Revealing the True Definition of APA § 701(a)(2) by Reconciling "No Law to Apply" with the Nondelegation Doctrine

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INTRODUCTION

When Congress passes a statute conferring a large degree of authority upon the executive, it may implicate two potentially conflicting legal doctrines: the nondelegation doctrine and the "committed to agency discretion" exception to judicial review under § 701(a)(2) of the Administrative Procedure Act[1] (APA).

The United States Constitution vests the president with all executive powers to carry out the law.[2] Given the vast number of laws that Congress has passed, the president is not capable of enforcing all of these laws himself.[3] Federal agencies, created by congressional statutes, perform much of the work of the executive branch.[4] Many federal agencies operate as miniature versions of the tripartite federal government, with the authority to legislate (through rulemaking), adjudicate (through administrative hearings), and execute agency policies (through agency enforcement).[5] This unique structure raises separation of powers concerns.[6] Congress enacted the APA to provide a structured framework for regulating agencies and their unique role in the federal government.[7]

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1 5 USC § 551 et seq (2000).

2 See US Const Art II, § 2; US Const Art II, § 3.

3 See Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, 4 J L & Polit 483, 503 (1988) (noting that given the "plethora of laws enacted by Congress, it is patently obvious that the president cannot personally execute every law, but must rely on subordinates").

4 See Gary Lawson, *Federal Administrative Law* 6–7 (West 3d ed 2004).

5 See, for example, Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 Cornell L Rev 488, 492–93 (1987) ("These agencies adopt rules having the shape and impact of statutes, mold governmental policy through enforcement decisions and other initiatives, and decide cases in ways that determine the rights of private parties.").

6 Id at 491 (noting the difficulty of giving content to the Constitution's separation of powers principles in cases concerning government agencies). See also Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 Cornell L Rev 1, 11 (1994) ("Under a pure formalist approach, most, if not all, of the administrative state is unconstitutional.").

7 See Alexander Dill, *Scope of Rulemaking after* Chadha*: A Case for the Delegation Doctrine?*, 33 Emory L J 953, 967 (1984) (describing how the APA was adopted to guard against administrative arbitrariness and to address accountability and separation of powers concerns).

The APA regulates the operation of federal agencies and sets out the scope of judicial review of agency action. Under § 701(a)(2) of the APA, the "committed to agency discretion" exception, agency action is judicially unreviewable where the action is "committed to agency discretion."[8] The Supreme Court has found that an action is "committed to agency discretion" if the delegation to the agency is so broad that a court cannot find any standard or "law to apply" to the agency action.[9] However, this same broad delegation can run afoul of the nondelegation doctrine. The nondelegation doctrine stands for the principle that Congress, vested with "all legislative powers" by Article I of the Constitution, cannot delegate these powers to another branch.[10] The Supreme Court has held, though, that Congress may delegate some of its authority,[11] as long as Congress provides an "intelligible principle" to guide the executive branch or agency therein.[12]

The inherent conflict between the two doctrines is that they apply the same test—whether there is an intelligible principle or law to apply to the executive action—but lead to opposite results.[13] Under the "committed to agency discretion" exception, when faced with a delegation lacking law to apply, a court should decline to review the agency action, thereby expanding the agency's discretion to act. However, if a court can find no law to apply, it must similarly find that the statute lacks an intelligible principle limiting the agency's authority. It must therefore strike it down on nondelegation grounds, leaving the agency with no discretion to act at all.[14] This suggests that delegations committing action to agency discretion under § 701(a)(2) are unconstitutional. Yet the Supreme Court has, on several occasions, held that agency action was committed to agency discretion, because the dele-

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8 5 USC § 701(a)(2).

9 See *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402, 410 (1971) (finding that the agency's action was not unreviewable under § 701(a)(2) because the exception precludes review only in rare cases where the statute provides "no law to apply").

10 The nondelegation doctrine applies to all three branches of the government; however, this Comment discusses the doctrine only as it applies to Congress.

11 See, for example, *United States v Grimaud*, 220 US 506, 517 (1911) (finding that Congress may delegate "power to fill up the details" under general provisions of law).

12 *J.W. Hampton, Jr., & Co v United States*, 276 US 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

13 See generally Amee B. Bergin, *Does Application of the APA's "Committed to Agency Discretion" Exception Violate the Nondelegation Doctrine?*, 28 BC Envir Aff L Rev 363 (2001) (arguing that the application of § 701(a)(2) under the "no law to apply" standard violates the nondelegation doctrine).

14 Id at 393.

gation provided no law to apply, without striking down the statute on nondelegation grounds.[15]

Although commentators have noted the conflict between the two doctrines,[16] the Supreme Court has never addressed both doctrines in the same case or spoken to how the contradictory doctrines can be reconciled. As a result, the apparent constitutional conflict between the two doctrines—that a statute committing action to agency discretion under § 701(a)(2) appears to violate the nondelegation doctrine—remains unresolved. However, a careful examination of the Court's nondelegation jurisprudence reveals a more accurate definition of the committed to agency discretion exception that resolves the constitutional issue. Through an analysis of the Supreme Court's "no law to apply" and nondelegation jurisprudence, this Comment reveals the true definition of the "committed to agency discretion" exception and thereby demonstrates that it does not conflict with the nondelegation doctrine.

Part I of this Comment surveys the current state of the "no law to apply" definition of the "committed to agency discretion" exception and the nondelegation doctrine, including the tension between the two. Part II then explores and proposes a resolution of the constitutional conflict between the "no law to apply" definition of § 701(a)(2) and the nondelegation doctrine by concluding that a finding that a statute commits action to agency discretion does not violate the nondelegation doctrine if the delegation is made in a realm where a nondelegation challenge to a statute would fail—areas that are beyond the limits of the nondelegation doctrine. Based on this conclusion, a new definition of the "committed to agency discretion" exception is proposed: agency action is committed to agency discretion where Congress has provided no law to apply to the agency action and where the agency is acting pursuant to lawmaking authority independent of the congressional delegation. Part III demonstrates that the posited definition of the "committed to agency discretion" exception is the

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15 See, for example, *Heckler v Chaney*, 470 US 821, 834–35 (1985) (holding that agency decisions not to take enforcement action are presumptively unreviewable under § 701(a)(2)).

16 See Bergin, 28 BC Envir Aff L Rev at 393–94 (cited in note 13). See also Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 Ariz St L J 941, 993 (2000) ("A statute that provides 'no law to apply' lacks guiding principles for either the agency or the court's edification, and therefore would be most vulnerable to challenge as an improper delegation of legislative authority."); Peter L. Strauss, *Presidential Rulemaking*, 72 Chi Kent L Rev 965, 977 (1997) ("[I]f we thought a court could not [determine whether an agency acted within its statutory authority], that there was no law to apply, we might quickly conclude that an improper delegation had occurred."); Donald A. Dripps, *Delegation and Due Process*, 1988 Duke L J 657, 682–83 n 105 ("[T]he nondelegation doctrine makes it unconstitutional for Congress to commit the exercise of legislative power entirely to agency discretion.").

true definition of the exception that the Supreme Court has employed when it has found agency action committed to agency discretion under § 701(a)(2). Part III also explores the practical problems created by the tension between "no law to apply" and the nondelegation doctrine. It then demonstrates how recognizing the true definition of the exception resolves these problems.

I. SECTION 701(A)(2) AND THE NONDELEGATION DOCTRINE

Although courts are frequently called upon to determine the lawfulness of agency action, a court must first determine whether the agency's action is subject to judicial review.[17] While there is a strong presumption in favor of judicial review of agency action,[18] the APA defines two instances where agency action is not subject to judicial review under the APA:[19] (1) where Congress has explicitly precluded judicial review under the terms of the governing statute,[20] and (2) where Congress has committed particular actions to agency discretion.[21] The second of these exceptions has caused confusion and controversy since its inception.[22]

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17 See, for example, 2 Am Jur 2d Administrative Law § 415 (2003) (indicating which agencies and actions are reviewable under the Hobbs Act).

18 *Bowen v Michigan Academy of Family Physicians*, 476 US 667, 670 (1986). See also *Lincoln v Vigil*, 508 US 182, 190 (1993) (recognizing a basic presumption of judicial review); *Abbott Laboratories v Gardner*, 387 US 136, 140–41 (1967) (noting that judicial review of administrative actions is favored by the Supreme Court).

