

Judicial Review Endangered: Decisions Not to Exclude Areas From Critical Habitat Should Be Reviewable Under the APA

by Damien M. Schiff

Damien M. Schiff is a Senior Attorney at the Pacific
Legal Foundation in Sacramento, California.

Summary

Under the Endangered Species Act, areas that otherwise qualify as critical habitat “may” be excluded from a designation if the government determines that the benefits of exclusion would outweigh the benefits of inclusion, and if the exclusion would not result in the species’ extinction. Federal courts have uniformly held that a decision not to exclude an area is immune from judicial review under the APA, pointing to that Act’s bar on judicial review of agency action “committed to agency discretion by law.” But contrary to the case law, application of this bar should not depend on whether Congress has enacted permissive statutory language; instead, it ought to depend on the nature of the administrative action itself. If an agency action falls within a category traditionally held to be immune from judicial review—for example, official immunity or political question—then the bar should apply. Applying this understanding to the ESA, decisions whether to exclude an area from critical habitat should be reviewable, at least for conformity with the Constitution and basic principles of rational agency decisionmaking.

In a 2015 decision, the U.S. Supreme Court declared without controversy: “One would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”¹ Yet a string of precedents in the lower federal courts threatens to undermine this basic principle of administrative law.² According to these decisions, the agencies that administer the Endangered Species Act (ESA)³ may designate an area as “critical habitat” under the Act, even if the designation would impose billions of dollars in costs, or pose significant threats to national security, or produce other substantial and harmful consequences, while achieving little or no environmental benefit. The agencies supposedly have this arbitrary power, according to these decisions, notwithstanding that the U.S. Congress amended the ESA specifically to authorize the exclusion of areas from designation when their inclusion would produce absurd cost-benefit outcomes.

How could the courts reach a conclusion so at odds with administrative law’s principal goal of ensuring rational agency decisionmaking?⁴ They have done so by ruling that the power to exclude or to retain areas within critical habitat has been “committed to agency discretion by law,”⁵ and therefore falls within “a very narrow exception”⁶ to the right of judicial review that the Administrative Procedure Act (APA) establishes.⁷ These courts highlight that the ESA provides that the agencies “may,” but not *must*, “exclude

Author’s Note: Many thanks to my Foundation colleagues for their input, especially to Jonathan Wood. The author has litigated the issues discussed here in several recent cases, as noted in Part III below.

1. Michigan v. Environmental Prot. Agency, 135 S. Ct. 2699, 2707, 45 ELR 20124 (2015). I say “without controversy” because, although the decision was 5-4, the principal dissenting opinion representing the views of all four dissenting Justices agreed with the statement quoted in the text. See *id.* at 2714 (Kagan, J., dissenting) (“I agree with the majority—let there be no doubt about this—that [the Environmental Protection Agency’s] power plant regulation would be unreasonable if ‘[t]he Agency gave cost no thought at all.’”) (quoting *id.* at 2706 (majority opinion)).
2. Cass R. Sunstein, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 COLUM. L. REV. 167, 170 (2014) (describing as “a kind of mini-constitution for the regulatory state” Executive Order No. 13563, which allows “agencies [to] proceed [with regulation] only if the benefits justify the costs and only if the chosen approach maximizes net benefits”).
3. 16 U.S.C. §§1531-1544.
4. See, e.g., Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 13 ELR 20672 (1983) (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). For the reasons set forth in Parts IV through VI, critical habitat exclusion decisionmaking does not fall into a conjectured “category of agency decisions in which it is rational to be arbitrary.” Adrian Vermeule, *Rationally Arbitrary Decisions in Administrative Law*, 44 J. LEGAL STUD. S475, S478 (2015).
5. 5 U.S.C. §701(a)(2).
6. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410, 1 ELR 20110 (1971).
7. See 5 U.S.C. §§702, 704.

any area.” The statute itself therefore provides no standard, “no law to apply,” to determine whether the agencies *ought* to exclude an area. For that reason, any challenge to such decisionmaking must be rejected because, with no limitation on their power to exclude, the agencies cannot commit any judicially identifiable wrong.⁸

This Article contends that these courts’ understanding of the scope of judicial review afforded by the APA is wrong. That the APA acknowledges some classes of agency action to be committed to agency discretion by law does *not* mean that Congress has granted arbitrary and unregulated power to agencies.⁹ Rather, the APA’s acknowledgment means simply that reviewing courts should continue to rely on case law antedating the APA’s passage that holds certain classes of agency action to be unreviewable, notwithstanding available “law to apply.”¹⁰ For example, the well-established doctrines of “political question”¹¹ or “sovereign immunity”¹² often require the dismissal of cases despite the presence of judicially manageable standards.

Hence, in construing the “committed to agency discretion by law” exception, what matters is *not* whether there is law to apply, but instead whether the challenged agency action falls within a traditional category of non-reviewable agency action. When an agency action does *not* implicate such traditional categories of non-reviewable action, then the action *should be reviewable*, by applying constitutional and basic administrative law principles that serve as a universal baseline of law to apply to all agency activity.

Correctly interpreting the APA’s bar has significant practical consequences, particularly as applied to decisionmaking involved in critical habitat exclusions. Designations of critical habitat can cover hundreds of thousands of acres and impose hundreds of millions of dollars in economic costs, as well as other substantial social costs.¹³

Yet often they provide little or no conservation benefit.¹⁴ Exclusion decisionmaking therefore raises a great risk of irrational action, in the form of extremely burdensome environmental regulation imposed without any accompanying benefits. Allowing judicial review of a decision on whether to exclude areas from critical habitat would provide a needed safeguard against abusive agency action and irrational environmental regulation.

The Article proceeds with an introduction to the ESA, and then continues with a discussion of how the courts generally have applied the APA’s “committed to agency discretion by law” exception. Next, it sets forth in greater detail the proposal, adumbrated above, for how that exception should be interpreted. Following this exposition, the Article discusses the principal decisions from the lower federal courts applying the APA’s discretion-committed exception to critical habitat exclusion decisionmaking. It concludes with an explanation as to how these cases have misinterpreted the “committed to agency discretion by law” bar.

I. The ESA

A. The Statute’s Basics

The ESA is the “pit bull” of environmental law.¹⁵ The statute has earned that label because it imposes significant burdens on the businesses, farmers, homeowners, and governments. Those burdens are imposed principally through the ESA’s “take” prohibition,¹⁶ as well as the provisions concerning critical habitat, including the ESA’s “consultation” requirements.¹⁷

8. The proposition that government can ever be above the law has been rejected by the Anglo-American legal tradition since at least the 13th century. See 1 HENRY DE BRACON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 38 (Travers Twiss ed., 1878) (c. 1250) (“The king himself ought not to be under man, but rather under God and the law, because the king is a creation of the law.”) (translation by author).

9. Other commentators have discussed the troubling constitutional implications of such an interpretation. See Viktoria Lovei, *Revealing the True Definition of APA §701(a)(2) by Reconciling “No Law to Apply” With the Nondelegation Doctrine*, 73 U. CHI. L. REV. 1047, 1060 (2006); Ameer B. Bergin, *Does Application of the APA’s “Committed to Agency Discretion” Exception Violate the Nondelegation Doctrine?*, 28 B.C. ENVTL. AFF. L. REV. 363, 383-84 (2001).

10. This reasonable interpretation adopts the construction offered in Justice Antonin Scalia’s dissenting opinion in *Webster v. Doe*, 486 U.S. 592, 606-21 (1988) (Scalia, J., dissenting), discussed *infra* Part IV.

11. See generally *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195-98 (2012) (explaining the political question doctrine).

12. See generally *Alden v. Maine*, 527 U.S. 706, 715-16 (1999) (explaining the doctrine of sovereign immunity).

13. See *infra* notes 78-83 and accompanying text. See also Matthew Groban, *Arizona Cattle Growers’ Association v. Salazar: Does the Endangered Species*

Act Really Give a Hoot About the Public Interest It “Claims” to Protect?, 22 VILL. ENVTL. L.J. 259, 279 (2011) (critical habitat designations “have the ability to ruin individuals’ lives”).

14. See, e.g., Final Designation of Critical Habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon, 68 Fed. Reg. 46684, 46684 (Aug. 6, 2003) (“In 30 years of implementing the ESA, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of conservation resources.”); Sheila Baynes, *Cost Consideration and the Endangered Species Act*, 90 N.Y.U. L. REV. 961, 998 (2015) (observing that “the biologists themselves have found critical habitat [to be] of such little utility”).

15. Jonathan H. Adler, *Introduction: Rebuilding the Ark*, in REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM 1, 1 (Jonathan H. Adler ed., 2011); Joe Mann, *Making Sense of the Endangered Species Act: A Human-Centered Justification*, 7 N.Y.U. ENVTL. L.J. 246, 250 (1999) (“In all of American environmental law, one would be hard-pressed to find another piece of legislation that establishes such an inflexible prioritization scheme as the ESA.”). But see Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 279 (1993) (“Recent evidence indicates that, whatever other result, the ESA has accommodated the overwhelming majority of human activity without impediment.”).

16. See 16 U.S.C. §1538(a)(1)(B).

17. *Id.* §§1533(b), 1536(a)(3).

Before any of these provisions can apply, a species must be listed. The ESA directs the Secretaries of the Interior and Commerce (who have delegated their authority to the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), respectively) to develop a list of “endangered” and “threatened” species.¹⁸ An “endangered species” is one that “is in danger of extinction throughout all or a significant portion of its range.”¹⁹ In contrast, a “threatened species” is one that “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”²⁰ A “species” can comprise a taxonomic species or subspecies, as well as a “distinct population segment” of a species.²¹ The Services make their listing determinations based on biological and related factors.²²

Once a species has been listed, stringent statutory and regulatory protections apply to it. For example, the statute itself generally prohibits the “take” of any endangered species.²³ The term “take” is defined very broadly to include nearly any activity that produces a measurable harm or injury to a member of a listed species.²⁴ By regulation, the Services have presumptively applied this “take” protection to all threatened species as well.²⁵ The unpermitted take of protected species can trigger significant civil and criminal liability.²⁶

The ESA also imposes onerous burdens through its “critical habitat” framework.²⁷ The original 1973 version of the ESA contained only a passing reference to critical habitat.²⁸ Federal agencies were “to insure that actions authorized . . . by them do not . . . result in the destruction or modification of habitat of such species which is determined

. . . to be critical.”²⁹ In 1975, the Services published guidance on how critical habitat should be identified. Although not defining “critical habitat,” the guidance provided several factors relevant to identifying such habitat.³⁰ These factors included space for growth and movement, nutritional requirements, breeding and rearing sites, and cover and shelter.³¹ A few years later, the Act’s critical habitat provisions would “receive[] a thorough scrubbing,”³² owing to the Supreme Court’s decision in *Tennessee Valley Authority (TVA) v. Hill*.³³

B. TVA v. Hill: Enter the Snail Darter

In *TVA*, the Court affirmed an injunction against the completion of the almost-finished Tellico Dam, located in eastern Tennessee. Such work, it was thought, would eradicate the endangered snail darter, a small freshwater fish.³⁴ For that reason, the work would violate ESA §7’s prohibition on the destruction of critical habitat.³⁵ In the Supreme Court, the government argued that even if the ESA technically outlawed the dam’s completion, the lower court’s injunction barring the dam’s construction violated traditional equitable principles.³⁶ The argument was unavailing. The Court ruled that Congress had intended to make endangered species preservation the highest priority of the federal government.³⁷ To that end, Congress had removed the courts’ traditional equitable discretion.³⁸ What the dissenting opinion of Justice Lewis Powell labeled an “absurd result,”³⁹ the Court’s majority defended based on Congress’ supposed desire to protect endangered species “whatever the cost.”⁴⁰

The decision incited an uproar in Congress. Many members flatly rejected the Court’s construction of the ESA to require species to be protected without any consideration of the cost of doing so. In the U.S. House of Representatives, Rep. Robert Leggett (D-Cal.) counseled that, although Americans “should be concerned about the conservation of endangered species, . . . I, for one, am not prepared to say that we should be concerned about them above all else.”⁴¹ Similarly, Sen. Howard Baker (R-Tenn.) rejected the notion that “Congress intended that the pro-

18. 16 U.S.C. §1532(15). See *id.* §1533(a)(1) (“The Secretary shall . . . determine whether any species is an endangered species or a threatened species . . .”).

