Generation-shifting measures were not a method of emission reduction that Congress could have reasonably foreseen at the time of the Clean Air Act's passing, and the implementation of that method was projected to have an impact of billions of dollars.[125] Worth

119. *Jarkesy*, 34 F.4th at 462.

120. Daniel Farber, *Major Questions About the Major Questions Doctrine*, PROGRESSIVE REFORM (Nov. 4, 2021), https://progressivereform.org/cpr-blog/major-questions-about-major-questions-doctrine/ [https://perma.cc/88M3-SE78].

121. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

122. *Id.* at 2607, 2614–15.

123. *Id.* at 2599.

124. *See id.* at 2605, 2634 (Kagan, J., dissenting).

125. *Id.* at 2605.

noting is what the holding leaves out. It is undisputed that generation-shifting fits under the plain meaning of "best system of emission reduction" and the EPA's general purpose to reduce carbon emissions.[126] The text itself is clear. This would be sufficient under existing major-questions precedent. Here, the Court finds ambiguity solely in the fact that the EPA's new regulations are too new and significant, and reasons that Congress should have been clearer than it already was.[127]

Justice Kagan's dissenting opinion argued that the majority's holding was a departure from precedent.[128] In previous applications of the major questions doctrine, a new and consequential impact was not enough.[129] Typically, the doctrine would be applied when agencies had strayed out of their area of expertise.[130] Examples of this include the Center for Disease Control ("CDC") intruding into the landlord-tenant relationship to impose an eviction moratorium,[131] or the FDA regulating the tobacco industry.[132] Often, the agency's action would also conflict with the text of the statute itself.[133] Neither factor is present with respect to the EPA in *West Virginia*.[134] The EPA merely regulated carbon emissions–a function firmly within its expertise.[135] The statutory text itself allowed for a broad grant of authority.[136]

West Virginia v. Environmental Protection Agency is also worth noting because, at the time of the Court's ruling, the issue was essentially moot.[137] The Trump administration had repealed the rule, and the Biden administration had announced that it would commence a new rulemaking instead of reinstating the prior rule.[138] So, the Supreme Court went against precedent and expanded the major questions doctrine on an issue that did not even need to be heard in the first place.

The Court's approach to the major questions doctrine suggests that it will take a similarly aggressive approach to the nondelegation doctrine. Both doctrines deal with the scope of authority that Congress

126. *Id.* at 2636 (Kagan, J., dissenting).

127. *Id.*

128. *Id.* at 2634 (Kagan, J., dissenting).

129. *Id.*

130. *Id.* at 2636.

131. Ala. Ass'n. of Realtors v. HHS, 141 S. Ct. 2485, 2490 (2021).

132. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000).

133. *West Virginia*, 142 S. Ct. at 2636 (Kagan, J. dissenting).

134. *Id.*

135. *Id.* at 2633.

136. *Id.*

137. *Id.* at 2628 (Kagan, J., dissenting).

138. *Id.*

can delegate to federal agencies. *Gundy* indicates that at least four of the Court's conservative justices are open to reworking the nondelegation doctrine.[139] The Supreme Court's actions, in taking on a moot case and disregarding precedent to expand the major questions doctrine, imply that it will likely do the same if given the opportunity with respect to nondelegation.

ii. Boundary vs Principle and Expanding the Nondelegation Doctrine

Dicta from Justice Thomas' plurality opinion framed the nondelegation issues discussed in a set of Fifth Circuit cases, which will be discussed below.

In *Little Sisters of the Poor*, a challenge to the ACA, the Supreme Court examined, in part, whether the HRSA enabling statute allowed the agency to create preventative care standards as well as religious exemptions.[140] Although the plaintiff did not raise a constitutional claim, Justice Thomas' majority opinion devoted a substantial amount of dicta to analyze a potential nondelegation issue. Justice Thomas identified the phrase "provided for [in comprehensive guidelines supported by the Health Resources and Services Administration]" in 42 U.S. Code §300gg-13(a)(4) as problematic because it was self-referential.[141] It allowed HRSA wide authority to create standards for what preventative care and applicable health plans must cover while remaining silent on how HRSA was supposed to create those standards.[142] Essentially, it provided a boundary for HRSA's exercise of authority without providing a principle for how HRSA should make decisions within that boundary. Related agencies are required to create standards that are "evidence-informed" or to consult with a third party.[143] Both limitations are absent with respect to HRSA. In other delegations, Congress provided an "illustrative list" of the types of things an agency rule must include.[144] Thomas states that Congress has not done that with respect to HRSA.[145]