19 Sections 701(a)(1) and 701(a)(2) preclude judicial review of agency action only under the APA. So, for example, pursuant to these exceptions, a court will not review agency action on the grounds that it was "arbitrary or capricious." However, a court will still review agency action on the claim that it is unconstitutional. *Webster v Doe*, 486 US 592, 603 (1988).

20 5 USC § 701(a)(1).

21 See id § 701(a)(2). One might ask why Congress would ever preclude judicial review under § 701(a)(2), when it could preclude review explicitly under § 701(a)(1). There is little to no discussion of this question and, as noted later, the legislative history is unhelpful. The best answer is that because Congress knew that it could not anticipate every circumstance where it will want to preclude review under § 701(a)(1), it added § 701(a)(2) to preclude review where Congress has not provided law and therefore left the decision up to the agency. In addition, even where the executive has some authority to act, it may not have enough independent authority to take certain actions. In such areas, a broad delegation implicitly provides additional statutory authority and allows the executive to do what it may be unable to do in absence of such delegation. See note 87 for more on this last point.

22 See, for example, Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn L Rev 689, 692, 734 (1990) (noting that the Supreme Court has made little headway in defining the boundaries of § 701(a)(2) and that "lower courts have tortured and evaded the formula in as many ways as they can contrive"); Sharon Werner, *The Impact of* Heckler v. Chaney *on Judicial Review of Agency Decisions*, 86 Colum L Rev 1247, 1248–49 (1986) (explaining that the meaning of § 701(a)(2) has been the subject of controversy); *Proceedings of the Forty-Sixth Judicial Conference of the District of Columbia Circuit*, 111 FRD 91, 173 (1985) ("The language about no law to apply has caused a good deal of confusion in the lower courts because the signals from the Supreme Court are contradicting.").

Part I.A discusses the "committed to agency discretion" exception with a focus on the Court's application of the "no law to apply" definition of the exception. The discussion highlights the vagueness of the definition as well as the confusion and criticism it has generated. Part I.B surveys the nondelegation doctrine and the "intelligible principle" requirement, noting that although the Court no longer strikes down statutes on nondelegation grounds, the doctrine survives as a canon of construction. This Part concludes by briefly pointing out the conflict between "no law to apply" and the nondelegation doctrine.

A. Section 701(a)(2): The "Committed to Agency Discretion" Exception

The "no law to apply" doctrine of § 701(a)(2) engenders confusion among courts and commentators. The language, structure, and legislative history of § 701(a)(2) provide little guidance for its application. A review of the origin of the "no law to apply" definition in *Citizens to Preserve Overton Park, Inc v Volpe*[23] and the Court's subsequent applications of the test demonstrates that the "no law to apply" formula fails to completely define the Court's conception of § 701(a)(2); the Court's fact-specific determinations provide no real guidance for lower courts. As a result, the scope of § 701(a)(2) and the "no law to apply" formula remains ambiguous.

1. Background of § 701(a)(2).

The language of the APA "committed to agency discretion" exception and the structure of the APA offer modest direction to guide courts in their application of the exception. The APA creates a framework that regulates the operation of federal agencies. It governs how federal agencies may propose and establish regulations, and it defines the scope of judicial review of agency action.[24] Section 701(a)(2) of the APA, which precludes judicial review of agency actions that are committed to agency discretion, has troubled commentators, scholars, and lower courts.[25]

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23 401 US 402 (1971).

24 The scope of this review is laid out in § 706: agency actions, findings, and conclusions must be held unlawful and set aside if they are, among other reasons, "arbitrary, capricious, an abuse of discretion," "unsupported by substantial evidence," or made "without observance of procedure required by law." 5 USC § 706(2)(A)–(F).

25 An initial debate focused on whether § 701(a)(2) did in fact entirely exclude agency action from judicial review. In 1965, Raoul Berger maintained, in a famous article, that Congress had intended the APA to subject all administrative action to judicial review for abuse of discretion and that § 701(a)(2) did not entirely preclude judicial review. See generally Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 Colum L Rev 55 (1965). His position pre-

The language of § 701(a)(2) does not make clear when this exception to judicial review of agency action applies and what it requires when it does apply.[26] A formal reading of the exception suggests that in every case where a statute gives an agency a degree of discretion, the statute allows a range of administrative action that courts cannot review.[27] Courts and commentators quickly abandoned this reading because courts routinely review agencies' exercise of discretionary judgment and they found no indication that Congress meant to preclude review in all instances where agencies exercise discretion.[28]

A formal interpretation of the exception also directly conflicts with another provision of the APA, § 706(2)(A), which requires courts to set aside agency action for "abuse of discretion." This provision specifically contemplates that (1) agencies will in fact have areas of discretion, and (2) action within these areas will be subject to judicial review.[29] This seems clearly to conflict with a literal reading of § 701(a)(2), which would prohibit review in instances where agencies were given discretion. Because § 706(2)(A) clearly provides for judicial review in instances where agencies were granted some discretion, a literal reading of § 701(a)(2) would thus render § 706(2)(A) meaningless.[30]

The legislative history of the exception, like the plain reading of the text, also fails to shed light on its purpose and meaning. The drafting legislators were in two camps: those who wanted to preserve review of all agency action and those who were in favor of a broad rule against reviewability.[31] After the drafters adopted what they knew to be an obscure statute, legislators on both sides of the debate inserted their interpretation of the exception into the legislative history, rendering it contradictory and unreliable.[32]

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cipitated "what is probably the longest—and possibly the most vitriolic—debate in the history of law reviews, with Professor Kenneth Culp Davis" who challenged Berger's position in a series of four articles to which Berger replied with four more of his own. Levin, 74 Minn L Rev at 694–95 (cited in note 22), citing Raoul Berger, *Administrative Arbitrariness: A Synthesis*, 78 Yale L J 965.

26 Levin, 74 Minn L Rev at 695 (cited in note 22) (positing that the legislative drafters of § 701 intentionally chose obscure and ambiguous language).

27 See Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 Admin L Rev 239, 250–60 (1986) (discussing the fronts upon which one can challenge an agency through judicial review, despite the agency acting under its discretion).

28 See Levin, 74 Minn L Rev at 696 (cited in note 22) (noting that sponsors of the APA disputed the interpretation that judicial review was prohibited whenever an agency possessed some discretion).

29 Kenneth Culp Davis, *"No Law to Apply,"* 25 San Diego L Rev 1, 2 (1988) (criticizing the "no law to apply" formula).

30 Id.

31 See Levin, 74 Minn L Rev at 695–96 (cited in note 22) ("[A]s questions about the meaning of [the] language surfaced, each side attempted to slant the legislative history in its favor.").

32 Id at 695–700.

Unable to rely on either a formal reading of the exception or congressional guidance, courts forged their own way in applying § 701(a)(2). Some courts applied a pragmatic balancing test in order to determine when review was not appropriate.[33] Others refused to recognize that Congress could entirely exempt a class of agency action from judicial review.[34] The Supreme Court finally entered the fray in 1971 and made it clear that the "committed to agency discretion" exception does in fact exempt certain agency actions from judicial review.

2. *Overton Park* and the birth of "no law to apply."

The Court first spoke to the "committed to agency discretion" exception to judicial review of agency action in *Overton Park*, holding that the exception applies to preclude judicial review in those rare cases where the governing statute provides no law to apply.[35] In *Overton Park*, a group of citizens challenged the Secretary of Transportation's decision to build a highway through a city park. The plaintiffs contended that the Secretary's action violated highway funding statutes that forbade the use of public parkland for highways, unless there was "no feasible and prudent alternative."[36] The Secretary, relying on this statutory language, argued that the agency's decision was not subject to judicial review because it fell within the "committed to agency discretion" exception.[37] The Court rejected this argument, stating that § 701(a)(2) "is a very narrow exception . . . applicable in those rare instances where 'statutes are drawn in such broad terms that in any given case there is no law to apply.'"[38] The Court then went on to determine that the statute in question clearly provided law to apply and that the Secretary's action was therefore reviewable.[39]

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33 Id at 702–04 ("[L]ower courts tried to achieve a coherent understanding of section 701(a)(2) through a balancing test that called for weighing policy reasons for and against judicial review.").