19. *Id.* §1532(6).

20. *Id.* §1532(20).

21. *Id.* §1532(16).

22. See *id.* §1533(a)(1)(A)-(E).

23. See *id.* §1538(a)(1)(B).

24. See *id.* §1532(19) (defining “take” to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”); 50 C.F.R. §17.3 (2016) (defining “harm” to include “significant habitat modification or degradation where it actually kills or injures wildlife”); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 25 ELR 21194 (1995) (upholding the regulatory definition of “harm”).

25. See Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44412, 44414, 44425 (Sept. 26, 1975), codified at 50 C.F.R. §17.31 (2016). Cf. Jonathan Wood, *Take It to the Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act*, 33 PACE ENVTL. L. REV. 23 (2015) (arguing that the Services’ presumptive application of “take” protection to all threatened species is illegal).

26. See 16 U.S.C. §1540(a)(1) (civil penalties of up to \$25,000); *id.* §1540(b)(1) (criminal penalties of up to \$50,000 and one year’s imprisonment).

27. James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311, 312 (1990) (“[C]ritical habitat is among the strongest enforcement provisions of the ESA . . .”).

28. Katherine Simmons Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL. L. 811, 828-29 (1990) (“[N]either ‘habitat’ nor ‘critical habitat’ was defined in the original Act. Federal agencies were commanded in section 7, however, to ‘insure’ that their actions did not ‘result in the destruction or modification of habitat . . . determined by the Secretary . . . to be critical.’”) (footnote omitted).

29. Endangered Species Act of 1973, §7, Pub. L. No. 93-205, 87 Stat. 884, 892.

30. 40 Fed. Reg. 17764 (Apr. 22, 1975).

31. *Id.* at 17764.

32. Houck, *supra* note 15, at 298.

33. 437 U.S. 153, 8 ELR 20513 (1978).

34. 40 Fed. Reg. 47505, 47506 (Oct. 9, 1975) (“The proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter’s habitat.”). Subsequent to the Court’s decision in *TVA*, “several small relict populations” of snail darter were discovered in other streams. Zygmunt J.B. Plater, *Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance*, 32 ENVTL. L. 1, 8 n.22 (2002). In 1984, FWS downlisted the fish to threatened status and rescinded its critical habitat. 49 Fed. Reg. 27510 (July 5, 1984).

35. See *TVA*, 437 U.S. at 193 (citing 16 U.S.C. §1536(a)(2)).

36. See *id.* at 193-94.

37. See *id.* at 174, 194.

38. See *id.* at 194.

39. *Id.* at 196 (Powell, J., dissenting).

40. *Id.* at 184 (majority op.).

41. See COMMITTEE ON ENVIRONMENT & PUBLIC WORKS, 97TH CONGRESS, A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS

tection or management of an endangered species should in all instances override other legitimate national goals or objectives with which they might conflict.⁷⁴² Sen. William Scott (R-Va.) pithily added, “People are more important than fish.”⁷⁴³

Sen. Jake Garn (R-Utah), one of the leading proponents of the efforts to amend the ESA, considered such reform to be necessitated by *TVA*’s misinterpretation. From the floor of the U.S. Senate, he declaimed that, “[i]n the case of *TVA* against Hill, the Supreme Court concluded that it had been Congress[’] intent to provide endangered or threatened wildlife and plants the highest possible degree of protection from Federal actions.”⁷⁴⁴ For that reason, the Court determined that “[a]ll other national goals . . . must fall in the face of a threat to an endangered species.”⁷⁴⁵ In Senator Garn’s estimation, “[t]hat interpretation is . . . patent nonsense, and it is not the interpretation put upon the act by the Congress in passing it.”⁷⁴⁶

The general congressional dissatisfaction with the decision in *TVA* resulted in the ESA Amendments of 1978.⁴⁷ These amendments included a definition for “critical habitat,”⁷⁴⁸ as well as provisions to increase the ESA’s flexibility and to make it more accommodating to economic, national security, and other interests.⁴⁹ They included the so-called God Squad provisions,⁵⁰ authorizing under very limited circumstances action that otherwise might result in the extinction of species.⁵¹ They included the requirement that economic and other non-biological considerations be taken into account when designating critical habitat.⁵² They also included the critical habitat exclusion power,⁵³ addressed in the next section’s discussion of the ESA’s present treatment of critical habitat.

C. The ESA’s Current Critical Habitat Framework

In its current form, the ESA still generally requires the Services to designate critical habitat for listed species,⁵⁴ typically contemporaneously with listing.⁵⁵ Such habitat can be “occupied” or “unoccupied.”⁵⁶ The former is defined as those “specific areas within the geographical area occupied by the species” that contain the “physical or biological features” that are “essential to the conservation of the species” and that “may require special management considerations or protection.”⁵⁷ The latter is defined as those “specific areas outside the geographical area occupied by the species . . . that . . . are essential for the conservation of the species.”⁵⁸

Economic and other non-biological considerations play no role in the listing process or in the initial determination of whether an area meets the statutory definition of critical habitat.⁵⁹ Such considerations do, however, play a crucial role in determining which areas ultimately will be designated as critical habitat. In its current form, the ESA incorporates these concerns in its §4(b)(2).⁶⁰ The first sentence of that subparagraph provides that the Services “shall designate critical habitat” only after “taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.”⁶¹

Building on this obligation, §4(b)(2)’s second sentence gives the Services the authority to exclude areas that otherwise would qualify as critical habitat, on account of a designation’s impacts. Specifically, the Services “may exclude any area” if they determine that “the benefits of such exclusion outweigh the benefits of

AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 822 (Cong. Res. Service eds., 1982).

42. *Id.* at 919.

43. *Id.* at 1068.

44. *Id.* at 1102.

45. *Id.*

46. *Id.*

47. Pub. L. No. 95-632, 92 Stat. 3751 (1978).

48. *Id.* §2, 92 Stat. at 3751.

49. See H. REP. NO. 97-418, at 10 (1982) (“[T]he Act was amended in . . . 1978 . . . to increase the flexibility in balancing species protection and conservation with development projects.”).

50. See Damien M. Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence*, 37 ENVIRONS ENVTL. L. & POL’Y J. 105, 111 n.38 (2014) (“The Endangered Species Committee has been referred to as the ‘God Squad’ as a sarcastic response to the Committee’s broad discretion to protect or not to protect certain species despite the language of [the ESA].”) (quoting Davina Kari Kaile, *Evolution of Wildlife Legislation in the United States: An Analysis of the Legal Efforts to Protect Endangered Species and the Prospects for the Future*, 5 GEO. INT’L ENVTL. L. REV. 441, 458 n.134 (1993)).

51. Pub. L. No. 95-632, §3, 92 Stat. at 3753-59. “[F]or a variety of reasons (perhaps including the Act’s politicization), the [God Squad] has rarely been used.” Schiff, *supra* note 50, at 113 (citing Holly Doremus, *Adapting to Climate Change With Law That Bends Without Breaking*, 2 SAN DIEGO J. CLIMATE & ENERGY L. 45, 55 (2010)).

52. Pub. L. No. 95-632, §11(7), 92 Stat. at 3766.

53. *Id.*

54. See 16 U.S.C. §1533(a)(3)(A) (directing the designation of critical habitat for listed species “to the maximum extent prudent and determinable”). For some time, FWS took the position that critical habitat was rarely if ever prudent and determinable. Daniel J. Rohlf, *Jeopardy Under the Endangered Species Act: Playing a Game Protected Species Can’t Win*, 41 WASHBURN L.J. 114, 117 n.9 (2001) (“[F]or the vast majority of species it listed as threatened or endangered from 1978 through the late 1990s, [the Service] followed a de facto policy of determining that critical habitat was not prudent.”). Following a barrage of successful environmentalist lawsuits, see Shawn E. Smith, *How “Critical” Is a Critical Habitat?: The United States Fish and Wildlife Service’s Duty Under the Endangered Species Act*, 8 DICK. J. ENVTL. L. & POL’Y 343, 371-78 (1999), the agency now routinely designates critical habitat in conjunction with listing decisions.

55. See 16 U.S.C. §1533(a)(3)(A).

56. *Id.* §1532(5)(A)(i)-(ii).

57. *Id.* §1532(5)(A)(i).

58. *Id.* §1532(5)(A)(ii).

59. See *Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1172, 40 ELR 20154 (9th Cir. 2010) (“The decision to list a species as endangered or threatened is made without reference to the economic effects of that decision.”); Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 Fed. Reg. 7226, 7228 (Feb. 11, 2016) (“The Act’s language makes clear that biological considerations drive the initial step of identifying critical habitat.”).