In *Big Time Vapes,* a manufacturer of e-liquids for vaping devices brought a declaratory judgment action against the Food and Drug Administration ("FDA") alleging that the Family Smoking Prevention and Tobacco Control Act ("TCA") impermissibly delegated authority

139. Gundy v. United States, 139 S. Ct. 2116 (2019).

140. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2382 (2020).

141. *Id.* at 2379–80.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

to the FDA to deem tobacco products subject to the TCA's mandates.[146] Plaintiffs asserted that Congress did not provide any guidance whatsoever with respect to what tobacco products should be subject to TCA mandates.[147] The Fifth Circuit held that the delegation was permissible because Congress defined "tobacco product" and identified four products (cigarettes, cigarette tobacco, roll-you-own tobacco, and smokeless tobacco) as immediately subject to the TCA's mandates.[148] Additionally, Congress regulated areas surrounding the delegation, such as requiring tobacco manufacturers to submit data about their products' ingredients, file annual registration statements, and obtain premarket authorization before introducing a product.[149]

In *Braidwood*, a constitutional challenge to various ACA agencies, the Fifth Circuit held that HRSA did not violate the nondelegation doctrine.[150] In its holding the Fifth Circuit made clear that precedent from an earlier case, *Big Time Vapes*, was controlling.[151] The Fifth Circuit held that because the enabling statute for the FDA delineated its "'its general policy' in the statute, the public agency to apply that policy, and the boundaries of the delegated authority," the nondelegation doctrine was not violated.[152] The *Braidwood* court applied the *Big Time Vapes* analysis and found the factors satisfied.[153] The plaintiff contends that although HRSA's power is limited to mandating preventative care and screenings as provided in the Guidelines, it lacks an intelligible principle with respect to which "preventative care and screenings" are to be covered.[154] The Fifth Circuit reasoned this was not relevant because *Big Time Vapes* foreclosed the "distinction between boundaries and principles."[155]

V. The Nondelegation Doctrine Should Not be Expanded to Distinguish Between Boundaries and Principles

The nondelegation doctrine should not be expanded to distinguish between boundaries and principles because the way it is now is

146. Big Time Vapes, Inc. v. FDA, 963 F.3d 436, 440 (5th Cir. 2020).

147. *Id.* at 443.

148. *Id.* at 443–45.

149. *Id.* at 445–46.

150. Braidwood Mgmt. v. Becerra, 627 F. Supp. 3d 624, 631–32, 652 (N.D. Tex. 2022).

151. *Id.* at 649–50.

152. *Big Time Vapes, Inc.*, 963 F.3d at 444–45.

153. *Braidwood Mgmt. Inc.*, 627 F. Supp. 3d at 650–51.

154. *Id.* at 649.

155. *Id.* at 651.

consistent with established precedent, and because the practical consequences of HRSA being found in violation would be harmful to women.

i. The Current Nondelegation Doctrine Allows Congress to Delegate Authority to HRSA Under 42 U.S. Code §300gg-13(a)(4)

An expanded nondelegation doctrine that distinguishes between boundaries and principles is simply not supported by existing precedent. 42 U.S. Code §300gg-13(a)(4) is written marginally broader than Paragraph (3), but it still provides a concrete boundary–or principle–to contain HRSA's exercise of authority.[156]

American Power & Light Co. established that a delegation is "constitutionally sufficient if Congress [(1)] clearly delineates [its] general policy, [(2)] the public agency which is to apply it, and [(3)] the boundaries of th[at] delegated authority."[157] With respect to HRSA, the first two factors are easily satisfied. The general policy behind 42 U.S. Code §300gg-13(a)(4) is to make preventative healthcare more accessible to women.[158] The agency to apply that authority is HRSA.[159] The third factor is more attenuated, but is still satisfied by 42 U.S. Code §300gg-13(a)(4).