34 Id at 699 (noting one influential commentator's interpretation that the exception was meaningless and merely declared that courts should respect legitimate exercises of agency discretion).

35 401 US at 410.

36 Id at 404 & n 2.

37 Id at 410–11.

38 Id, quoting S Rep No 752, 79th Cong, 1st Sess 26 (1945).

39 *Overton Park*, 401 US at 412–13 ("Plainly, there is 'law to apply' and thus the exemption for action 'committed to agency discretion' is inapplicable.").

3. Applying "no law to apply."

After *Overton Park*, the Supreme Court did not address the "no law to apply" definition of § 701(a)(2) for fourteen years.[40] When the Court did eventually apply the "no law to apply" test to hold that agency action was unreviewable under § 701(a)(2), it did not rely exclusively on this test, but relied also on case specific arguments favoring unreviewability. This has caused commentators to question whether the "no law to apply" conception of § 701(a)(2) is still accurate.[41] The Court has, however, reaffirmed this definition of the "committed to agency discretion" exception as recently as 1992.[42]

In *Heckler v Chaney*,[43] a seminal case applying the "committed to agency discretion" exception, the Court held that agency decisions not to act are presumptively unreviewable under § 701(a)(2).[44] In *Chaney*, prison inmates sought a ban on the use of certain drugs for lethal injections after they had petitioned the Food and Drug Administration (FDA) to take enforcement action and the FDA had refused. The Court found in favor of the FDA and held that agency decisions not to take enforcement action fall within the "committed to agency discretion" exception and are presumptively unreviewable unless Congress states otherwise.[45]

Although the Court invoked the "no law to apply" formula to find that the statute committed action to agency discretion under § 701(a)(2), it is unclear whether the Court based its holding exclusively on this test.[46] After briefly quoting from *Overton Park* and restating the "no law to apply" test, the *Chaney* Court broke with this line of analysis and began a thorough discussion of the factors that, for

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40 After *Overton Park*, lower courts split in their application of § 701(a)(2). Some formalistically applied the "no law to apply" formulation of the clause and declined to review agency action when they felt that it contained no substantive guidance. See, for example, *Jaymar-Ruby, Inc v FTC*, 651 F2d 506, 510–13 (7th Cir 1981) (holding that the decision of the FTC to release its investigative files was exempt from judicial review). Other courts simply reverted to the balancing test they had used pre–*Overton Park*. See, for example, *Bullard v Webster*, 623 F2d 1042, 1046 (5th Cir 1980) ("There must be a weighing of the need for, and feasibility of, judicial review versus the potential for disruption of the administrative process.").

41 See Levin, 74 Minn L Rev at 734 (cited in note 22).

42 See *Franklin v Massachusetts*, 505 US 788, 819 (1992) ("Nor is this an instance in which the statute is so broadly drawn that 'there is no law to apply.'").

43 470 US 821 (1985).

44 Id at 832 ("[A]n agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2).").

45 Id at 837–38.

46 See Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 NYU L Rev 1657, 1668 (2004) (noting that the Court did not actually use the "no law to apply" test in *Chaney*); Levin, 74 Minn L Rev at 712 (cited in note 22) (arguing that although most commentators have read *Chaney* as a reaffirmation of *Overton Park*, the Court actually undermined the "no law to apply" formula by substituting it with a functional approach).

policy reasons, reflected the "general unsuitability for judicial review of agency decisions to refuse enforcement."[47] For example, the Court noted that an agency must consider several factors before taking enforcement action, and reasoned that agencies are better equipped than courts to weigh these factors.[48]

In subsequent cases where the Court held that agency action was committed to agency discretion, it similarly reaffirmed the *Overton Park* "no law to apply" formula, but also relied on a range of practical arguments weighing against judicial review of the agency action. The Court has noted, for example, that it would not review a decision taken by the Director of the Central Intelligence Agency (CIA) because, short of cross-examining him about his views on national security, the Court had nothing on which to base its review.[49] The Court has also refused to review, under § 701(a)(2), agency decisions regarding the allocation of funds from a lump sum congressional appropriation because the Court concluded that the essential purpose of such an appropriation is to allow the agency to determine the best way to meet its statutory mandates.[50] Thus, in finding agency action committed to agency discretion, the Court looks not only to whether the statute provides law to apply but also to the appropriateness of judicial review given the context of the agency action.

4. The current state of the "committed to agency discretion" exception.

While the Court has continued to invoke the "no law to apply" formula for determining whether an action is committed to agency discretion, it has never relied solely on this formula when it has declined to review agency action under § 701(a)(2). As a result, the Court has carved out various pockets where agency action is committed to agency discretion, such as agency decisions not to enforce, but it has yet to articulate an overarching and administrable test for determining when agency action is committed to agency discretion. Are the practical and other nonstatutory arguments that the Court has relied on part of the "no law to apply" formula? Are they essential for finding unreviewability under § 701(a)(2)? Lower courts, agencies, and lawyers are still uncertain as to what standards to employ in determin-

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47 470 US at 831.

48 Id at 831–32.

49 *Webster*, 486 US at 600–04 (finding that the CIA's decision to terminate an employee was unreviewable but that constitutional claims stemming from the termination decision were reviewable).

50 See *Vigil*, 508 US at 192.

ing whether agency action is beyond judicial review[51]—the only certainty is that the exception applies only in rare circumstances.[52]

The "no law to apply" formulation of § 701(a)(2) has also been criticized since it was first articulated in *Overton Park* for being both vague and meaningless.[53] In light of this pervasive ambiguity and criticism, the doctrine needs to be explored and explained.

B. The Nondelegation Doctrine

In contrast to the congressionally created and not well understood "committed to agency discretion" exception, the nondelegation doctrine is relatively well defined and rooted in the Constitution.[54] Article I provides, "All legislative Powers herein granted shall be vested in a Congress of the United States."[55] From this clause, the Supreme Court has inferred a constitutional prohibition against a congressional delegation of legislative authority to the judicial or executive branch.[56] Although this interpretation appears rigid on its face, the Supreme Court applies it liberally. As this Part details, the Court has continued to hold that the doctrine requires only that a delegation contain an "intelligible principle" to guide those implementing the statute.[57] This Part then outlines the current state of the doctrine, noting that the Court has liberalized its interpretation of the "intelligible principle"

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51 See note 22.

52 Levin, 74 Minn L Rev at 702 (cited in note 22) ("Although courts have not enjoyed much success in defining which administrative actions to treat as unreviewable, one premise . . . is uncontroversial: the clause applies to only a small fraction of all agency actions.").

53 See note 22. See also Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 Tulane L Rev 877, 891 (1989) (arguing that the "no law to apply" test is doctrinal and rigid); Levin, 74 Minn L Rev at 705–06 (cited in note 22) (noting that the Court's interpretation of § 701(a)(2) makes the clause "mere surplusage" because if there are truly no standards to apply in reviewing agency action—if there are no grounds on which to set it aside—then a challenge to the action can be dismissed on the merits and there is no need for a clause that makes such actions unreviewable); Davis, 25 San Diego L Rev at 1, 10 (cited in note 29) (arguing that the Court misconstrued legislative history in formulating the "no law to apply" test and that the Court can "always use its expertness in appraising reasonableness of administrative action") (emphasis omitted).

54 See *Mistretta v United States*, 488 US 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers."). But see Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U Chi L Rev 1721, 1722 (2002) ("In our view there just is no constitutional nondelegation rule, nor has there ever been."); Kenneth Culp Davis and Richard J. Pierce, Jr., 1 Administrative Law Treatise § 2.6 at 66–85 (Little, Brown 3d ed 1994) (noting that no constitutional provision expressly says that Congress cannot choose to delegate its power to others and that there is some debate as to whether the text and history of the Constitution justify the existence of the nondelegation doctrine at all).

