

A NEW FEDERALIST STRUCTURE TO ENCOURAGE STATE POLICY INNOVATION

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INTRODUCTION

In March 2026, Judge Lewis Liman of the Southern District of New York upheld New York's congestion pricing program and declared that the Trump Administration's actions seeking to repeal it were "arbitrary and capricious."¹ The long and winding set of events that led to this ruling illustrates the difficulties states face when seeking to enact policies that require federal approval.² Since the United States' founding, states have legislated in areas where the federal government cannot under federalism and the doctrine of state police power.³ This doctrine grants power to the states, but the federal government often imposes numerous hurdles on states pursuing new policies or projects.⁴ New York's recent implementation of

1. *Metro. Transp. Auth. v. Duffy*, No. 25-CV-1413 (LJL), 2026 WL 588117, at *45 (S.D.N.Y. Mar. 3, 2026).

2. *See infra* Part II.A.

3. The doctrine of state police power is an implied limitation of the Constitution's Contract Clause and the Supreme Court has found that it allows states and municipalities to legislate to protect health, safety, morals, and general welfare. *See* 1 DAVID S. RUBENSTEIN, MODERN CONSTITUTIONAL LAW § 17:28 (3d ed. Supp. 2026); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 437 (1934) ("This power, which . . . is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people . . ."); *see also, e.g.,* *Nw. Fertilizing Co. v. Vill. of Hyde Park*, 97 U.S. 659, 670 (1878) (describing states' interests in "general interests of the community" as "the police power"); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203–04 (1824) (explaining that states have exclusive domain over certain policy areas).

4. For a key example of this, see Abbe R. Gluck and Thomas Scott-Railton's description of how the first Trump Administration managed and implemented the Affordable Care Act. *Affordable Care Act Entrenchment*, 108 GEO. L.J. 495, 549–51 (2020) (describing how the Trump Administration "encourag[ed] states to . . . eva[de] . . . [the] ACA," "impose[d] new obstacles" to its effective implementation, and "pass[ed] new . . . rules" that made it harder for states to enroll legal residents).

congestion pricing after years of environmental reviews,⁵ state pauses,⁶ lawsuits,⁷ federal approvals,⁸ subsequent federal disapprovals,⁹ and appeals¹⁰ illustrates the complicated landscape ahead for states seeking to implement policies that require federal approval.¹¹ Congestion pricing is a recent example of a state, New York, needing federal approval to operate a largely state-based program, but many other government programs also fit this mold. One comparable program and approval structure is the state air quality standards system authorized under the Clean Air Act.¹² Under that statute, and others, Congress created programs that are overseen by federal agencies, but are implemented on the ground by states.¹³ This structure allows states to craft their own policies subject to an onerous federal review and approval processes prescribed by federal law.¹⁴ Broadly, this review

5. See Dave Colon, *Exclusive: EPA Endorsed Congestion Pricing After MTA Resolved Initial Concerns*, STREETS BLOG NYC (Feb. 13, 2024, at 12:03 ET), <https://nyc.streetsblog.org/2024/02/13/exclusive-epa-endorsed-congestion-pricing-after-mta-resolved-initial-concerns> [https://perma.cc/UC4U-8ZNA].

6. See Jose Martinez, *MTA Board Votes to Confirm Hochul's Congestion Pricing Pause, Scales Back Future Plans*, CITY REP. (June 26, 2024, at 13:25 ET), <https://www.thecity.nyc/2024/06/26/mta-board-vote-confirms-hochul-congestion-pricing-pause/> [https://perma.cc/5AW5-NUEH].

7. See Dan Rivoli, *Arguments Begin in Cases to Stop MTA's Congestion Pricing Plan*, SPECTRUM NEWS: NY1 (May 17, 2024, at 19:35 ET), <https://ny1.com/nyc/manhattan/news/2024/05/17/congestion-pricing-lawsuits-oral-arguments-manhattan> [https://perma.cc/AW66-7QMB].