The main principle to guide HRSA's exercise of authority is that any coverage mandate must be provided for in their "comprehensive guidelines."[160] In the same paragraph, Congress provides several limitations on that principle. Its application is limited to women, and to "such additional preventative care and screenings not described in paragraph (1)."[161] Paragraph (1) mandates coverage for "evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of [USPTF]."[162]

Read generously, paragraph (1) may be enough to support HRSA not violating the nondelegation doctrine, even by Justice Thomas' standard of distinguishing between boundaries and principles. Paragraph (4) uses the phrase "additional preventative care and

156. 42 U.S.C. § 300gg-13(a)(4).

157. Am. Power & Light Co., v. SEC, 329 U.S. 90, 105 (1946).

158. 42 U.S.C § 300gg-13(a)(4); Laurie Sobel et al., *Explaining Litigation Challenging the ACA's Preventive Services Requirements: Braidwood Management Inc. v. Becerra*, KFF (May 15, 2023), https://www.kff.org/womens-health-policy/issue-brief/explaining-litigation-challenging-the-acas-preventive-services-requirements-braidwood-management-inc-v-becerra/ [https://perma.cc/5TRN-2FBB].

159. 42 U.S.C § 300gg-13(a)(4).

160. *Id.*

161. *Id.*

162. 42 U.S.C § 300gg-13(a)(1).

screenings" in reference to Paragraph (1).[163] The preventative care and screenings mandated in Paragraph (1) are required to be "evidence-based."[164] Thus, because Paragraph (4) authorizes HRSA to mandate "additional" preventative care and screenings, presumably similar to those mandated by USPTF in Paragraph (1), it could be implied that HRSA's preventative care and screening mandates are also required to be "evidence-based."[165] Justice Thomas has stated that Paragraph (3), which contains the phrase "evidence-informed," does not have a nondelegation issue.[166] If HRSA's coverage mandates are required to be "evidence-based" under Paragraph (4), then it should similarly be able to avoid being held in violation of the nondelegation doctrine.[167] Further, the Constitutional Avoidance canon instructs that statutes should be interpreted in a way that avoids placing their constitutionality in doubt.[168] Although canons of construction are not binding, this makes the above interpretation more persuasive.

Alternatively, if the phrase "evidence-based" cannot be read into Paragraph (4), the statute still has a sufficient intelligible principle. Congress provided more guidance to HRSA in Paragraph (4) than they did to the President in either of the Supreme Court's two findings of a nondelegation violation. Unlike *Panama Refining Co.*, Congress has provided at least some principle to constrain HRSA's exercise of authority.[169] And unlike *A.L.A. Schechter Poultry Corp*, HRSA's authority to mandate insurance coverage according to its Guidelines is more narrow in scope than the President's power to regulate the entire economy to promote fair competition.[170] The promotion of fair competition, in context of the entire economy, is such an abstract concept that it entitles the President to take almost any action. The Guidelines are a more concrete limiting principle. Unlike the President, as a federal agency, HRSA is subject to Section 553 of the APA to update its Guidelines.[171] Under the APA, HRSA is required to publish notice of the proposed update in the Federal Registrar, allow the public

163. *Id.*

164. *Id.*

165. 42 U.S.C § 300gg-13(a)(4).

166. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2380 (2020).

167. 42 U.S.C § 300gg-13(a)(4).

168. Aaron-Andrew P. Bruhl, *Interpreting State Statutes in Federal Court*, 98 NOTRE DAME L. REV. 61, 81 (2022).

169. Panama Refining Co. v. Ryan, 293 U.S. 338, 415 (1935).

170. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 534 (1935).