55 US Const Art I, § 1.

56 See *Mistretta*, 488 US at 372.

57 *J.W. Hampton, Jr., & Co v United States*, 276 US 394, 409 (1928).

requirement.[58] Today the nondelegation doctrine exists mainly as a canon of construction that is used to narrow broad delegations.[59]

1. Nondelegation doctrine background and history.

Broad delegations implicate the nondelegation doctrine because if they do not precisely prescribe agency action, the agency must make its own rules and determinations. In doing so, the agency arguably must engage in legislative lawmaking, which must be done by Congress.[60] However, the Court has consistently held that the nondelegation doctrine does not bar the executive branch, in particular administrative agencies, from "filling in the details of . . . general statutes or from applying legislative principles to new facts."[61]

The Court first directly upheld a congressional delegation of legislative power to the executive in *J.W. Hampton, Jr., & Co v United States*.[62] The Court upheld the delegation because it provided an "intelligible principle" to guide the exercise of the delegated authority, thereby cabining executive discretion.[63] The Court reasoned: "Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts."[64] Thus, for the Court, as long as Congress furnishes an agency with a guiding principle for the exercise of its delegated authority, Congress does not violate the nondelegation doctrine.

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58 *Yakus v United States*, 321 US 414, 427 (1944) ("The directions that the prices fixed shall be fair and equitable, that in addition they shall tend to promote the purposes of the Act . . . confer no greater reach for administrative determination than the power to fix just and reasonable rates.").

59 *Mistretta*, 488 US at 373 n 7 ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.").

60 David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U Pitt L Rev 1, 11–12 (2002).

61 Id at 11. See also *United States v Grimaud*, 220 US 506, 517 (1911) (finding that Congress may delegate "power to fill up the details" under general provisions of law).

62 276 US 394 (1928). Prior to 1935, the Court had not based a holding on the nondelegation doctrine, although it continuously reaffirmed that delegations of legislative power to the executive were unconstitutional. See, for example, *The Brig Aurora v United States*, 11 US (7 Cranch) 382, 385 (1813) ("Congress could not transfer the legislative power to the President."). The Court had permitted some legislative delegations under the premise that they were not in fact delegations of legislative power. See, for example, *Field v Clark*, 143 US 649, 692–93 (1892) (upholding a delegation to the president by reasoning that he was not being delegated legislative power but the authority to make factual determinations).

63 *J.W. Hampton*, 276 US at 409.

64 Id at 408, quoting *Interstate Commerce Commission v Goodrich Transit Co*, 224 US 194, 214 (1912).

After *J.W. Hampton*, the Court continued to employ the "intelligible principle" test in determining the constitutionality of congressional delegations. For example, the Court found that a statute allowing the president to ban interstate shipments of "hot oil," without providing any substantive or procedural standards to govern the decision, failed to provide an intelligible principle and violated the nondelegation doctrine.[65] Although the Supreme Court has not invalidated a statute on nondelegation grounds since 1936, courts continue to apply the "intelligible principle" test when faced with nondelegation claims.[66]

2. The current state of the doctrine.

Since 1936, the Court has consistently rejected nondelegation-based challenges to statutes by applying an increasingly liberal interpretation of the "intelligible principle" requirement.[67] For example, the Court found an intelligible principle in a statute instructing an administrator to fix prices that were, in the administrator's judgment, "fair and equitable."[68] Recently, the Court has applied the delegation doctrine primarily as a canon of interpretation.[69] For years, the Supreme Court has accepted the principle that courts should interpret statutes, when reasonably possible, in a way that allows the court to avoid deciding constitutional questions.[70] Where a court is faced with a statute

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65 *Panama Refining Co v Ryan*, 293 US 388, 430 (1935). In addition to the "intelligible principle" requirement, the Court has held that congressional delegations outside of the three branches are presumptively prohibited by the nondelegation doctrine. See *Carter v Carter Coal Co*, 298 US 238, 311 (1936) ("This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.").

66 See, for example, *The Pittston Co v United States*, 368 F3d 385, 396 (4th Cir 2004) (finding that the Coal Industry Retiree Health Benefits Act was a proper delegation because it defined the nature of the fund and other specifications); *Tulare County v Bush*, 306 F3d 1138, 1143 (DC Cir 2002) (finding that the Antiquities Act includes intelligible principles to guide the president's action, and thus is not an improper delegation).

67 *Mistretta*, 488 US at 373 ("[After 1935] we have upheld . . . without deviation, Congress' ability to delegate power under broad standards.").

68 *Yakus*, 321 US at 427. The Court has also upheld a delegation instructing the executive to make regulations serving "the public interest, convenience, or necessity." Id. These developments have led some commentators to conclude that the nondelegation doctrine is dead. See, for example, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 132–33 (Harvard 1980). But see, for example, Gary Lawson, *Delegation and Original Meaning*, 88 Va L Rev 327, 330 (2002) ("The nondelegation doctrine . . . is the Energizer Bunny of constitutional law: No matter how many times it gets broken, beaten, or buried, it just keeps on going and going.").

69 *Mistretta*, 488 US at 373 n 7.

70 See, for example, *INS v St. Cyr*, 533 US 289, 299–300 (2001) (noting that if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, a court is obligated to construe the statute to avoid such a problem).

that could potentially violate the nondelegation doctrine, the court will interpret the statute in a way that does not present a nondelegation problem.[71] A court does this by looking to various sources, such as legislative history, custom, and the entire scope of the statute, in order to find an "intelligible principle."[72] Thus, the nondelegation doctrine has become a canon of avoidance.[73]

The Supreme Court's holding that legislative delegations to the executive must contain an intelligible or guiding principle is in tension with the "no law to apply" formula. If the nondelegation doctrine requires that legislative delegations contain a guiding intelligible principle, how can a statute that leaves courts without any law to apply to a given agency action ever meet this constitutional prerequisite? It is difficult to see how a broad statute that lacks any law to apply to an agency's action can contain a guiding principle. As such, a statute that contains no law to apply and commits action to agency discretion under § 701(a)(2) appears to be unconstitutional.

II. RECONCILING THE NONDELEGATION DOCTRINE WITH "NO LAW TO APPLY"

A comparison of the nondelegation doctrine and the "no law to apply" formulation of the "committed to agency discretion" exception presents some conceptual puzzles and may lead to the conclusion that a statute that falls under the exception violates the nondelegation doctrine. A cursory look at the Court's jurisprudence does not shed light on this dilemma, as the Court has never addressed the two doctrines in the same case. As a result, it is not readily apparent how the potential constitutional conflict between the two doctrines can be resolved. A careful examination of the Court's nondelegation jurisprudence does, however, provide an answer by revealing the limits of the nondelegation doctrine, which demonstrate that the areas beyond the limits of the doctrine are the areas where agency action may constitutionally be committed to agency discretion. Recognizing the limits of the nondelegation doctrine provides the answer to reconciling the

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71 See Cass R. Sunstein, *Nondelegation Canons*, 67 U Chi L Rev 315, 315 (2000) (arguing that the nondelegation doctrine now consists of a set of canons subject to "principled judicial application"). For a criticism of the use of the nondelegation canon, see Driesen, 64 U Pitt L Rev 1 (cited in note 60) (arguing that the judiciary's use of nondelegation canons aggrandizes the judiciary at the expense of the other, more democratic branches).

72 See, for example, *Industrial Union Department, AFL-CIO v American Petroleum Institute*, 448 US 607, 676–85 (1980) (Rehnquist concurring) (observing that the Court often looks to add a "gloss" to broad grants of legislative authority by examining the statute's legislative history, purpose, factual background, and statutory context).

73 See, for example, id at 645–46 (narrowing the scope of the Occupational Health and Safety Act).

doctrine with the "no law to apply" formula and suggests an alternate definition of § 701(a)(2).

Part II.A highlights the inherent conflict between the nondelegation doctrine and "no law to apply" and considers why, although frequently noted by commentators, the Court has never formally addressed the conflict. Part II.B explores the limits of the nondelegation doctrine highlighted by the Supreme Court's reasoning in *Loving v United States*.[74] Part II.C proposes an alternate definition of the "committed to agency discretion" exception that recognizes the relationship between the two doctrines by placing the exception beyond the realm of the nondelegation doctrine: agency action may constitutionally be committed to agency discretion where Congress has provided no law to apply and where the agency is acting pursuant to some independent authority.