60. The ESA Amendments of 1982 moved the relevant language from then §4(b)(4) to a new §4(b)(2). See Pub. L. No. 97-304, §2(a)(2), 96 Stat. 1411, 1412 (1982). The 1982 amendments made no substantive change to the exclusion process established by the 1978 amendments. See *id.*

61. 16 U.S.C. §1533(b)(2) (originally enacted as 16 U.S.C. §1533(b)(4), Pub. L. No. 95-632, §11(7), 92 Stat. at 3766). See *Bennett v. Spear*, 520 U.S. 154, 172, 27 ELR 20824 (1997) (noting the “categorical requirement” to consider such impacts).

specifying such area as part of the critical habitat.⁶² The only limitation on this power is that the Services may not exclude any areas if the exclusion would result in the species' extinction.⁶³

Despite the 1978 amendments, critical habitat continues to play a significant function in the application of §7.⁶⁴ Federal agencies still must ensure that none of their activities—including the issuance of permits to private parties—jeopardizes the continued existence of a listed species, or destroys or adversely modifies its critical habitat.⁶⁵ To meet that obligation, §7 imposes a procedural duty on agencies to consult with the Services.⁶⁶ This consultation obligation can be triggered even by a very small potential impact to the species or its critical habitat.⁶⁷ Consultation takes two forms: informal and formal.⁶⁸ The latter is triggered once the Services have determined that it is likely that a proposed action will adversely affect the species or its habitat.⁶⁹

Following the formal consultation process, the Services give their opinion as to whether the proposed action will jeopardize the species or adversely modify its critical habitat.⁷⁰ If it will, then the Services may offer a substitute action, known as a “reasonable and prudent alternative.”⁷¹ Such an alternative functions as a “take” permit, immunizing the agency and its permittees from liability.⁷² Formal consultation can be time-consuming and expensive, and adherence to a reasonable and prudent alternative often entails substantial mitigation.⁷³ Agencies and private actors therefore try to avoid formal consultation by anticipating the Services' objections and amending their proposed projects to avert further regulation and mitigation.⁷⁴

62. 16 U.S.C. §1533(b)(2).

63. *Id.*

64. See Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 ELR 10678, 10679 (Aug. 2013) (“[T]o avoid the difficulties and expense of formal consultation under section 7, many action agencies and private entities will undertake significant efforts to either avoid siting projects in designated critical habitat areas, or to avoid any impact at all to the primary constituent elements of critical habitat . . .”). But see Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141, 166 (2012) (“[T]he agencies have treated the class of actions that adversely modifies habitat without also causing jeopardy as a null set.”).

65. 16 U.S.C. §1536(a)(2).

66. *Id.* See *Defenders of Wildlife v. Environmental Prot. Agency*, 420 F.3d 946, 950-51, 35 ELR 20172 (9th Cir. 2005), *overruled on other grounds by National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 37 ELR 20153 (2007).

67. See 50 C.F.R. §402.14(a) (2016) (“Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.”).

68. *Id.* §§402.13(a), 402.14(a). “The overwhelming majority of consultations, however, are ‘informal’ and do not conclude with the issuance of a biological opinion.” Michael Senatore, *A Comment on Critical Habitat and the Challenge of Regulating Small Harms*, 43 ELR 10675, 10675 (Aug. 2013).

69. See 50 C.F.R. §§402.13(a), 402.14(a) (2016).

70. 16 U.S.C. §1536(b)(3)(A); 50 C.F.R. §402.14(h)(3) (2016).

71. *Id.*

72. See 16 U.S.C. §1536(o); 50 C.F.R. §402.14(i)(5) (2016).

73. Turner & McGrath, *supra* note 64, at 10681 (“Section 7 consultation often takes months or years, significantly delaying projects and resulting in substantial additional project costs, if not destroying the projects' economic viability.”).

74. *Id.* at 10678.

D. The Impacts of Critical Habitat

The law review literature is replete with discussion about the impacts (or, depending on one's perspective, the pseudo-impacts) of critical habitat designation.⁷⁵ The Services have for long contended that the protections afforded critical habitat are largely duplicative of those triggered by listing.⁷⁶ Not surprisingly, environmentalists continue to believe in critical habitat's independent utility.⁷⁷ Although the actual impacts of critical habitat are not relevant to determining whether decisions not to exclude areas from critical habitat are subject to judicial review, a discussion of those impacts highlights the practical significance of whether a decision not to exclude an area from critical habitat is judicially reviewable.

Such a decision, from the perspective of landowners and other regulated parties, can be very significant, because “the costs and burdens of critical habitat designation are tangible and substantial.”⁷⁸ A 2016 study of designations for 159 listed species estimated the total designated acreage to be more than 60 million acres (of which more than 11 million acres are privately owned), and the total economic impact to exceed \$10 billion over 20 years.⁷⁹ Even the Services occasionally acknowledge, through their mandated impact assessments, the momentousness of a designation's effects.

For example, FWS estimated that its designation of critical habitat for the California red-legged frog will cost from

75. For the generally positive view, see, e.g., Houck, *supra* note 15, at 307-15; Kalyani Robbins, *Recovery of an Endangered Provision: Untangling and Reviving Critical Habitat Under the Endangered Species Act*, 58 BUFF. L. REV. 1095 (2010); Katherine Simmons Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL. L. 811 (1990); Salzman, *supra* note 27; Michael Senatore et al., *Critical Habitat at the Crossroads: Responding to the G.W. Bush Administration's Attacks on Critical Habitat Designation Under the ESA*, 33 GOLDEN GATE U. L. REV. 447 (2003); Amy Armstrong, *Critical Habitat Designations Under the Endangered Species Act: Giving Meaning to the Requirements for Habitat Protection*, 10 S.C. ENVTL. L.J. 53 (2002). For a generally negative view, see, e.g., Nicholas C. Fantl, *Not So Critical Designations: The Superfluous Nature of Critical Habitat Designations Under the Endangered Species Act*, 57 ARK. L. REV. 143 (2004); Robert J. Scarpello, *Statutory Redundancy: Why Congress Should Overhaul the Endangered Species Act to Exclude Critical Habitat Designation*, 30 B.C. ENVTL. AFF. L. REV. 399 (2003); Groban, *supra* note 13, at 279. And for something in between, see, e.g., Allan Julius Ray, *Cooling the Core Habitat Provision of the Endangered Species Act Before It Goes Critical: Practical Critical Habitat Reformulation*, 34 ENVIRONS ENVTL. L. & POL'Y J. 99 (2010); Josh Thompson, *Critical Habitat Under the Endangered Species Act: Designation, Re-Designation, and Regulatory Duplication*, 58 ALA. L. REV. 885 (2007); Shawn E. Smith, *How “Critical” Is a Critical Habitat?: The United States Fish and Wildlife Service's Duty Under the Endangered Species Act*, 8 DICK. J. ENVTL. L. & POL'Y 343 (1999).

76. See, e.g., David J. Hayes et al., *A Modest Role for a Bold Term: “Critical Habitat” Under the Endangered Species Act*, 43 ELR 10671, 10672 (Aug. 2013) (“Critical habitat designations typically have modest impacts primarily because the regulatory consequences of listing a species in the first place are so far-reaching.”); 68 Fed. Reg. 46684, 46684 (Aug. 6, 2003).

77. See, e.g., Anna T. Moritz et al., *Biodiversity Baking and Boiling: Endangered Species Act Turning Down the Heat*, 44 TULSA L. REV. 205, 231 (2008) (“For many species undergoing rapid range shifts, protection of such areas as critical habitat will be one of the most important regulatory actions that will allow them to persist in a changing climate.”).

78. Turner & McGrath, *supra* note 64, at 10681.

79. Brian Seasholes, *The Critical Nature of Critical Habitat Decisions*, OUT OF CONTROL POLICY BLOG, June 1, 2016.

\$150 million to \$500 million over the next two decades.⁸⁰ The same agency estimated that its critical habitat designation for the coastal California gnatcatcher will cost more than \$1 billion through 2025.⁸¹ It offered a similarly high estimate for the critical habitat designation for 15 California vernal pool species.⁸² Such expensive designations are not peculiar to FWS. NMFS estimated that the proposed designation for a population of the North American green sturgeon would cost up to \$578 million annually.⁸³

What are the reasons for these high costs? There are three, principally. First, as noted above, the presence of critical habitat can trigger the §7 consultation process. Second, critical habitat has a stigma effect that reduces the value of property. Third, critical habitat designation can increase the chance of liability for the “take” of protected species.

With respect to the first point, any federally endorsed action that may affect critical habitat requires some level of consultation.⁸⁴ An action that may adversely affect critical habitat requires formal consultation,⁸⁵ which, as noted previously, can be quite burdensome.⁸⁶ To be fair, many formal consultations (those that end with a biological opinion and usually with a reasonable and prudent alternative) that are triggered by impacts to critical habitat would have been triggered anyway without that habitat. That is so because the agency action likely would have adversely affected individual members of the species (thereby possibly causing jeopardy), in addition to negatively affecting the species’ critical habitat (thereby possibly destroying or adversely modifying that habitat).⁸⁷

But it does not follow that §7’s overlap between protections for species themselves and the habitat where they dwell blunts critical habitat’s impact on consultation. To begin with, that impact frequently materializes in the form of costs incurred by regulated parties and agencies seeking to avoid formal consultation. Hence, focusing on when formal consultation occurs would miss these impacts.⁸⁸ Moreover, studies of the relationship between critical habitat and the costs of formal consultation frequently do not take

into account designations of *unoccupied* habitat,⁸⁹ which will become more common as the Services anticipate the impacts of climate change.⁹⁰

The failure to take unoccupied designations into account is significant. Adverse modification of unoccupied habitat would trigger §7 consultation. But such habitat destruction would not directly affect individual members of the species (because they are unlikely to be found in unoccupied habitat), and thus would be unlikely to jeopardize the species’ continued existence.⁹¹ For that reason, projects that destroy unoccupied critical habitat trigger §7 solely because of the impacts to critical habitat.⁹² Thus, there are many reasons why one should expect critical habitat designations to increase significantly the costs of the consultation process.

But the effects of critical habitat do not end with §7 consultation.⁹³ Critical habitat designations make the local land use permitting process harder to complete. Designations send a signal that development will be more expensive and may incur legal liability. That signal leads local governments to become more risk-averse and less likely to approve projects.⁹⁴ This aspect of critical habitat designation particularly affects consumers. David Sunding, a leading resource economics expert at the University of California, has written that critical habitat designations hurt housing consumers through increases in home prices and reductions in the supply of housing.⁹⁵ In fact, critical habitat can impose costs even for land not designated. As Professor Sunding explains, critical habitat can be defined

80. 75 Fed. Reg. 12816, 12858 (Mar. 17, 2010).

81. ECONOMIC & PLANNING SYSTEMS, INC., FINAL DRAFT REPORT: ECONOMIC ANALYSIS OF CRITICAL HABITAT DESIGNATION FOR THE CALIFORNIA GNATCATCHER 13 (2004).

82. See 68 Fed. Reg. 46684, 46753 (Aug. 6, 2003) (estimating a total cost of \$1.3 billion over 20 years).

83. INDUSTRIAL ECONOMICS, INC., FINAL: ECONOMIC ANALYSIS OF THE IMPACTS OF DESIGNATING CRITICAL HABITAT FOR THE THREATENED SOUTHERN DISTINCT POPULATION SEGMENT OF NORTH AMERICAN GREEN STURGEON ES-4 (2009).