171. *Preventative Guidelines and Screenings for Women, Children, and Youth*, *supra* note 46; Administrative Procedure Act, 5 U.S.C.A. § 553.

an opportunity to comment, and issue a "concise general statement of their basis and purpose."[172] The "concise and general statement" under the APA requires HRSA to show they made a reasonable assessment to justify the proposed update.[173] Functionally, this requires a similar level of justification as the "evidence-based" requirement under Paragraph (3), which Justice Thomas considers to comply with the nondelegation doctrine.[174]

The authority delegated to HRSA is similar to other delegations the Supreme Court has approved in the past. Recently in *Gundy*, the Court approved a statute that authorized the Attorney General to "specify the applicability" of SORNA's sex offender registration requirement.[175] In *Yakus,* the Court approved a delegation during wartime to fix the prices of commodities at a level that "will be generally fair and equitable."[176] It also found an intelligible principle in statutes authorizing regulation in the "public interest," such as authorizing the Federal Communications Commission to regulate airwaves in *National Broadcasting Co.* or the Interstate Commerce Commission's power to approve railroad consolidations in *New York Central Securities Corp.*[177] HRSA's authority to mandate coverage based on the Guidelines is a more narrow delegation than any of the above cases.

ii. 42 U.S. Code §300gg-13(a)(4) Being Found in Violation of the Nondelegation Doctrine Would be Harmful to Women

If it is found that HRSA's authority to mandate preventative care coverage for women without cost sharing violates the nondelegation doctrine, care for women would in turn be more expensive and, in some cases, completely inaccessible. In absence of a mandate, some insurance providers will inevitably scale back preventative care coverage–likely for a mix of economic and religious reasons. Contraceptive coverage may be particularly vulnerable on religious grounds. The current Guidelines mandate the "full range of [FDA] – approved, –granted, or –cleared contraceptives, effective family planning practices, and sterilization procedures."[178] Similar to the plaintiffs in *Braidwood*, other

172. Administrative Procedure Act, 5 U.S.C.A. § 553(c).

173. *Id.*

174. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2380 (2020).

175. Gundy v. United States, 139 S. Ct. 2116, 2122 (2019).

176. Yakus v. United States, 321 U.S. 414, 420, 423–26 (1944).

177. New York Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–226 (1943).

178. *Women's Preventative Service Guidelines*, *supra* note 29.

insurance providers will undoubtedly raise religious objections to this care.[179]

HRSA's noncompliance with the nondelegation doctrine would exacerbate the problem America already has with individuals not being able to access healthcare. In 2020, the CDC found that 31.6 million (9.7% of the population) Americans were uninsured.[180] This figure does not include the millions of under-insured Americans who lack access to appropriate preventative care services.[181] In part, because coverage is so sporadic, the American healthcare system is oriented more toward responding to acute problems and emergency care than it is toward prevention.[182] Not only is this more costly compared to systems that focus on preventative care, it also produces worse health outcomes.[183] Almost half of all deaths in the US are estimated to be caused by modifiable health behaviors.[184] An increase in the use of clinical preventative care services is estimated to save more than 2 million life-years annually.[185]

Further, HRSA losing authority to mandate preventative care coverage for women harms an already vulnerable subsection of the population. Women suffer from chronic disease and disability at rates higher than men and need to use more preventative care on average.[186] Women's increased need for healthcare compounds with gender-based financial disadvantages. On average, women earn less than men.[187] Most individuals in America are covered by insurance obtained through the workplace. On average, because women are employed at lower rates than men, they are twice as likely as men to be covered as dependents.[188] Thus they are more vulnerable to losing coverage to incidents such as

179. Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 633 (N.D. Tex. 2022).

180. Amy E. Cha & Robin A. Cohen, *Demographic Variation in Health Insurance Coverage: United States, 2020*, 169 NAT'L HEALTH STAT. REP. 1 (2022).

181. INST. MED. NAT. ACAD., *supra* note 38, at 17.

182. *Id.* at 16–17.

183. *Id.*

184. *Id.*

185. Michael Maciosek et al., *Greater Use of Preventative Services in U.S. Health Care Could Save Lives at Little or No Cost*, 29 HEALTH AFFS. 1656, 1656 (2010).

186. SUSAN F. WOOD ET AL., WOMEN'S HEALTH AND HEALTH CARE REFORM: THE ECONOMIC BURDEN OF DISEASE IN WOMEN 5 (2009); Steven Asch et al., *Who Is at Greatest Risk for Receiving Poor-Quality Health Care?*, 354 NEW ENG. J. MED. 1147, 1147 (2006).