A. The Apparent Unconstitutionality of Finding No Law to Apply

The "no law to apply" formula and the nondelegation doctrine appear to be in pointed tension.[75] Both doctrines are triggered by broadly written congressional delegations and employ the same test: is there any guiding law or principle in the statute that circumscribes agency action? If a statute is so broad that it lacks a guiding policy, the statute may lack an intelligible principle, in violation of the nondelegation doctrine. However, if the statute lacks a guiding policy or principle, a court may find that it gives no law to apply and commits action to agency discretion. The two doctrines lead to opposite results: the second result significantly expands the agency's discretion to act, in direct contrast to the first result, which finds that the agency has no power to act at all.[76]

There are few cases where courts have discussed both the nondelegation doctrine and "no law to apply."[77] This is a likely reason why the tension between the two doctrines has received limited attention. There are several explanations for why the two doctrines do not frequently arise together. First, Congress typically provides law to guide the agency in executing a congressional delegation.[78] Therefore, there

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74 517 US 748 (1996).

75 For a more thorough discussion of the apparent unconstitutionality of the application of the "no law to apply" exception, see generally Bergin, 28 BC Envir Aff L Rev 363 (cited in note 13).

76 Id at 393.

77 See generally *Marine Engineers' Beneficial Association v Maritime Administration,* 215 F3d 37 (DC Cir 2000); *Florsheim Shoe Co v United States*, 744 F2d 787 (Fed Cir 1984). Both of these cases will be discussed in Part II.C, and are cited in notes 112 and 115, respectively.

78 See John C. Deal, *Banking Law Is Not for Sissies: Judicial Review of Capital Directives*, 12 J L & Comm 185, 202 (1993) (noting that Congress is reluctant to preclude judicial review

are few statutes implicating § 701(a)(2) in the first place. Second, the nondelegation doctrine currently exists as a canon of construction;[79] courts rarely strike down legislation on nondelegation grounds. As a result, litigants are unlikely to raise nondelegation arguments.[80] Furthermore, the existence of the doctrine as a canon of construction may mask instances where the doctrine and the "committed to agency discretion" exception do in fact interact. Courts may frequently use the nondelegation canon to narrowly interpret statutes that implicate § 701(a)(2), thereby finding an intelligible principle or law to apply. In doing so, the court eliminates the possibility that the statute commits action to agency discretion possibly without ever addressing the issue. Moreover, courts do not always note that they are employing the nondelegation canon and sometimes employ the canon even where the litigants have not raised a nondelegation attack.[81] If courts mention neither the nondelegation doctrine nor the canon, it is difficult to determine whether a case implicates both the nondelegation and "no law to apply" doctrines. The lack of cases addressing both doctrines allows the conflict to remain unresolved.

B. The Limits of the Nondelegation Doctrine

Recognizing the limits of the nondelegation doctrine is the first step towards reconciling the doctrine with the "no law to apply" definition of § 701(a)(2). Under the nondelegation doctrine, Congress cannot delegate, and the executive cannot implement, a statute lacking an intelligible principle because in order to implement such a statute, the executive must engage in what courts have likened to legislative lawmaking. Under Article I, legislative lawmaking must be done by Congress. However, the executive branch may legislate without properly delegated authority from Congress if the Constitution authorizes executive lawmaking in the subject area.[82] Where there is such constitutional authorization, the executive has authority over the subject mat-

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because it relies upon the courts to require agencies to comply with Congress's wishes), citing *Bowen v Michigan Academy of Family Physicians*, 476 US 667, 681 (1986).

79 See *Mistretta v United States*, 488 US 361, 373 n 7 (1989); note 59.

80 See *Webster v Doe*, 486 US 592, 599 (1988) ("Typically, a litigant will contest an action (or failure to act) by an agency on the ground that the agency neglected to follow the statutory directives of Congress.").

81 See Sunstein, 67 U Chi L Rev at 331–37 (cited in note 71) (discussing how courts employ various substantive canons of construction, such as the presumption that legislation only applies domestically, many of which embody the nondelegation canon).

82 Driesen, 64 U Pitt L Rev at 42 (cited in note 60) (discussing erroneous applications of the nondelegation canon and noting that "[t]he Court has . . . never demanded an intelligible principle when the recipient of delegated authority has adequate independent constitutional authority over the subject matter"), citing *Loving*, 517 US at 772–73, and *United States v Mazurie*, 419 US 544, 556–57 (1975).

ter independent of the congressional delegation.[83] Therefore, in an area where the executive has some authority to act independently of the congressional authorization, rulemaking pursuant to a statute lacking an intelligible principle does not violate the nondelegation doctrine. In this scenario, the delegation is beyond the limits of the nondelegation doctrine.

The Constitution vests different powers in each branch of the government. In areas where the Constitution vests a branch with power, it has independent authority to act. Some of the branches' authority is exclusive, such as Congress's power to make appropriations,[84] and some is nonexclusive, such as the president's power to make treaties.[85] The Court has indicated that in areas where the executive has some independent authority, even if the authority is concurrent with that of Congress, broad delegations are constitutional.[86] When Congress delegates to the executive in an area where the executive has some independent authority, Congress can delegate more broadly than would be permissible in the absence of independent executive authority because Congress is merely expanding the lawmaking authority that the executive already has.[87]

The Supreme Court alluded to the limits of the nondelegation doctrine in areas where the executive has independent lawmaking authority in *Loving*. Loving, an Army private convicted of murder, appealed his conviction on the ground that allowing the president to define aggravating factors that permit the imposition of the death penalty in military capital cases violated the nondelegation doctrine.[88]

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83 The executive has varying degrees of independent authority depending on the congressional authorization at issue.

84 See, for example, *Glidden Co v Zdanok*, 370 US 530, 570 (1962).

85 See, for example, *Roper v Simmons*, 543 US 551, 622 (2005) (noting that the Constitution empowers the Senate and the president to make treaties).

86 See, for example, *Loving*, 517 US at 772–73 (holding that Congress could delegate to the president the power to define aggravating factors that permit the imposition of the death penalty in military trials).

87 See, for example, *United States v Curtiss-Wright Export Corp*, 299 US 304, 319–20 (1936) (upholding the power of the president to prosecute violators of an arms embargo because the president is the "sole organ . . . in the field of international relations"). See also Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U Pa L Rev 1035, 1102 (1986) (noting that although the president's general foreign affairs power in *Curtiss-Wright* would not have been sufficient to authorize him to act independently of congressional authorization, because the president had some power Congress was able to delegate broad authority in a manner that would have been impermissible if he had no power over the area). Note that where the independent authority of the executive is not exclusive but concurrent, the executive's power may not permit it to act independently in the area absent congressional authorization, such as a delegation. See *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 587, 592–639 (1952) (Jackson concurring) (discussing the scope of the president's independent lawmaking authority).

88 *Loving*, 517 US at 759.

The Court rejected Loving's nondelegation claim and held that the nondelegation doctrine did not preclude the delegation.[89]

In its holding, the Court stated that the issue in the case was not, as Loving asserted, "whether there was any explicit principle telling the president how to select aggravating factors, but whether any such guidance was needed, given the nature of the delegation."[90] The Court held that the relevant delegation was to the president in his role as commander in chief and that this role required him to "take responsible and continuing action to superintend the military."[91] The Court therefore found that the delegation was "interlinked with duties already assigned to the president by express terms of the Constitution, and the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'"[92]

The Court has similarly upheld delegations lacking an intelligible principle to voters, states, and Native American tribes, recognizing that such delegations were beyond the limits of the nondelegation doctrine.[93] For example, the Court held that a statute allowing tribes to regulate the introduction of liquors into Native American Territory was not unconstitutionally broad because Native American tribes have attributes of sovereignty and the power to regulate their internal affairs.[94] The Court has also extended this principle to areas where the president has plenary authority under the Constitution.[95] For example, the Court upheld as a lawful delegation of power a statute authorizing the president to determine whether an embargo on arms sales to foreign belligerents would contribute to world peace because the president "is the sole organ of the nation in its external relations."[96]

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89 Id at 772–74.

90 Id at 772.

91 Id.

92 Id, quoting *Mazurie*, 419 US at 556–57.

93 See, for example, *Eastlake v Forest City Enterprises*, 426 US 668, 677–80 (1976) (upholding a city charter requiring voter ratification of land use changes because the people exercised power reserved to themselves); *United States v Sharpnack*, 355 US 286, 296–97 (1958) (upholding a statute that allows states to dictate what constitutes a federal crime).