84. See 16 U.S.C. §1536(a)(2); 50 C.F.R. §§402.13(a), 402.14(a) (2016).

85. 50 C.F.R. §402.14(a) (2016).

86. See Turner & McGrath, *supra* note 64, at 10678.

87. See Owen, *supra* note 64, at 166 (failing to find “a single [biological] opinion in which either [Service] found jeopardy without finding adverse modification” and observing that “the agencies have treated the class of actions that adversely modifies habitat without also causing jeopardy as a null set”).

88. Turner & McGrath, *supra* note 64, at 10678 (“Efforts . . . to ensure compliance with critical habitat provisions . . . , while potentially time-consuming and expensive, . . . are often undertaken in order to avoid the even greater costs and burdens of formal consultation.”).

89. Cf. Hayes et al., *supra* note 76, at 10672 (“Absent critical habitat designation, federal actions in unoccupied areas are unlikely to undergo the interagency consultation process prescribed by Section 7 and even less likely to result in a prohibited ‘taking’ of listed wildlife.”).

90. See Owen, *supra* note 64, at 160 (“Scientists therefore know that greenhouse gas-emitting projects are adversely affecting critical habitat, but it is much harder to say that those projects are jeopardizing specific species or taking identifiable individual animals.”).

91. See *id.* at 158 (“[A]ctions that adversely affect currently unoccupied habitat are highly unlikely to cause a take . . .”).

92. See *id.* at 173 n.208 (interview with FWS biologists in which they asserted that “informal consultations were now more likely to occur, particularly for projects in unoccupied habitat”).

93. See *To Review Federal Regulations With Respect to Critical Habitat Designations Under the Endangered Species Act: Hearing Before the S. Subcomm. on Fisheries, Wildlife, and Water*, 108th Cong. 66-68 (2003) (statement of David Sunding, professor of agricultural and resource economics, University of California, Berkeley) (noting the “common claim” of FWS that “critical habitat designation only causes economic impacts in the presence of a federal nexus,” but nevertheless asserting, based on “work with developers, local government officials and others” that “critical habitat designation has more far-reaching implications”), discussed in Brief for Amici Curiae the Cato Institute et al., at 7-8, *Building Indus. Ass’n of the Bay Area v. U.S. Dep’t of Commerce* (U.S. No. 15-1350).

94. See Jeffrey E. Zabel & Robert W. Patterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. REG. SCI. 67, 94 (2006), cited in Brief for Amici Curiae the Cato Institute et al., *supra* note 93, at 8. A few federal courts have addressed whether government-issued licenses or permits that result in a violation of the ESA may subject the government issuer to liability. See *Aransas Project v. Shaw*, 775 F.3d 641, 656 n.9, 44 ELR 20146 (5th Cir. 2014) (per curiam) (discussing cases).

95. DAVID SUNDING, GIANNI FOUNDATION OF AGRICULTURAL ECONOMICS, *THE ECONOMIC IMPACTS OF CRITICAL HABITAT DESIGNATION 9*, available at <https://www.cbd.int/financial/finplanning/usa-costhabitats.pdf>.

“in such a way that some time and expense is needed to determine whether a parcel is actually included or not.”⁹⁶

Finally, critical habitat designation can increase a landowner’s potential liability for “take.” As noted above, the ESA and its implementing regulations forbid any person to “take” a protected species.⁹⁷ “Take” is defined to include “harm,”⁹⁸ and by regulation, “harm” has been interpreted to include at least some types of habitat modification.⁹⁹ Hence, as a practical matter, modification of critical habitat is much more likely to result in a prohibited “take” than modification of other types of habitat.¹⁰⁰ Landowners therefore have reason to fear enforcement action from the government for unpermitted activity in critical habitat. But that fear is not limited to agency lawsuits; it also derives from the risk of litigation brought by environmental groups. That is so because the Act authorizes “citizen suits” to restrain violations of the Act,¹⁰¹ including imminent takes caused by land development.¹⁰² And naturally, productive activity occurring in critical habitat will receive much greater scrutiny from environmental groups than activity occurring in areas not designated.

E. *An Aside: The Debate Over How the Impacts of Critical Habitat Should Be Assessed*

In the past several years, much debate has occurred over *how* the economic impacts of critical habitat designations should be assessed.¹⁰³ The Services recently took formal sides in this debate by adopting a regulation codifying the so-called baseline approach.¹⁰⁴ Under this theory, also known as the “incremental” approach,¹⁰⁵ the Services attribute a cost to critical habitat only if such cost would not be incurred, but for the existence of the designation.¹⁰⁶ Thus, when assessing a designation’s economic impact according to this metric, the Services exclude consideration of costs attributable to critical habitat designation, if those costs also can be attributed to a species’ listing.¹⁰⁷

96. *Id.* at 10.

97. See 16 U.S.C. §1538(a)(1)(B); 50 C.F.R. §17.31 (2016).

98. 16 U.S.C. §1532(19).

99. See 50 C.F.R. §17.3 (2016).

100. See Salzman, *supra* note 27, at 327 (discussing a “series of cases illustrat[ing] courts’ continuing tendency to merge critical habitat analysis with other ESA prohibitions” such as the “take” prohibition). See also *id.* at 330 (“Critical habitat does have advocacy value. It helps the prosecutor by getting rid of the necessity of showing the steps to jeopardy.”) (quoting a former U.S. Department of Justice official).

101. See 16 U.S.C. §1540(g).

102. See *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 25 ELR 20706 (9th Cir. 1995).

103. See Baynes, *supra* note 14, at 982-89.

104. See 78 Fed. Reg. 53058, 53061 (Aug. 28, 2013) (revising 50 C.F.R. §424.19(b) (2016)) (“The Secretary . . . will compare the impacts with and without the designation.”).

105. See Sean O’Connor, *The Rio Grande Silvery Minnow and the Endangered Species Act*, 73 U. COLO. L. REV. 673, 734-35 (2002); Lawrence R. Lieberman et al., *Determining the Conservation Value of Habitat: Modern Challenges Under the Endangered Species Act*, 45 ELR 10265, 10266 (Apr. 2015) (statement of Angela Somma, Director, Endangered Species Division, NMFS).

106. *Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1172, 40 ELR 20154 (9th Cir. 2010).

107. *Id.*

The competing theory has been called the “co-extensive” approach.¹⁰⁸ Consistent with this metric, a cost will be considered if it is traceable to critical habitat designation, regardless of whether it can be traced to a species’ listing.¹⁰⁹ This Article is not the place to take sides in this debate.¹¹⁰ It is enough to note that, even when using the narrower baseline approach, the costs of critical habitat designations still can be quite significant.¹¹¹

Precisely because a designation’s impacts can be so severe, Congress gave the Services the ability to exclude areas from critical habitat to avoid such impacts.¹¹² Whether the agencies’ exclusion decisionmaking is subject to judicial review is an issue that several lower federal courts have confronted.¹¹³ Those decisions will be addressed in Part III. First, however, the next section will set forth a proposal for interpreting the APA’s bar on judicial review of agency action committed to agency discretion by law.

II. Challenging Agency Action: When Is Action Committed to Agency Discretion by Law?

A. The “No Law to Apply” Standard

The fundamental charter for administrative decisionmaking in the federal system is the APA.¹¹⁴ Among other things,

108. See *id.*; *New Mexico Cattle Growers Ass’n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1285, 31 ELR 20614 (10th Cir. 2001).

109. *New Mexico Cattle Growers Ass’n*, 248 F.3d at 1285.

110. The U.S. Court of Appeals for the Ninth Circuit has rejected the co-extensive approach, reasoning that “[t]he very notion of conducting a cost/benefit analysis is undercut by incorporating in that analysis costs that will exist regardless of the decision made.” *Arizona Cattle Growers’ Ass’n*, 606 F.3d at 1173. That rationale is somewhat in tension with the Ninth Circuit’s subsequent holding that §4(b)(2) “requires only that an agency take economic impact into consideration,” but does not require “a specific methodology that an agency must employ when considering the economic impact of designation.” *Building Indus. Ass’n of the Bay Area v. U.S. Dep’t of Commerce*, 792 F.3d 1027, 1033, 45 ELR 20130 (9th Cir. 2015). That the co-extensive approach may be hard to reconcile with *one* method of assessing a designation’s impacts is no reason to conclude that the co-extensive approach is categorically improper.

111. For example, the previously cited designation for the red-legged frog—estimating impacts of up to \$500 million over 20 years—was done using the baseline analysis. See 75 Fed. Reg. 12816, 12858 (Mar. 17, 2010).

112. Pub. L. No. 95-632, §11, 92 Stat. 3751, 3766 (1978).

113. See *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 473-75 (5th Cir. 2016); *Building Indus. Ass’n of the Bay Area*, 792 F.3d at 1034-35; *Bear Valley Mut. Water Co. v. Salazar*, No. SACV 11-01263, 2012 WL 5353353, at *14 (C.D. Cal. Oct. 17, 2012), *aff’d sub nom.* *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989-90, 45 ELR 20121 (9th Cir. 2015); *Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014); *Cape Hatteras Access Pres. Alliance v. U.S. Dep’t of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010); *Home Builders Ass’n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. 05-cv-629, 2006 WL 3190518, at *20, 36 ELR 20226 (E.D. Cal. Nov. 2, 2006).

114. Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1208 (2015) (“The Administrative Procedure Act . . . is one of the most important statutes in the United States Code. . . . [T]he [Act] is still the ‘fundamental charter’ of the ‘Fourth Branch’ of the government.”) (quoting Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 874 (2007)).

the APA provides a right of judicial review to persons who are aggrieved by federal agency action.¹¹⁵ This right is limited in two important respects. First, the standards of review for agency action subject to challenge under the APA¹¹⁶ are very generous to the government.¹¹⁷ Second, and more important for this Article, the APA expressly excludes from judicial review certain classes of agency action. Specifically, the APA denies judicial review when review of the agency action is precluded by statute,¹¹⁸ as well as when the action “is committed to agency discretion by law.”¹¹⁹

Whether review is “precluded by statute” presents a fairly straightforward question. The paramount consideration is whether meaningful review would be available without the APA.¹²⁰ Other considerations that inform the analysis include the nature of the administrative action, as well as the underlying statute’s language, structure, objectives, and legislative history.¹²¹ Hence, although the answer to whether a given statute precludes review is not always clear,¹²² the basic framework for resolving that question is.