187. INST. MED. NAT. ACAD., *supra* note 38, at 19.

188. *Id.* at 20.

divorce or becoming widowed.[189] Forty-four percent of adult women, as compared to thirty-five percent of men, reported they had a problem paying medical bills or were paying off medical debt over time.[190] Less than half of women are up-to-date with recommended preventative care and screening services.[191]

Beyond HRSA, Justices Gorsuch, Thomas, and Kagan have all referenced the extensive nature of the current administrative state.[192] It is something deeply intertwined with our system of government. Expanding the nondelegation doctrine to find HRSA in violation would likely lead to a cascading effect, causing multiple other federal agencies to be in violation. However, an analysis of the full impact of an expanded nondelegation doctrine is beyond the scope of this paper.

VI. Solutions

Congress should also amend 42 U.S. Code §300gg-13(a)(4) to include the phrase "evidence-informed." Further, delegations by Congress to federal agencies should be acknowledged as delegations of legislative authority. This would be a step towards maintaining the current framework of the nondelegation doctrine and allow HRSA to continue to operate as it does now.

i. Congress Should Amend 42 U.S. Code §300gg-13(a)(4) and Add the Phrase "Evidence-Informed"

Congress should amend 42 U.S. Code §300gg-13(a)(4) to include the phrase "evidence-informed" to ensure HRSA can continue to function as it does now. If the Supreme Court finds the current version of Paragraph (4) to be in violation of the nondelegation doctrine this would be the most straightforward solution. It would provide a narrower principle within the boundary set by the phrase "provided for in the HRSA comprehensive guidelines" for HRSA to operate.[193] Justice Thomas has already implied the term "evidence-informed," found in Paragraph (3) of the same statute, would satisfy his analysis under the nondelegation doctrine.[194]

Functionally, HRSA's preventative care mandates with respect to women are already evidence-informed. HRSA updates the Guidelines by considering recommendations made through WPSI–a program

189. *Id.*

190. *Id.*

191. *Id.*

192. Gundy v. United States, 139 S. Ct. 2116, 2130, 2137 (2019); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001).

193. 42 U.S.C. § 300gg-13(a)(4).

194. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2380 (2020).

whose purpose is to research and develop updates to the Guidelines.[195] Additionally, as discussed in Section V(i) of this paper, the "concise and general statement" HRSA is required to issue under the APA to update the Guidelines already ensures that they are essentially "evidence-informed."[196]

The drawback of this proposed solution is that Congress is notoriously inefficient in passing or amending legislation. Further, HRSA's authority to mandate preventative care coverage for women was established through the ACA, a partisan piece of legislation that the Republican Party sought to effectively repeal in 2017.[197] It is unlikely that an amendment to HRSA will receive bipartisan support. To amend the statute, the Democratic Party may need to act unilaterally. This would require a Democratic majority in the House of Representatives and Senate, as well as a Democratic President.

ii. The Nondelegation Doctrine Should be Reframed to Allow Delegations of Legislative Power

The nondelegation doctrine should be updated to allow delegations of legislative power as long as they are bound by an intelligible principle. This change would be purely conceptual; it would not impact how federal agencies, including HRSA, operate currently.

Liberal and conservative justices have both expressed dissatisfaction with the current state of the nondelegation doctrine.[198] In *Whitman*, when Congress granted the EPA authority to promulgate standards of air pollutants, set at a level "requisite to protect the public health" and with an "adequate margin of safety," Justice Breyer and Thomas both argued that the delegation should be acknowledged as legislative in nature.[199] Beyond *Whitman*, this point has been echoed in previous nondelegation jurisprudence.[200]

195. *Preventative Guidelines and Screenings for Women, Children, and Youth*, *supra* note 46.

196. Administrative Procedure Act § 553.

197. *Summary of the Health Care Freedom Act*, KFF (Jul. 2017), https://files.kff.org/attachment/Summary-of-the-Health-Care-Freedom-Act [https://perma.cc/K2JJ-9EZY].

198. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487–88 (2001).

199. *Id.* at 487, 490–96.