94 *Mazurie*, 419 US at 556–57.

95 See *Loving*, 517 US at 772–74 ("From the early days of the Republic, the President has had congressional authorization to intervene in cases where courts-martial declared death."); *Curtiss-Wright*, 299 US at 319–20 (discussing the president's power to negotiate and make treaties on behalf of the United States). See also *Youngstown*, 343 US at 592–639 (Jackson concurring) (discussing the scope of the president's independent lawmaking authority).

96 *Curtiss-Wright*, 299 US at 319–20 (internal quotation marks omitted):

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal gov-

There are areas where agencies, like the president, have independent authority. While Congress creates agencies and defines the scope of their authority, it is possible for an agency to have independent authority beyond what Congress has delegated to it. Courts have recognized that agencies have some inherent powers. First, agencies have inherent powers inferred from, implied from, or incident to the express powers granted to them and duties imposed upon them by Congress.[97] These inherent powers include those which are reasonable and appropriate for the agency to carry out their duties.[98]

The ability of agencies to act pursuant to authority implied from the powers granted to them by Congress is not boundless. Such authority is only implied to the extent that it is necessary to execute and fulfill the laws and duties delegated to them by Congress.[99] Additionally, implied powers cannot contravene express statutory provisions and limits laid down by Congress.[100] If Congress has provided law to apply, an agency does not have implied powers that conflict with that law.

In addition, agencies have some inherent powers derived from their location under the president in the executive branch.[101] In order to carry out his Article II executive powers, such as his role as commander in chief and his power in the areas of foreign affairs and national security,[102] the president delegates his authority to other executive officers.[103] Executive agencies and departments exercise the executive powers of the president that are delegated to them. Because the

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ernment in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.

97 See 73 CJS Pub Admin Law and Procedure § 109 (2005). See also Carl W. Tobias, *Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings*, 82 Colum L Rev 906, 923 (1982) ("[I]t is well established that federal agencies possess implied as well as express statutory authority.").

98 *Gallagher's Steak House, Inc v Bowles*, 142 F2d 530, 534 (2d Cir 1944) ("[T]he lawful delegation of a power carries with it the authority to do whatever is reasonable and appropriate properly to effectuate the power."), citing *McCulloch v Maryland*, 17 US (4 Wheat) 316 (1819). See also, for example, *Royal Indemnity Co v United States*, 313 US 289, 294 (1941) (recognizing that the doctrine of implied authority extends to the disposition of the rights and property of the federal government); *United States v Bailey*, 34 US (9 Pet) 238, 255 (1835) (holding that the Secretary of Treasury had implied power to require oaths when paying claims); *Gadda v Ashcroft*, 377 F3d 934, 948 n 8 (9th Cir 2004) (recognizing the inherent power of courts to discipline attorneys); *Ober v Whitman*, 243 F3d 1190, 1194–95 (9th Cir 2001) (suggesting that agencies have the inherent authority to exempt de minimis violations from regulation); *GTE Service Corp v FCC*, 782 F2d 263, 274 n 12 (DC Cir 1986) (recognizing the inherent authority of courts to control dockets).

99 See 73 CJS Pub Admin Law and Procedure § 109 (cited in note 97).

100 Id.

101 Thomas W. Merrill and Kristin E. Hickman, Chevron*'s Domain*, 89 Georgetown L J 833, 876 (2001).

102 See generally *Curtiss-Wright*, 299 US 304.

103 See note 3.

president is the "ultimate repository" of the power that Congress delegates to agencies and other officers of the executive branch, the president's Article II powers are attributed to these agencies and officers.[104]

The powers an agency derives from the president are, like its implied powers, limited in that the agency may generally not rely on them to act in opposition to Congress. To act in the face of congressional opposition, the executive must have exclusive constitutional authority to act outside of, and against, the congressional delegation.[105] Otherwise, where Congress has provided law to apply in its delegating statute, the agency cannot rely on independent authority to act in conflict with the statutory law.

When an agency acts within the bounds of its Article II powers, it operates in a realm where the nondelegation doctrine does not apply. Thus, in areas where an agency has independent authority, Congress may, consistent with the nondelegation doctrine, delegate to the agency without providing an intelligible principle.[106]

C. The Constitutional Definition of § 701(a)(2): The "Independent Authority" Exception

Recognizing the limits of the nondelegation doctrine allows it to be reconciled with the "no law to apply" definition of the "committed to agency discretion" exception: it is constitutional for a statute to commit action to agency discretion by not providing law to apply if the agency has lawmaking authority in the area of delegation independent of the congressional delegation.

Where an agency has independent authority either derived from the president's constitutional powers or from its own implied powers, it is not unconstitutional for Congress to provide no law to apply to agency action.[107] "No law to apply" in this instance does not violate the nondelegation doctrine because, through the delegating statute, Con-

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104 See, for example, *Department of the Navy v Egan*, 484 US 518, 527–30 (1988) (holding that a decision to deny an employee security clearance was not subject to review in part because of the president's authority to classify and control access to information bearing on national security).

105 This case is analogous to Justice Jackson's *Youngstown* category three. This category denotes the situation where the president acts in the face of congressional opposition. Jackson notes that the president may constitutionally act in such a case only if the Constitution gives him exclusive authority over the subject matter. In Jackson's category two, the president acts in the face of congressional silence. In this instance, the president can act if the Constitution gives him the power to do so absent congressional authorization. In category one, the president acts with congressional authorization. In this instance, the president can exercise not only his but also Congress's constitutional powers. *Youngstown*, 343 US at 634–39 (Jackson concurring).

106 For a discussion of why Congress would do this, see note 21.

107 See text accompanying note 82.

gress has simply added to the agency's independent authority to act.[108] If the agency has independent lawmaking authority in the relevant area, it is not constitutionally essential that Congress provide an intelligible principle—Congress may commit agency action to the agency's discretion.[109] Therefore, a court may properly find that agency action is committed to agency discretion only where the agency has independent authority, because it is only in this case that a delegation lacking a law to apply is constitutional. In such a case, a "committed to agency discretion" claim can succeed for precisely the same reason that a nondelegation attack would fail—because the agency is acting pursuant to an independent source of authority.

Understanding that Congress may only commit action to agency discretion by providing no law to apply in cases where the agency has independent authority gives rise to a definition of § 701(a)(2) that comports with the nondelegation doctrine: agency action may be committed to agency discretion where (1) Congress has provided no law to apply, and where (2) the agency is acting pursuant to independent lawmaking authority. The second condition, independent authority, must be met, otherwise Congress has provided no intelligible principle in violation of the nondelegation doctrine. Under the proposed "independent authority" definition, where Congress has provided no law to apply but the agency does not have independent authority to act pursuant to the second condition, judicial review may not constitutionally be precluded. In this case, a court must review agency action and discern law to apply.[110]

The "independent authority" definition reconciles § 701(a)(2) with the nondelegation doctrine and also provides the reasoning behind the exception. Where an agency is acting pursuant to a statute and its independent authority, it is not possible for courts to review the action under the APA: courts cannot determine whether agency action is an "abuse of discretion" or "arbitrary and capricious" in relation to the delegating statute, because the agency has authority to act independent of the statute.[111] The agency action can be seen as both outside of the realm of the APA and the nondelegation doctrine.

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[108] This situation is analogous to Jackson's *Youngstown* category one, where the president's authority "is at its maximum." *Youngstown*, 343 US at 635 (Jackson concurring).

[109] Id.

[110] See Davis, 25 San Diego L Rev at 9 (cited in note 29) (noting that courts frequently have to review agency action when there is no clear law by, for example, employing the standard of reasonableness).

[111] However, even where agency action is unreviewable pursuant to § 701(a)(2), courts can, as always, review the action on constitutional grounds. *Webster*, 486 US at 600 (holding that unreviewability under § 701(a)(2) did not foreclose judicial review of plaintiff's claims that his

III. REVEALING THE TRUE DEFINITION OF § 701(A)(2): THE "INDEPENDENT AUTHORITY" EXCEPTION

The Supreme Court has held that agency action is unreviewable and committed to agency discretion under § 701(a)(2) where the governing statute provides no law to apply to the agency action. However, a statute lacking law to apply to agency action appears to violate the nondelegation doctrine. Nonetheless, a statute lacking law to apply does not violate the nondelegation doctrine if it operates in an area where the executive has independent authority. By recognizing this relationship between the doctrines, the "independent authority" definition of § 701(a)(2) resolves the exception's apparent conflict with the nondelegation doctrine.