It is a different story with the APA’s second exclusion, for those actions committed to agency discretion by law. Here, there has been significant scholarly debate over precisely what Congress meant.¹²³ The Supreme Court, in *Heckler v. Chaney*,¹²⁴ divined the following interpretation: “review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.”¹²⁵ Arguably, the exception according to this interpretation is a truism. It applies when there is “no law” for a court of law to apply¹²⁶—but what else would a “court of law” apply?¹²⁷ Perhaps sensing the difficulties with such an interpretation, the Supreme Court

alternatively has styled the test as a search for a “meaningful standard.”¹²⁸

Aside from *Heckler’s* contribution (however labeled), the Supreme Court has provided little guidance to flesh out the “no law to apply” test,¹²⁹ other than to hold that agency decisions not to criminally prosecute or civilly enforce are beyond judicial review.¹³⁰ The lower courts have applied the “no law to apply” standard with varying results,¹³¹ and the legislative history is unhelpful.¹³² As one commentator recently explained, Congress was split among “those who wanted to preserve review of all agency action and those who were in favor of a broad rule against reviewability.”¹³³ Consequently, “legislators on both sides of the debate inserted their interpretation of the exception into the legislative history, rendering it contradictory and unreliable.”¹³⁴

The *Heckler* “no law to apply” standard has received a cool reception in the academy. Prof. Kenneth Culp Davis famously observed that the trouble with the “no law to apply” standard is that it would give agencies a pass in precisely those situations when they would be most likely to act erroneously.¹³⁵ Professor Davis therefore argued that courts should exercise their own “discretion” to review discretionary agency decisions.¹³⁶ A less controversial way of expressing Professor Davis’ otherwise sound proposal is that a court always has “law to apply” because all agencies are bound by fundamental principles of rationality and fairness, e.g., those derived from the U.S. Constitution and federal administrative common law (such as the “rational connection” requirement¹³⁷ or

115. See 5 U.S.C. §§702, 704.

116. *Id.* §706(2).

117. See *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 13 ELR 20672 (1983) (“The scope of review . . . is narrow and a court is not to substitute its judgment for that of the agency.”).

118. 5 U.S.C. §701(a)(1).

119. *Id.* §701(a)(2).

120. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994).

121. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984).

122. Compare *Sackett v. Environmental Prot. Agency*, 622 F.3d 1139, 1143-44, 40 ELR 20255 (9th Cir. 2010) (discussing cases holding that the Clean Water Act precludes judicial review of compliance orders), with *Sackett v. Environmental Prot. Agency*, 566 U.S. 120, 126-31, 42 ELR 20064 (2012) (holding that the Clean Water Act does not preclude judicial review).

123. See Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 694-95 (1990) (noting that dispute over the meaning of the Act’s exception for agency action committed to agency discretion by law created “the longest—and possibly the most vitriolic—debate in the history of law reviews, with Professor Kenneth Culp Davis challenging the thesis in a series of four articles and [Prof. Raoul] Berger replying in four more”).

124. 470 U.S. 821, 15 ELR 20335 (1985).

125. *Id.* at 830.

126. *Id.* at 830-31 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 1 ELR 20110 (1971)). For criticism of the “no law to apply” test, see Kenneth Culp Davis, “No Law to Apply,” 25 SAN DIEGO L. REV. 1, 1 (1988); Levin, *supra* note 123, at 704-05, discussed in Bergin, *supra* note 9, at 383-84.

127. Professor Davis would undoubtedly answer that a court of law, even in the absence of law, “normally can and should exercise *judicial discretion* in deciding whether the agency has abused its discretion.” Davis, *supra* note 126, at 11.

128. *Heckler*, 470 U.S. at 830.

129. Lovei, *supra* note 9, at 1055 (observing that in more recent cases, the Supreme Court has “also relied on a range of practical arguments weighing against judicial review of the agency action,” but “it has yet to articulate an overarching and administrable test for determining when agency action is committed to agency discretion”). Accord Isaac J. Morris, *Irrational Fears: The “No Law to Apply” Doctrine vs. The Real Culprit of Unconstitutional Delegation*, 98 NW. U. L. REV. 367, 377 (2003) (contending that, in *Webster*, the Court merely “purport[ed] to rely on the ‘no law to apply’ doctrine,” and in fact “used the fallback approach of security and safety”).

130. *Heckler*, 470 U.S. at 831-33. And somewhat tautologically, it applies when Congress intended it to apply. See *Webster v. Doe*, 486 U.S. 592, 601 (1988).

131. Proceedings of the Forty-Sixth Judicial Conference of the District of Columbia Circuit, 111 F.R.D. 91, 173 (1985) (statement of Professor Kenneth Culp Davis) (“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.”), quoted in Lovei, *supra* note 9, at 1050 n.22.

132. For a general discussion of that history, see Kovacs, *supra* note 114, at 1224-27. Shortly after the Act’s passage, Justice Robert Jackson observed that it “represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.” Philip J. Harter, *The APA at Fifty: A Celebration, Not a Puzzlement*, 48 ADMIN. L. REV. 309, 309 (1996).

133. Lovei, *supra* note 9, at 1052.

134. *Id.*

135. Davis, *supra* note 126, at 1 (“Yet agencies probably go wrong more frequently in exercising discretion than in finding facts or applying law, and exercise of judicial discretion is needed to correct agencies’ abuse of discretion.”) (emphasis removed).

136. *Id.* at 9.

137. See *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 13 ELR 20672 (1983).

the *Michigan v. Environmental Protection Agency* principle regarding extreme cost-benefit disproportion¹³⁸). These principles clearly are judicially manageable.¹³⁹ Hence, denial of judicial review on the ostensible ground of “no law to apply” is always improper, so the argument goes, because at least some law—that derived from the Constitution and federal administrative common law—is always available.¹⁴⁰

B. A Better Approach Than the “No Law to Apply” Standard

In my view, the correct approach to applying the APA’s discretion-committed exception to judicial review is to be found in Justice Antonin Scalia’s dissenting opinion in *Webster v. Doe*.¹⁴¹ The case concerned a former Central Intelligence Agency (CIA) employee who challenged his termination from government service. The *Doe* employee contended that the CIA had terminated him because he was a homosexual, and that this termination violated the agency’s own governing statutes and regulations, as well as the Constitution. The lower courts ruled that the employee’s claims were subject to judicial review, but the Supreme Court disagreed in part. Relying heavily on the unique circumstances of national security, the Court held that the National Security Act commits to the CIA director’s absolute, *statutorily granted*, discretion the decision on whether to terminate a CIA employee.¹⁴²

But the Court then proceeded in the second half of its opinion to declare that, although Congress had intended to grant unfettered discretion to the CIA director to act under the enabling statute, Congress had evinced no such intent with respect to colorable *constitutional* claims.¹⁴³ Buoyed by the presumption that Congress does not generally want to preclude judicial review of constitutional claims, the Court concluded that the *Doe* employee’s constitutional challenges could proceed.¹⁴⁴

Justice Scalia dissented. In his view, not only had Congress granted to the CIA director an absolute power to terminate employees, it also had provided him a power that was not subject to any judicial review, even review for constitutional error.¹⁴⁵ He began his analysis by pointing out that the “no law to apply” standard does not accurately capture what Congress was getting at in §701(a)(2).¹⁴⁶ After

all, “there is no governmental decision that is not subject to a fair number of legal constraints precise enough to be susceptible of judicial application—beginning with the fundamental constraint that the decision must be taken in order to further a public purpose rather than a purely private interest.”¹⁴⁷ Yet, “there are many governmental decisions that are not at all subject to judicial review,” such as a prosecutor’s decision to prosecute even when that decision is based on personal animus.¹⁴⁸

Hence, the “key to understanding” §701(a)(2), according to Justice Scalia, is to contrast it with §701(a)(1).¹⁴⁹ Recall that the latter provision forecloses review “to the extent that . . . statutes preclude judicial review.” The question then arises: “Why ‘statutes’ for preclusion, but the much more general term ‘law’ for commission to agency discretion?”¹⁵⁰ The answer, according to Justice Scalia, is that Congress intended §701(a)(2) to preserve a certain common law of judicial review, which “had marked out, with more or less precision, certain issues and certain areas that were beyond the range of judicial review.”¹⁵¹ Examples of those issues and areas would be the doctrines of political question, sovereign immunity, and official immunity, as well as prudential limitations on courts’ powers and “what can be described no more precisely than a traditional respect for the functions of the other branches.”¹⁵² Accordingly, the key inquiry to correctly applying §701(a)(2)’s bar on review is not, “Is there law to apply?”—because there almost always is—but rather, “Is this the type of decision that, for a variety of reasons, courts traditionally have declined to review?”¹⁵³

Justice Scalia’s approach also neatly resolves how to reconcile the APA’s bar on review of action committed to agency discretion with the Act’s separate authorization for “abuse of discretion” review.¹⁵⁴ The two are made consistent by the acknowledgement that judicial review does not turn solely on whether an action is truly “discretionary.” Rather, the availability of review largely depends on whether the agency decision falls within a category of traditionally non-reviewable action.¹⁵⁵ If the decision does not, then the fact that it is discretionary action should not preclude the courts from determining whether the agency abused its discretion in making its decision.¹⁵⁶

Is, then, the “no law to apply” standard meaningless? Not at all. Undoubtedly, a statute could be written in such a way that, other than constitutional or basic norms of administrative decisionmaking, a court would have no statutory standard by which to adjudge the correctness of an agency decision. For example, a statute that sim-

138. See *Michigan v. Environmental Prot. Agency*, 135 S. Ct. 2699, 2707, 45 ELR 20124 (2015).

139. See *Davis*, *supra* note 126, at 11 (“Law requiring justice, fairness, and reasonableness is always present in any American court, never absent.”); *Kovacs*, *supra* note 114, at 1236 (“[C]onstitutional values infuse administrative law and . . . ordinary administrative schemes and requirements . . . can inform judicial understandings of what the Constitution requires.”) (quoting Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 484-85, 507 (2010)).

140. See *Webster v. Doe*, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting).

141. *Id.*

142. *Id.* at 599-601.

143. *Id.* at 602-04.

144. *Id.*

145. See *id.* at 615-16.

146. See *id.* at 607-08.

147. *Id.* at 608.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 608-09.

153. Nevertheless, the extent to which a statute provides its own standards naturally affects the *amount* of law to apply.

154. See 5 U.S.C. §706(2)(A).

155. *Webster*, 486 U.S. at 609-10 (Scalia, J., dissenting).

156. *Id.* at 610.

ply said, “The agency may grant a permit,” would not itself provide any standard. The only available and judicially manageable standards in such an instance would be whether the agency acted according to animus, or for constitutionally forbidden reasons, or simply acted irrationally (i.e., the reasons given for the decision do not actually support the decision).

But what Justice Scalia’s approach *does* portend for the “no law to apply” standard is that, when an action is challenged on constitutional or rationality grounds, the “no law to apply” standard makes no sense—because, again, there *is* law to apply. In such a case, the court instead must determine whether the agency action falls within a traditional category of non-reviewable action. Is the action a political question? Is the agency immune from suit? Would the claim’s adjudication require an unseemly rummaging around in the affairs of a coordinate branch of government? If the answer to these questions is no—if, in other words, the agency action is simply a run-of-the-mill decision that just happens to be pursuant to a rather discretionary-looking grant of power—then the action *should be reviewable*, at least for constitutional error or irrationality.¹⁵⁷

C. The Better Approach Applied to Critical Habitat

How would this approach play out with critical habitat? To begin with, denying judicial review *solely* on “no law to apply” grounds would always be improper in the face of, for example, a claim that the Services’ exclusion decisionmaking was inconsistent or otherwise irrational. Denial of judicial review on the pretense that an exclusion decision falls within the traditional categories of non-reviewable agency action also would be categorically improper. The cost-benefit analysis suggested by §4(b)(2) is far afield from the sensitive political questions that courts traditionally have declined to review.