200. Bowsher v. Synar, 478 U.S. 714, 752 (1986) (Stevens, J., concurring) ("Despite the statement in Article I of the Constitution that 'All legislative powers herein granted shall be vested in a Congress of the United States,' it is far from novel to acknowledge that independent agencies do indeed exercise legislative powers."); INS v. Chadha, 462 U.S. 919, 985 (1983) (White, J., dissenting) (" . . . by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments without the passage of new legislation."); *see also* Morrison v. Olson, 487 U.S. 654, 705–06 (1988) (Scalia, J., dissenting)

Congressional delegations of rulemaking authority to federal agencies are considered a "quasi-legislative" power.[201] Delegations are no longer considered "not legislative" as they were in the past, but they are not acknowledged as "legislative" either.[202] The "quasi-legislative" term is applied exclusively to agency rulemaking.[203] Essentially, the concept is a legal fiction to allow Courts to sidestep a perceived separation of powers issue while allowing the federal government to function.

Justices Thomas and Gorsuch have both noted that the current nondelegation doctrine allows for delegations of legislative power as a justification to expand the doctrine and narrow the amount of authority Congress can delegate to agencies.[204] Acknowledging Congressional delegations of rulemaking authority to federal agencies as legislative allows proponents of the current nondelegation doctrine to address those arguments from a stronger position, instead of having to defend the tenuous concept of a "quasi-legislative" delegation. Acknowledging these delegations as legislative is faithful to the text of the Constitution, and consistent with the spirit of previous nondelegation cases.

In Article 1 of the Constitution the Founders vest "All legislative Powers" in Congress, similar to how in Article II they vest the "executive Power" in the President.[205] Neither provision restricts either recipient from delegating that power to others.

Not only does the text of the Constitution permit delegation of legislative power, but this framework is consistent with how federal agencies and the American government currently operate. Black's Law Dictionary defined legislation as the "[f]ormulation of rule[s] for the future."[206] As stated by Justice Stevens in *Whitman*, "the proper characterization of governmental power should generally depend on the nature of the power, not on the identity of the person exercising it."[207] If the same preventative care insurance coverage mandates promulgated by HRSA were instead established by Congress, they would be acknowledged as an exercise of legislative power. Likewise, prior rules promulgated by federal agencies to fix the prices of commodities,

(arguing that the independent counsel exercised "executive power" unconstrained by the President).

201. *In re* Investigation of Unfair Election Practice Objections, 451 N.W.2d 49, 52 (1990).

202. *Whitman*, 531 U.S. at 488.

203. *In re Investigation of Unfair Election Practice Objections,* 451 N.W.2d at 52.

204. *Whitman*, 531 U.S. at 487; Gundy v. United States, 139 S. Ct. 2116, 2130, 2137 (2019); West Virginia v. EPA, 142 S. Ct. 2587, 2634 (2022).

205. U.S. CONST. art. I, § 1.

206. BLACK'S LAW DICTIONARY 899 (6th ed.1990).

207. *Whitman*, 531 U.S. at 488.

regulate the airwaves, or approve railroad consolidations would also be considered legislative if enacted by Congress.[208]

Concerning intent of the Founders, past records and practice indicate that they would have approved of Congressional delegations of legislative power. The records of the Constitutional Convention, ratification debates, and Federalist Papers do not establish a significant limit on Congress' ability to delegate authority to the Executive Branch.[209] In practice, the first Congress was comfortable giving broad and significant delegations of authority to the Executive. These included the power to devise a licensing scheme for trading with Native Americans, to craft laws for the Territories, and to decide how to pay down the national debt.[210]

VII. CONCLUSION

While the Supreme Court may be poised to expand the nondelegation doctrine and narrow the scope of the administrative state, it should not do so. An expanded nondelegation doctrine would represent a break from existing precedent and the adverse health outcomes that would result from HRSA being found in violation illustrate how harmful such a break from precedent can be. Congress should amend 42 U.S. Code §300gg-13(a)(4) to include the phrase, "evidence-informed" to protect HRSA from a potential nondelegation violation. Further, delegations of Congressional authority should be acknowledged as legislative to stabilize and reinforce the current version of the nondelegation doctrine. Implementing these solutions would maintain the status quo of the administrative state and protect women's healthcare throughout the country.

208. Yakus v. United States, 321 U.S. 414, 420, 423–26 (1944); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943); New York Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932).

209. Mortenson & Bagley, *supra* note 116, at 349.

210. *Id.* at 334–38.