A review of circuit court and Supreme Court "no law to apply" jurisprudence reveals that the "independent authority" definition of § 701(a)(2) is the true definition of the "committed to agency discretion" exception. The Court's jurisprudence reveals that when it finds agency action committed to agency discretion it requires not only that the statute provide no law to apply but also that the agency have independent authority. The "independent authority" definition accurately defines the court's conception of § 701(a)(2) and provides an overarching definition of the exception that explains the Court's "no law to apply" jurisprudence by cohesively tying together what appear to be case specific holdings. Thus, the Court's application of "no law to apply" has been consistent with the nondelegation doctrine because the Court has applied it only where the agency had independent authority. A recognition of the true definition of § 701(a)(2) reconciles the exception with the nondelegation doctrine and more accurately defines the substantive law, thereby making the application of the "committed to agency discretion" exception clearer.

A. Reconciling the "Independent Authority" Definition with Circuit Courts' "No Law to Apply" Jurisprudence

The Supreme Court has never addressed both the "no law to apply" and the nondelegation doctrines in the same case, and thereby provides no direct guidance to test the posited "independent authority" definition of § 701(a)(2). However, where the D.C. Circuit and the Federal Circuit have addressed the two doctrines simultaneously, their holdings are consistent with the "independent authority" definition: Congress may preclude agency action from judicial review by offering no law to apply only if it does so beyond the limits of the nondelega-

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dismissal violated his constitutional rights). For this reason Congress could not, through § 701(a)(1) or § 701(a)(2), shield a statute from being reviewed on nondelegation grounds.

tion doctrine. The D.C. Circuit and the Federal Circuit cases show that it is particularly in those instances where an agency acts beyond the limits of the nondelegation doctrine that courts find the action committed to agency discretion.

The D.C. Circuit has held that the Maritime Administration's decision to transfer the registry of eight vessels from the United States to the Republic of the Marshall Islands was committed to agency discretion because of the executive's plenary and independent authority in the area of national defense and foreign policy.[112] The court also went on to reject the claim that the delegation violated the nondelegation doctrine.[113] The "committed to agency discretion" exception applied for the same reason that the nondelegation claim failed: because the executive had an independent source of authority in the area.[114] Therefore, consistent with the "independent authority" definition, the court declined to review agency action where there was both no law to apply and independent authority.

Similarly, the Federal Circuit has held that the Customs Service's classification of imported Indian leather as dutiable merchandise was committed to agency discretion; the executive branch's decisions concerning international trade are not reviewable because the executive branch has independent authority in this area.[115] The court also held that the delegation did not violate the nondelegation doctrine because the subject matter of the statute involved international trade—an area of foreign affairs, in which broad delegations are permissible.[116] Again, consistent with the "independent authority" definition, the court found that an agency decision was unreviewable where the agency was acting with independent authority beyond the realm of the nondelegation doctrine.

These two cases confirm the two-pronged "independent authority" definition of § 701(a)(2). The courts held that agency actions were unreviewable where there was no law to apply and the agency had independent authority to act.

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112 *Marine Engineers' Beneficial Association v Maritime Administration*, 215 F3d 37, 41–42 (DC Cir 2000) (finding that reviewing the agency's decision would entail second-guessing the executive's judgments on questions of foreign policy and national interest).

113 Id at 44.

114 Id at 41–42, 44.

115 *Florsheim Shoe Co v United States*, 744 F2d 787, 795 (Fed Cir 1984) ("[T]he Executive's decisions in the sphere of international trade are reviewable only to determine whether the President's action falls within his delegated authority.").

116 Id.

B. Reconciling the "Independent Authority" Definition with Supreme Court "No Law to Apply" Jurisprudence

Congressional delegations that lack an intelligible principle or law to apply are constitutional only if the delegation is in an area where the executive has independent authority. Interestingly, while the Supreme Court has never articulated the connection between "no law to apply" and the nondelegation doctrine, it has held that agency action was unreviewable under § 701(a)(2) only where the agency had a source of independent lawmaking authority.[117] Like the circuit courts, in the cases where the Court held that there was no law to apply, it never relied exclusively on the language of the governing statute, but instead also focused on nonstatutory reasons why the agency had discretion to act[118]—reasons that, upon examination, clearly derive from the fact that the agency was acting within the scope of its independent authority. Thus, the Court has implicitly required that two conditions be met for agency action to fall within § 701(a)(2): that there be no law to apply and that the agency have independent authority to act. The current "no law to apply" definition articulates only one of these conditions, while the Court has implicitly required both. The "independent authority" definition posited in this Comment incorporates both conditions to arrive at the more complete definition of the "committed to agency discretion" exception that the Court has employed: agency action is unreviewable under § 701(a)(2) where Congress has provided no law to apply and where the agency has independent authority to act in the area.

The Court held in *Chaney* that executive decisions not to take enforcement action are committed to agency discretion.[119] En route to its holding, the Court examined the governing statute and determined that Congress had not provided law guiding agency decisions not to take enforcement action. The Court then looked beyond the delegating statute to the larger context of the delegation, particularly the nature of the action and the agency's historical ability to act freely in the given area.[120] The Court recognized that while it is the job of Congress to make the laws, it is up to the executive to decide how it will enforce and execute those laws. Agencies have independent authority derived from their inherent executive powers to decide the manner in which

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117 See, for example, *Webster v Doe*, 486 US 592, 601 (1988) (finding that the statute giving a CIA Director complete discretion did not violate the nondelegation doctrine).

118 See, for example, *Chaney*, 470 US at 831–32 (discussing reasons behind enforcement and prosecutorial discretion).

119 Id at 838.

120 Id at 831–32.

they execute the laws.[121] In declining review, the *Chaney* Court found that both conditions of the "independent authority" definition were met.

Similarly, the Court in *ICC v Brotherhood of Locomotive Engineers*[122] held that the agency's refusal to reconsider a decision was committed to agency discretion.[123] As in *Chaney*, the decision was to rehear a petition related to the manner in which the agency executes the laws. The Court held that just as a body with enforcement power has discretion not to take enforcement action, a body that makes judgments on party claims has the discretion not to review its previous determinations.[124] An agency has independent authority to make such determinations stemming from its executive and implied agency powers. Thus, in *Brotherhood of Locomotive Engineers*, the Court again denied review where Congress had not provided law to apply and where the agency was acting pursuant to its independent authority.

In *Webster v Doe*,[125] a CIA employee contested the grounds of his termination and the Court held that the CIA Director's decision to fire the CIA employee was unreviewable under § 701(a)(2). This holding also comports with the "independent authority" definition of § 701(a)(2). The Court first found that the governing statute did not provide the agency with law to apply to employee termination decisions.[126] After making this determination, the Court again went on to discuss the nature of the agency and the decision to terminate before conclusively finding that the decision was committed to agency discretion.[127] The Court stressed that the CIA plays an integral role in the executive's ability to carry out its foreign affairs and commander in

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121 Id at 832, citing US Const Art II, § 3. The Court emphasized that decisions not to enforce require the agency to balance and assess many factors, such as its chances of prevailing in the action, competing uses for its limited budget, and its regulatory priorities. Because these factors are within the agency's expertise, judicial supervision of such choices would be impractical and unwise. *Chaney*, 470 US at 831–32.

122 482 US 270 (1987).

123 Id at 282.

124 Id at 281 (stating that a tradition of nonreviewability exists with regard to refusals by agencies and courts to reconsider for material error). The Court also held in *Lincoln v Vigil*, 508 US 182 (1993), that decisions on how to spend lump sum appropriations were not reviewable after likening them to agency decisions not to enforce. Id at 191–92. Again, the agency had independent authority derived from its implied powers.

125 486 US 592 (1988).

126 Id at 600 (noting that the statute allowed for termination of an employee when the Director deemed such termination necessary or advisable, "not simply when the dismissal *is* necessary or advisable").