Indeed, at least as applied to the ESA, Congress appears already to have made plain its agreement that the Services’ cost-benefit analyses should be reviewable. It would be difficult to conceive of a more political decision than that of the Endangered Species Committee’s determination that a species must be allowed to go extinct to allow an important federal project to proceed.¹⁵⁸ Yet, notwithstanding its obvious political import, such a decision is expressly made subject to judicial review under the APA.¹⁵⁹ A fortiori, the often much less momentous decision of whether to exclude an area from critical habitat—which by definition will not result in the species’ extinction¹⁶⁰—should be reviewable, according to Congress’ logic.

But is exclusion decisionmaking not akin to the discretionary decision that the Supreme Court in *Heckler* held to be non-reviewable?¹⁶¹ I do not believe so. *Heckler* concerned an agency decision not to enforce,¹⁶² whereas a decision *not to exclude* an area of critical habitat is effectively a decision *to enforce* the ESA’s rules regarding critical habitat.¹⁶³ Moreover, none of the concerns that led the *Heckler* Court to rule against the availability of judicial review—such as the fear of intruding upon prosecutorial decisionmaking, impinging upon agency discretion over how best to expend agency resources, or improperly inserting the judiciary into an agency’s enforcement prioritization¹⁶⁴—relate to critical habitat. When declining to exclude areas from critical habitat, the Services are *not* acting like prosecutors, they are *not* deciding how best to use agency resources, and they are *not* prioritizing enforcement. Instead, they are prioritizing *non-enforcement* by determining that an area already designated as critical habitat—i.e., an area already subject to active enforcement of the ESA’s critical habitat rules—should remain so, notwithstanding the economic and other non-biological consequences of so doing.

In sum, critical habitat exclusion decisionmaking does not fall within a class of agency activity traditionally considered non-reviewable; it does not impinge on sensitive political questions (at least no more than other endangered species decisionmaking that *is* reviewable); it does not involve an unseemly delving into the sensitive decisionmaking of the executive branch; and it does not rummage around in the discretionary non-enforcement decisionmaking of a prosecutor. To be sure, the ESA itself does not provide a court with the ready standard by which to adjudge an exclusion decision, for the statute, after all, simply says that the Services *may* exclude an area once certain predicates have been established (and a certain consequence—namely, extinction—is avoided).

But that, as we know, is not the end of the analysis. Although the ESA may not provide the law to apply, the Constitution, as well as administrative law generally, do so provide. In particular, the requirements that agencies act based on public-regarding, non-animus-motivated reasons, and that they do so consistently according to those reasons, also apply to critical habitat exclusion decisionmaking. Hence, a challenge to an unexplained decision not to exclude areas that are similarly situated to areas that were excluded, should be judicially reviewable.

157. The Supreme Court has suggested that the minimum degree of rationality that the Due Process Clause requires of all government action is less rigorous than the degree of rationality that the APA requires of federal agency decisionmaking. See *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9, 13 ELR 20672 (1983).

158. See 16 U.S.C. §1536(h).

159. *Id.* §1536(n).

160. See *id.* §1533(b)(2).

161. See *Heckler v. Chaney*, 470 U.S. 821, 837-38, 15 ELR 20335 (1985).

162. See *id.* (“The [U.S. Food and Drug Administration’s] decision not to take the enforcement actions requested by respondents is therefore not subject to judicial review under the APA.”).

163. *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, No. 14-31008, 2017 WL 606513, at *15 n.21 (5th Cir. Feb. 13, 2017) (Jones, J., dissenting from denial of rehearing en banc (“[T]he Service’s decision *not to exclude* . . . is really part and parcel of the Service’s decision *to include* . . .”).

164. See *Heckler*, 470 U.S. at 831-32.

III. A Synopsis of the Cases Holding That Exclusion Decisions Are Not Subject to Judicial Review

To date, all of the lower federal courts that have addressed the question have answered that the Services' exclusion decisionmaking is not reviewable.¹⁶⁵ They have reached that erroneous outcome as a result of a misunderstanding of the "no law to apply" standard. According to their reasoning (set out at length below), the APA allows a court to enforce only non-discretionary procedural and substantive obligations *contained within the underlying statute*.¹⁶⁶ Hence, if the underlying statute grants a power couched in discretionary terms, the courts cannot review a decision taken pursuant to that power.

Although the exclusion power has been in effect since 1978, the first reported case challenging an exclusion decision was not issued until 2006.¹⁶⁷ In *Home Builders Ass'n of Northern California v. U.S. Fish & Wildlife Service*,¹⁶⁸ the plaintiff home builders challenged a nearly one-million-acre designation of critical habitat for 15 vernal pool species.¹⁶⁹ The home builders contended that the designation's exclusion analysis was invalid because, among other things, FWS had failed to explain why certain areas were excluded whereas other, seemingly similarly situated, areas were not excluded.¹⁷⁰

The district court ruled that the challenge was not reviewable. The court relied principally on an observation within the House Committee Report accompanying the 1978 amendments, to the effect that the "consideration and weight to be given to any particular impact is completely within the [Service's] discretion."¹⁷¹ The court also offered that the statute provided "no substantive standard by which to review the [Service's] decisions not to exclude certain tracts based on economic or other considerations."¹⁷² Therefore, such decisions are "committed to agency discretion."¹⁷³

165. The Services have formally stated their agreement with the case law in declining that "the decision to exclude is always completely discretionary." See Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 79 Fed. Reg. 27052, 27054 (May 12, 2014).

166. For example, the Service must consider economic impacts when designating critical habitat, but the particular manner of its consideration is discretionary. See, e.g., *Building Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. C 11-4118 PJH, 2012 WL 6002511, at *6, 42 ELR 20255 (N.D. Cal. Nov. 30, 2012) ("[T]he court holds only that defendants were required to, and did, 'consider' economic impacts, and makes no determination as to the exact methodology required for such consideration.")

167. Arguably this is so because the Services so rarely designated critical habitat that exclusions were not much needed. See Houck, *supra* note 15, at 297 (noting that the exclusion power, as well as the God Squad process, "are rarely used and play a minor role in the administration of the Act," in part because the Services "define critical habitat in a way that greatly minimizes its importance," and in part because, "for the great majority of species, [the Services] ha[ve] simply refused to designate critical habitat at all").

168. No. 05-cv-629, 2006 WL 3190518, 36 ELR 20226 (E.D. Cal. Nov. 2, 2006). The author was lead counsel for the home builder plaintiffs in this litigation.

169. *Id.* at *1.

170. *See id.* at *13.

171. *Id.* at *20 (quoting H.R. REP. NO. 95-1625, at 16-17 (1978)).

172. *Home Builders Ass'n of N. Cal.*, 2006 WL 3190518 at *20.

173. *Id.*

The second major decision was *Cape Hatteras Access Preservation Alliance v. U.S. Department of Interior*,¹⁷⁴ a challenge to the designation of critical habitat for the piping plover.¹⁷⁵ The plaintiffs, a coalition of local governments and off-road enthusiasts, contested FWS' decision not to exclude any areas from the bird's critical habitat designation on account of economic or other impacts.¹⁷⁶ Using the "no law to apply" standard, the district court ruled that the Service's refusal to exclude any areas was not subject to judicial review.¹⁷⁷ Following *Home Builders*, the *Cape Hatteras* court explained that judicial review was not possible because a "plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."¹⁷⁸

The third major case, and the first appellate decision, was *Bear Valley Mutual Water Co. v. Jewell*,¹⁷⁹ a challenge to the critical habitat designation for the Santa Ana sucker.¹⁸⁰ The plaintiffs, a coalition of municipalities and water districts along the Santa Ana River, challenged the designation on several grounds, among them that FWS had arbitrarily chosen to include certain areas within the current designation that had been excluded from a prior designation.¹⁸¹ The district court rejected as unreviewable the plaintiffs' claims, to the extent that they challenged the Service's exclusion decisionmaking.¹⁸²

The U.S. Court of Appeals for the Ninth Circuit affirmed. That court began its analysis by reciting the *Heckler* rule that an action is not reviewable if there exists no "meaningful standard against which to judge the agency's exercise of discretion."¹⁸³ Next, the Ninth Circuit read the case law to create a presumption against review when an agency declines to exercise a permissive power.¹⁸⁴ The court then concluded that the presumption should prevail in challenges to exclusion decisionmaking.¹⁸⁵ It rejected the municipalities' and water districts' principal argument that a decision not to exclude should be reviewable given that the coordinate decision to exclude is reviewable.¹⁸⁶

The Ninth Circuit conceded that at least some decisions to exclude are reviewable because the ESA itself provides manageable standards.¹⁸⁷ For example, §4(b)(2) does not authorize an exclusion if it would result in the species' extinction—hence, one might challenge a decision to exclude on the ground that the exclusion *would* result in

174. 731 F. Supp. 2d 15, 29 (D.D.C. 2010).

175. *Id.* at 17.

176. *See id.* at 17-18.

177. *Id.* at 29.

178. *Id.*

179. 790 F.3d 977, 45 ELR 20121 (9th Cir. 2015).

180. *Id.* at 981.

181. *See Bear Valley Mut. Water Co. v. Salazar*, No. SACV 11-01263, 2012 WL 5353353, at *14 (C.D. Cal. Oct. 17, 2012).

182. *Id.* ("[G]iven that there is no standard to judge the decision not to exclude, it is committed to agency discretion and not judicially reviewable.")

183. *Bear Valley Mut. Water Co.*, 790 F.3d at 989 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830, 15 ELR 20335 (1985)).

184. *Id.* at 989.

185. *See id.* at 989-90.