127 Id.

chief powers.[128] In this way, the Court importantly recognized that whether an agency decision is reviewable is not only rooted in the relevant statutory language, but also in the specific nature of the agency and the tasks it was established to perform. The president's commander in chief and foreign affairs powers provide a definitive basis for independent authority in *Webster*. The lack of law to apply did not violate the nondelegation doctrine because, like the president in *Loving*, the intelligence director derives independent authority from Article II. Consistent with the "independent authority" definition, the Court could find that the decision was unreviewable because Congress did not provide law to apply and because the director was acting within the scope of his independent authority.

As these cases demonstrate, the Court has found agency action committed to agency discretion when Congress has not provided law in the governing statute and where there are various nonstatutory arguments in favor of unreviewability. A close look reveals that the nonstatutory arguments in each case stem from the presence of independent agency authority to act. It is because the agency has this independent executive authority that the Court's initial finding that there is no law to apply does not render the governing statute an unconstitutional delegation. The Court's jurisprudence confirms the "independent authority" definition: the Court holds that agency action is committed to agency discretion where the statute provides no law to apply and where the agency is acting pursuant to some independent authority.

C. Resolving Current Difficulties with the "No Law to Apply" Definition

The "independent authority" definition of § 701(a)(2) facilitates a necessary reconciliation between the "no law to apply" formula and the nondelegation doctrine. The necessity of this reconciliation arises from the fact that the "no law to apply" definition appears to violate the nondelegation doctrine and because neither courts nor commentators understand this traditional definition of § 701(a)(2).[129] This confusion has led to a range of practical difficulties for courts, legislators, and litigants faced with broad congressional delegations. A recognition of the true "independent authority" definition of § 701(a)(2)

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[128] Id at 601 ("Section 102(c) is an integral part of that statute, because the Agency's efficacy, and the Nation's security, depend in large measure on the reliability and trustworthiness of the Agency's employees.").

[129] See note 22.

remedies these difficulties by explicitly recognizing the relationship between the two doctrines.

Under the traditional definition of "no law to apply," an agency could argue that a broad delegation lacks law to apply and commits action to agency discretion. This line of argument, however, may leave the statute particularly vulnerable to an attack on nondelegation grounds. This conflict raises a problem for the agency's defense of its actions: how does the agency make its case that there is truly no law to apply from the statute to its action, while defending the statute against an attack that it lacks an intelligible principle? Because the "no law to apply" defense does not respond to the nondelegation attack, the agency is forced to walk a delicate line, arguing that the statute contains an intelligible principle yet maintaining that it nevertheless provides no law to apply.

The "independent authority" definition of § 701(a)(2) resolves this difficulty because it clearly establishes the relationship between the nondelegation doctrine and § 701(a)(2). In order to prevail on the claim that the agency's action is unreviewable, the agency must show that it has independent authority to act, without having to refute a claim that the statute lacks an intelligible principle. Therefore, litigants do not need to make an argument that bolsters their case while weakening it at the same time. The "independent authority" definition of § 701(a)(2) collapses the nondelegation and the "no law to apply" arguments into one, allowing both the court and the litigants to focus on the crucial question once it has been determined that the statute lacks law to apply: whether the agency has authority to act independent of the congressional delegation.

Another D.C. Circuit case further demonstrates the difficulties created by the tension between the "no law to apply" and the nondelegation doctrines. In *Rainbow Navigation, Inc v Department of the Navy*,[130] Rainbow Navigation, a U.S. shipping company, accused the Navy of violating the Cargo Preference Act (CPA), which stipulates that U.S. ships must be used to transport sea supplies for U.S. forces.[131] An exception in the CPA permits the president to issue contracts to foreign shippers if he finds that the rates charged by U.S. shippers are "excessive or otherwise unreasonable."[132] Rainbow Navigation brought a claim after the Navy revoked the preference that the company had been granted for the shipping route from the United States to a U.S. base in Keflavik, Iceland.

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130 783 F2d 1072 (DC Cir 1986).

131 Id at 1073–74.

132 Id.

The Navy based its decision to revoke Rainbow's preference and grant it to Icelandic shippers on diplomatic and security reasons, but officially invoked the "excessive or otherwise unreasonable" clause in the CPA as the basis for its decision.[133] The Secretary argued that the Navy's decision was committed to agency discretion because it entailed sensitive foreign relations matters.[134] The court held that the decision was reviewable because "excessive or otherwise unreasonable" referred to monetary considerations only and provided law that the court could apply.[135]

However, the court noted that the Secretary's decision was reviewable only because the Secretary had invoked the "excessive or otherwise unreasonable" exception as the basis for its decision.[136] If the Secretary had instead declared that he was basing its decision on foreign affairs concerns, the court would likely have declined to review its action.[137] In this case, the Navy would not have been acting under its statutory authority but under independent foreign affairs powers derived from the president. The court's analysis in that circumstance would have focused on whether the Navy had constitutional power, as opposed to statutory authority, to take the contested action.

The relevant point from the case is that Congress had initially written the CPA to give the president full discretion to suspend a national cargo preference whenever he deemed it desirable in the interests of national defense.[138] However, Congress rejected this language in favor of that ultimately adopted[139] because it feared that courts would invalidate the original statute on nondelegation grounds.[140] Congress failed to recognize that the statute as written would have been beyond the limits of the nondelegation doctrine, because the Navy, through the president, would have been acting pursuant to independent au-

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133 Id. Icelandic shippers were upset by their exclusion from the route and the issue became a source of considerable friction in U.S.-Icelandic relations. The Secretary of State declared his fear that this friction might result in retaliatory action by Iceland. Id.

134 Id at 1078–79.

135 Id at 1079–80 (noting that the court could determine whether rates charged were reasonable).

136 Id.

137 Id at 1075.

138 See id at 1077. The original language was as follows: "[T]he President of the United States may from time to time suspend, in whole or in part, section 1 of this act whenever, in the interests of the national defense or for the protection of the interests of the Government, such suspension may seem to him desirable." Cargo Preferences Act, S 2263, 58th Cong, 2d Sess, in 38 Cong Rec S 2408 (Feb 26, 1904).

139 "[U]nless the President shall find that the rates of freight charges by said vessels are excessive or otherwise unreasonable . . . ." *Rainbow Navigation*, 783 F2d at 1077, citing Cargo Preferences Act, 38 Cong Rec at S 2474–77 (cited in note 138).

140 See *Rainbow Navigation*, 783 F2d at 1077 (noting that the principal proponent of the change argued that the presidential finding must be something specific).

thority. Congress was free to offer no law to apply and commit the action to agency discretion because the agency would remain free to act in accordance with Congress's desire pursuant to the agency's independent authority. Had the relationship between the nondelegation and the "no law to apply" doctrines been clearer, Congress could have enacted the legislation as initially written. Instead, Congress amended the language of the exception and limited the Navy's discretion to act under the governing statute.[141]

In *Rainbow Navigation*, a governing statute was unnecessarily amended in order to avoid invalidation on nondelegation grounds. The case demonstrates how the tension between the traditional "no law to apply" definition and the nondelegation doctrine creates difficulties for courts, legislators, and litigants, including agencies. As a result of the tension, Congress unnecessarily limited the agency's statutory discretion. An understanding of the true definition of § 701(a)(2) would have provided Congress and the agency with the crucial question in the case: does the agency have the ability to act pursuant to independent lawmaking authority in the area of the delegation? By focusing on this question, Congress and the agency can determine more accurately whether a broad delegation is permissible, allowing Congress to delegate broadly and expand the agency's statutory authority where the agency has an independent source of authority.

CONCLUSION

The true "independent authority" definition of the "committed to agency discretion" exception resolves the tension between the exception, as it is currently understood through the "no law to apply" definition, and the nondelegation doctrine. The true definition makes clear that a finding that a statute commits action to agency discretion by providing no law to apply is constitutional because the Court only makes such a finding where the agency is acting pursuant to independent authority. In addition, this understanding of § 701(a)(2) reveals the complete definition of the exception, that the "no law to apply" definition has failed to provide, by accurately explaining the Supreme Court's two-pronged "no law to apply" jurisprudence.

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141 The Navy still had independent authority to act, but Congress had narrowed its discretion to act under the statutory delegation. The situation fell within *Youngstown* category two—congressional silence—as opposed to category one—congressional authorization. As a result, the executive's authority was not at its maximum because it did not include "all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 US at 635–37.