186. *Id.*

187. *See id.* at 990.

a species' extinction.¹⁸⁸ But §4(b)(2) merely says that the Services "may" exclude areas if the benefits of exclusion outweigh the benefits of inclusion.¹⁸⁹ Accordingly, as the Ninth Circuit concluded, because the statute provides no meaningful standard, a decision not to exclude is not subject to judicial review.¹⁹⁰

The fourth decision, also from the Ninth Circuit, is *Building Industry Ass'n of the Bay Area v. U.S. Department of Commerce*.¹⁹¹ The case concerned a challenge to the critical habitat designation for the green sturgeon.¹⁹² The lower court rejected the plaintiff-industry-groups' challenge to the Service's exclusion methodology,¹⁹³ and the Ninth Circuit again affirmed. Although largely following *Bear Valley*, the court in *Building Industry Ass'n* added further analysis. The court distinguished the first sentence of §4(b)(2) from its second sentence: whereas the first *mandated* that economic and other impacts be considered in designating critical habitat, the second merely granted a *discretionary* power, under certain circumstances, to exclude otherwise qualifying areas of critical habitat.¹⁹⁴ Perhaps anticipating criticism of its courthouse-door-closing ruling, the court underscored that "section 4(b)(2) does not preclude all judicial review of designation decisions."¹⁹⁵ Although the final decision whether to exclude is not subject to judicial

review, the procedures leading up to the designation—such as the requirement to consider the economic and other impacts of designation—are.¹⁹⁶

The fifth and most recent decision comes from the U.S. Court of Appeals for the Fifth Circuit. In *Markle Interests, LLC v. U.S. Fish & Wildlife Service*,¹⁹⁷ the plaintiff landowner challenged the critical habitat designation for the dusky gopher frog. The Service had determined that the plaintiff's land should not be excluded from the designation, despite the fact that the frog did not occupy the area, the land was not very suitable for the frog, and the designation would cost the landowner nearly \$40 million over a 20-year period. The Fifth Circuit ruled that the landowner's challenge was not reviewable. The court employed Heckler's "no law to apply"/"meaningful standard" criterion.¹⁹⁸ Citing *Building Industry Ass'n*, the Fifth Circuit agreed with the Ninth Circuit that the ESA provides no standard under which the Service *must* exclude an area.¹⁹⁹ The Fifth Circuit therefore concluded that the statute grants the Service an unreviewable discretion not to exclude any area.²⁰⁰

Taken together, this body of case law provides three basic arguments against judicial review of decisions not to exclude critical habitat: (i) the ESA says that the Services "may" exclude but not "must" exclude; (ii) the ESA provides no "meaningful" or "substantive" standard by which to measure a decision not to exclude; and (iii) the ESA's legislative history indicates that Congress intended the Services to have complete discretion over how to consider and weigh relevant impacts. The following section will demonstrate that none of these arguments against judicial review is convincing, especially in light of the interpretation of §701(a)(1) advanced above.

IV. The Unconvincing Arguments Against Judicial Review of Decisions Not to Exclude Areas From Critical Habitat

That §4(b)(2) is couched in permissive language does not mean that decisions made pursuant to that power are unreviewable. The APA's text commands a contrary conclu-

188. See *id.* (noting that the Service "is obligated to take an action under Section 4(b)(2), i.e., designate essential habitat as critical," and therefore that the "decision to exclude otherwise essential habitat is thus properly reviewable because it is equivalent to a decision not to designate critical habitat"). At one level, the court's analysis makes sense, given that the ESA plainly limits the Services' exclusion power to those areas the removal of which from critical habitat would not result in a species' extinction. See 16 U.S.C. §1533(b)(2). That being said, it is somewhat awkward to interpret §4(b)(2) *itself* as mandating the designation of any habitat. A more natural reading is that §4(b)(2) addresses what the Services are to do *after* they have made an initial designation of habitat, whereas §4(a)(3)(A)(i) imposes the *initial* obligation to designate critical habitat. See 16 U.S.C. §1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, *under subsection (a)(3)* on the basis of the best scientific data available . . ."). Also, it is odd for the court to find an obligation to designate "essential" habitat in §4(b)(2), given that "essential" habitat is generally only relevant to unoccupied critical habitat, see 16 U.S.C. §1532(5)(A)(ii), whereas §4(b)(2) applies to occupied as well as unoccupied habitat. The court's opinion is unclear as to whether other challenges to exclusion decisions—such as whether the benefits of exclusion actually exceed the benefits of inclusion—also would be reviewable. Cf. Jared B. Fish, *Critical Habitat Designations After New Mexico Cattle Growers: An Analysis of Agency Discretion to Exclude Critical Habitat*, 21 FORDHAM ENVTL. L. REV. 575, 615-30 (2010) (arguing that the Services' reasoning supporting a decision to exclude should be reviewable).

189. *Bear Valley Mut. Water Co.*, 790 F.3d at 990.

190. *Id.*

191. 792 F.3d 1027, 45 ELR 20130 (9th Cir. 2015). The author served as counsel of record for the appellants' unsuccessful petition for certiorari to the Supreme Court.

192. *Id.* at 1028-29.

193. *Building Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. C 11-4118 PJH, 2012 WL 6002511, at *7, 42 ELR 20255 (N.D. Cal. Nov. 30, 2012) ("[S]ection 4(b)(2) provides a standard of review to judge decisions to exclude, but provides no such standard to review decisions not to exclude. Thus, the agency action in this case is committed to agency discretion by law . . ."). *Accord* *Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) (citing the district court's decision in *Building Indus. Ass'n* for the proposition that a court cannot review "the Service's ultimate decision not to exclude . . . , which is committed to the agency's discretion").

194. *Building Indus. Ass'n*, 792 F.3d at 1035 (quoting Policy Regarding Implementation of Section 4(b)(2) of the ESA, 79 Fed. Reg. 27052, 27054 (May 12, 2014)).

195. *Building Indus. Ass'n*, 792 F.3d at 1035.

196. *Id.*

197. 827 F.3d 452 (5th Cir. 2016). The author served as a counsel of record in this litigation.

198. *Id.* at 474.

199. *Id.* at 473-74.

200. *Id.* at 475. A petition for rehearing en banc was subsequently denied. *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, No. 14-31008, 2017 WL 606513 (5th Cir. Feb. 13, 2017) (mem.). Judge Edith Jones, dissenting from that denial and writing for five other judges, argued forcefully that exclusion decisions should be reviewable. She castigated the majority opinion for failing to give due weight to the presumption in favor of judicial review of final agency action. See 2017 WL 606513, at *15 (citing *Mach Mining, LLC v. Equal Employment Opportunity Comm'n*, 135 S. Ct. 1645, 1653 (2015)). She criticized the majority for failing to see the equivalence between a decision not to exclude (which the majority held to be non-reviewable) and a decision to include (which all courts have held to be reviewable). See *Markle Interests*, 2017 WL 606513, at *15 n.21. And she found support for her view, *id.*, in the Supreme Court's observation in *Bennett v. Spear*, 520 U.S. 154, 27 ELR 20824 (1997), that the "ultimate decision [under §4(b)(2)] is reviewable only for abuse of discretion," *id.*

sion.²⁰¹ Indeed, the APA expressly allows for judicial review of *discretionary* decisionmaking.²⁰² Hence, merely because an agency *may* but not *must* do something, cannot mean that the agency's decision is "committed to agency discretion by law."²⁰³ Rather, a statute's use of the word "may" more likely denotes that a court's review of the agency's decision should be deferential.²⁰⁴

The ESA may give the Services wide discretion to establish the general rules and principles that will govern their exclusion decisionmaking.²⁰⁵ But the agencies cannot depart from these guideposts on whim or fancy.²⁰⁶ In *Markle Interests*, FWS declined to exclude an area the designation of which would impose nearly \$40 million in costs.²⁰⁷ The agency explained that it "did not identify any disproportionate costs that are likely to result from the designation."²⁰⁸ Why should a landowner not be allowed to claim that, in fact, the record clearly shows the impacts to be disproportionate? In other words, why can a court not apply (with appropriate deference) the same standard that the agency itself has chosen?

In any event, it is simply not true that there is categorically "no law to apply" or that there are no meaningful standards by which to adjudge a decision not to exclude critical habitat.²⁰⁹ The cases so holding misperceive the rel-

evant analysis. As explained above, the law or standard to apply need not come from the substantive statute at issue.²¹⁰ The Constitution, for one, provides a standard by which all agency action can be adjudged regardless of any particular standard unique to the agency action at issue.²¹¹ Moreover, the fundamental principle of rational decisionmaking,²¹² which undergirds administrative law, provides two meaningful standards that proceed from the underlying substantive statute: an agency (i) must articulate a rational connection between the facts found and the decision made,²¹³ and (ii) must explain how its methodology rationally relates to the reality intended to be depicted.²¹⁴

These standards can be applied even in the context of an entirely "discretionary" action.²¹⁵ Assuming that the Services truly had otherwise unfettered discretion to exclude or not to exclude a given parcel,²¹⁶ surely they could not decline to exclude a parcel because of the race or religion of

reached. See Lovei, *supra* note 9, at 1071. Applying that standard to critical habitat exclusion decisionmaking would render such decisionmaking reviewable, as the Services have no authority outside of the ESA to regulate critical habitat.

201. See Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 58-61 (1965).

202. See 5 U.S.C. §706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . an abuse of discretion . . .").

203. Dissenting in *Webster v. Doe*, 486 U.S. 592, 593 (1988), Justice Scalia harmonized (i) the APA's bar on review of agency committed to agency discretion by law with (ii) the Act's authorization of review for abuse of discretion in the following manner: the former excludes review of certain classes of agency action, which do not necessarily pertain to the degree of discretion afforded; whereas the latter allows for review even of discretionary actions, so long as the action falls within a general class of agency action susceptible of judicial review. See *id.* at 609-10 (Scalia, J., dissenting).

204. Dickson v. Secretary of Defense, 68 F.3d 1396, 1401 (D.C. Cir. 1995) (a statute's use of the word "may" "does not mean that the matter is committed exclusively to agency discretion" but instead that the "courts should accordingly show deference to the agency's determination" when reviewing it). Cf. Patricia M. Wald, *Judicial Review: Talking Points*, 48 ADMIN. L. REV. 350, 350 (1996) ("If the Congress indicates that it wants to delegate vast amounts of discretion to define the contours of a statute to the agency, then the courts will be more hesitant to second-guess the agency and they will hold back unless they think the statutory intent is being flagrantly flouted or the agency has acted unreasonably in exercising its delegated authority."). As Justice Joseph Story famously explained, arbitrary or capricious discretion is "dependent upon the mere pleasure of the judge." 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 57 §742 (4th ed., rev., corr., enlrgd., 1846). In contrast, "sound and reasonable discretion . . . governs itself as far as it may by general rules and principles." *Id.*

205. Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 191 (1996) ("If . . . an agency formulates and consistently follows a particular enforcement policy, courts should be extremely deferential in reviewing the discretionary aspects of that policy regarding such matters as limited resources, as well as in reviewing the application of such discretionary factors to particular enforcement decisions.").

206. See Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) ("[A]n '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" (quoting National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005))).

207. See 77 Fed. Reg. 35118, 35140-41 (June 12, 2012).

208. *Id.* at 35141.

209. One commentator has suggested that the "no law to apply" standard means not just that Congress has provided no clear rule of decision, but also that the agency has power, independent of Congress, to reach the result it has

210. Presumably that is why the courts routinely review agency decisions on petitions for rulemaking. See, e.g., *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 918-19, 38 ELR 20181 (D.C. Cir. 2008) (subjecting to judicial review the denial of a petition for emergency ESA rulemaking, notwithstanding that the petition pertained "to a matter of policy within the agency's expertise and discretion").

211. See *Webster v. Doe*, 486 U.S. 592, 603-04 (1988) (majority opinion) (holding that the Constitution itself would provide a meaningful standard even when the statute itself does not). Cf. *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring in part and concurring in the judgment) ("[T]he Court has limited the exception to judicial review provided by 5 U.S.C. §701(a)(2) to cases involving national security, . . . or those seeking review of refusal to pursue enforcement actions . . .").

212. See *Michigan v. Environmental Prot. Agency*, 135 S. Ct. 2699, 2707, 45 ELR 20124 (2015) (agency action that produces substantial costs with little or no benefit is "not . . . rational"); *Federal Communications Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment) ("If an agency takes action not based on neutral and rational principles, the APA grants federal courts power to set aside the agency's action as 'arbitrary' or 'capricious.'"). Cf. Andrew M. Grossman, *Michigan v. EPA: A Mandate for Agencies to Consider Costs*, 2015 CATO SUP. CT. REV. 281, 283 ("Michigan provides an opportunity to obtain judicial review of how agencies regard costs."); *Clean Air Act—Cost Benefit Analysis—Michigan v. EPA*, 129 HARV. L. REV. 311, 319 (2015) ("If this [Michigan] analysis reveals that a regulation's costs are wholly disproportionate to its benefits, the regulation could well be struck down as arbitrary and capricious under [Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 13 ELR 20672 (1983)] review.").

213. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

214. *Columbia Falls Aluminum Co. v. Environmental Prot. Agency*, 139 F.3d 914, 923, 28 ELR 21106 (D.C. Cir. 1998) (an agency's use of a model is arbitrary if the model bears no rational relationship to the on-the-ground facts).

215. Bhagwat, *supra* note 204, at 186 ("[E]ven the most seemingly discretionary types of agency action generally are, and should be, subject to at least partial review.").

216. Truly unfettered discretion that would allow the Services to regulate (or not to regulate) a given area as critical habitat likely would violate the nondelegation doctrine. See Lovei, *supra* note 9, at 1060 ("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."); Bergin, *supra* note 9, at 396 ("If a court finds that a delegation lacks 'law to apply,' it follows analytically that not only *can* the court find that the delegation lacks an intelligible principle, but that it *must* do so." (footnote omitted)). Cf. Wood, *supra* note 25, at 38-40 (arguing that the Services' interpretation of their power to protect threatened species under 16 U.S.C. §1533(d) violates the nondelegation doctrine).

its owner.²¹⁷ Similarly, the Services could not use a methodology for deciding whether to exclude a given parcel and apply it inconsistently.²¹⁸

As an example of the latter, in *Building Industry Ass'n*, the Fisheries Service declined to exclude any areas, on account of economic impacts, in so-called high conservation value zones.²¹⁹ The agency reasoned that excluding any areas from such zones would materially impede the green sturgeon's conservation.²²⁰ Yet, the Fisheries Service inexplicably did exclude areas within those same zones on account of national security and Indian tribe concerns.²²¹ Why should the agency be allowed to apply decisional standards inconsistently? Although agency action involving "a sensitive and inherently discretionary judgment call" is not reviewable,²²² such a judgment assumes the logically prior determination that the agency is *already* acting within the bounds of its authority.²²³

The ESA's legislative history does not support an anti-review result.²²⁴ The House Report on the 1978 amendments provides that the "consideration and weight given to any particular impact is completely within the [Services'] discretion."²²⁵ Even taken at face value, this assertion cannot plausibly be interpreted to mean that exclusion decisions are wholly committed to agency discretion. At most, the passage from the House Report indicates that the value assigned to particular impacts should fall within the Services' judgment. But whether the Services deny an

exclusion because of a property owner's religion, or inconsistently apply a method of consideration, has nothing to do with the Services' discretion to assign weight to an impact of critical habitat designation. Further, the cited House Report was addressed to an *earlier* draft of the exclusion power, one which would have applied only to critical habitat designations for *invertebrate* species.²²⁶

It is not surprising, then, that such a modest power failed to raise concern among the committee members: why worry about granting unreviewable discretion when the delegated power is narrow in scope? A broad power, however, naturally would be more likely to raise concern, but the House Committee did not have the opportunity to comment on such an expansion.²²⁷ Ultimately, nothing in the 1978 amendments' legislative history suggests a congressional intent to deny judicial review to exclusion decisionmaking. If anything, to the extent that such denial might lead to environmental regulation inadequately sensitive to economic and social costs, the legislative history would support judicial review.

V. Conclusion

Critical habitat designations impose significant economic and social costs on landowners throughout the country. Recognizing that fact, Congress wisely amended the ESA to inject some measure of fairness and flexibility into an otherwise rigid statute.²²⁸ But this ameliorative effort is frustrated when affected parties cannot seek judicial review of the Services' decision on whether to exclude an area from critical habitat. Giving the Services a complete pass on their decisionmaking invites abuse.²²⁹

217. Bhagwat, *supra* note 204, at 186 n.143 ("[I]t seems clear that agencies never have discretion to act for some reasons, such as racial or religious animus."). *But see* Webster v. Doe, 486 U.S. 592, 613-14 (1988) (Scalia, J., dissenting) ("It seems to me clear that courts would not entertain, for example, an action for backpay by a dismissed Secretary of State claiming that the reason he lost his Government job was that the President did not like his religious views—surely a colorable violation of the First Amendment. I am confident we would hold that the President's choice of his Secretary of State is a 'political question.'").

218. Recasting a decision not to exclude an area from critical habitat as a purportedly unreviewable non-enforcement decision under *Heckler v. Chaney*, 470 U.S. 821, 837-38, 15 ELR 20335 (1985), does not convince. For even then, a court could properly require that the agency provide "reasons for its decision," thereby allowing a court "to review both the rationality of an agency's stated reasons for declining to enforce," as well as "the consistency of the current inaction with past behavior and stated policy." Bhagwat, *supra* note 204, at 182.

219. 74 Fed. Reg. 52300, 52315 (Oct. 9, 2009).

220. *See id.* at 52334.

221. *Id.* at 52337 (tbl. 2); *id.* at 52339 (tbl. 3).

222. Department of Navy v. Egan, 484 U.S. 518, 527 (1988).

223. Berger, *supra* note 201, at 63 ("[D]iscretion' permits an agency to make reasonable choices within a given area, but 'the court decides in each case what the area of discretion is.'" (quoting LOUIS JAFFE & NATHANIEL NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 791 (1961))).

224. One might argue that legislative history is categorically irrelevant when determining whether agency action is committed to agency discretion by law, at least when one is searching the legislative history to ascertain Congress' opinion on the availability of judicial review. After all, why would Congress know better than the courts whether a given standard is judicially manageable? In contrast, to the extent that such history helps to ascertain the meaning of the statute, *cf.* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history."), it may shed light on whether a manageable standard, approved by Congress, exists. Presumably, such history also would be relevant when determining whether Congress intended review to be precluded.

225. H.R. REP. NO. 95-1625, at 17 (1978).

226. *See id.* at 36.

227. None of the versions considered by the Senate contained a critical habitat exclusion provision. *See* S. 2899, 95th Cong. (1978), introduced by Sen. John Culver (D-Iowa) (Apr. 12, 1978); S. 2899 (Cal. No. 804), reported with S. REP. NO. 95-874 (1978); CONG. REC. S11158-60 (July 19, 1978) (S. 2899 as passed by the Senate). The House version was amended on the floor to apply to all species. It was subsequently amended on the floor of the House to apply to all listed species. *See* House consideration and passage of H.R. 14104, with amendments, Oct. 14, 1978, reprinted in COMMITTEE ON ENVIRONMENT & PUBLIC WORKS, *supra* note 41, at 884-85. The amendment's sponsor, Rep. John Buchanan (R-Ala.), advocated for the change owing to the negative economic impact in his congressional district caused by endangered species protections afforded two small minnow-like fish. *See id.* Curiously, the Conference Report is silent as to the final bill's adoption of the House's broad exclusion power. *See* H.R. CONF. REP. NO. 95-1804, at 27-28 (1978). The legislative history to the 1982 amendments to the Act—which among other things formally separated the listing process from the critical habitat designation process—supports the idea that Congress expected the exclusion process to moderate the Act's economic impacts. *See* H.R. REP. NO. 97-418, at 12 (1982) ("[T]he Committee . . . recognized that the critical habitat designation, with its attendant economic analysis, offers some counter-point to the listing of species without due consideration for the effects on land use and other development interests. . . . The balancing between science and economics should occur subsequent to listing through the exemption process.").

228. Or to put it somewhat less tendentiously, Congress' 1978 amendments "changed the designation process from a purely biological assessment to a social policy decision." Salzman, *supra* note 27, at 320.

229. Berger, *supra* note 201, at 95 ("Assumptions that any form of arbitrariness is unreviewable must be rejected if only so that no official may rest secure in the knowledge that those subject to his power are outside the pale of judicial protection.").

The case law's treatment of the reviewability of exclusion decisionmaking highlights a significant problem in how the lower federal courts treat the APA's bar on review of agency action committed to agency discretion by law. These precedents notwithstanding, it simply makes no sense to apply the APA's bar based on whether the underlying statute at issue itself provides judicially manageable standards. Denial of review on such a ground is categorically wrong because at least some extrinsic standards are always available.²³⁰ Yet, acknowledging this defect to the "no law to apply" standard would not render §701(a)(2)'s bar meaningless. That bar would still serve the purpose of preserving the federal common law of reviewability,²³¹ which holds that, *regardless of the presence of "law to apply" or meaningful standards*, certain types of agency action are not subject to judicial review.²³²

But critical habitat exclusion decisionmaking does not fall within those categories. There is nothing in the Services' exclusion decisionmaking that is so politically sensitive, or judicially unmanageable, as to make judicial review impossible, especially with respect to claims that the decisionmaking is invidious or irrationally inconsistent. Hence, at the very least, a decision not to exclude an area from critical habitat should be reviewed for its consistency with the Constitution, as well as basic principles of reasoned decisionmaking. Indeed, one might go even further and ask whether it would ever be rational for the Services not to exclude an area when, by the agencies' own analysis, the benefits of doing so (including the noneconomic benefits) outweigh the benefits of not doing so. Is that not the essence of reasonable regulation?

230. See *Webster v. Doe*, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting).

231. See *id.* at 609 ("The intended result of [§701(a)] is to restate the existing law as to the area of reviewable agency action.") (quoting U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 94 (1947)).

232. See *Webster*, 486 U.S. at 608-09 (Scalia, J., dissenting) (citing, *inter alia*, the political question doctrine, sovereign immunity, and official immunity).