8. See Ana Ley, *Congestion Pricing Plan Set to Come to New York City on Jan. 5*, N.Y. TIMES (Nov. 22, 2024), <https://www.nytimes.com/2024/11/22/nyregion/nyc-congestion-pricing-federal-approval.html> (on file with the *Fordham Urban Law Journal*).

9. See David K. Li, Steve Kopack & Madison Lambert, *Trump Administration Terminates Approval of New York City Congestion Pricing*, NBC NEWS (Feb. 19, 2025, at 18:25 ET), <https://www.nbcnews.com/news/us-news/trump-administration-terminates-approval-new-york-city-congestion-pricing-rcna192847> [https://perma.cc/7X2V-S3WH].

10. See Jesse Zanger, *Trump Administration Appeals NYC Congestion Pricing Ruling That Kept Toll in Place*, CBS NEWS (May 1, 2026, at 18:07 ET), <https://www.cbsnews.com/newyork/news/trump-administration-appeal-nyc-congestion-pricing-toll/> [https://perma.cc/TW83-L4WP].

11. See Stefanos Chen & Winnie Hu, *Trump Wants Congestion Pricing Dead by March 21. New York Won't Budge*, N.Y. TIMES (Feb. 26, 2025), <https://www.nytimes.com/2025/02/26/nyregion/trump-nyc-congestion-pricing-deadline.html> (on file with the *Fordham Urban Law Journal*).

12. Another example is under the Occupational Safety and Health Act. See Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689, 1722 (2018) (discussing how the Clean Air Act and Occupational Safety and Health Act establish federal standards that states must legislate within).

13. See Gluck & Huberfeld, *supra* note 12, at 1721–22. For a broader discussion of examples of “Cooperative Federalism,” or federal statutes that delegate implementation authority to the states, see Josh Bendor & Miles Farmer, Note, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes*, 122 YALE L.J. 1280, 1285–89 (2013).

14. See, e.g., Gluck & Huberfeld, *supra* note 12, at 1783–84.

process includes both federal agency review and often subsequent judicial review in federal court.¹⁵ Additionally, even if the courts uphold a federal agency approval, the federal government can subsequently attempt to revoke that approval.¹⁶ It is possible that federal revocation could lead to the end of a previously approved state program—even after the program begins.¹⁷

New York's back-and-forth with the federal government over congestion pricing illustrates the fragility and instability of these types of federally approved, state-implemented programs. These government programs are especially vulnerable during times of federal administrative change and high political polarization,¹⁸ as can be seen with the Trump Administration's congestion pricing revocation. However, the process that preceded this revocation is the true source of vulnerability in this statutory regime.

State-run programs that require federal government approval often must go through multiple stages of review.¹⁹ These reviews are required by multiple authorities and touch all three branches of the federal government.²⁰ The process often looks like this. First, a state submits its proposal to the relevant federal agency (or agencies) for review.²¹ Second, if the agency

15. See Bendor & Farmer, *supra* note 13, at 1289, 1294.

16. See Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1654 (2012); Bendor & Farmer, *supra* note 13, at 1288; see also Sara C. Bronin, *Transportation Law's Congestion Problem*, 135 YALE L.J.F. 319, 341 (2026).

17. See Stefanos Chen & Winnie Hu, *Trump Official Pushes Congestion Pricing Deadline Back a Month*, N.Y. TIMES (Mar. 20, 2025), <https://www.nytimes.com/2025/03/20/nyregion/nyc-congestion-pricing-trump-mta-battle.html> (on file with the *Fordham Urban Law Journal*).

18. See Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1744 (2015) ("Polarization, or at least polarization combined with divided government, warps this web of agency controls in significant ways.").

19. This Note will focus on the impacts of the federal agency review process, but individual states and municipalities often face a wide range of procedural hurdles and reviews at the state level that their programs must pass through as well. See, e.g., 4 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 9.08[1], LexisNexis (database updated 2026) (noting that at least twenty-six states have laws that require extensive environmental review for state projects).

20. Note that National Environmental Policy Act (NEPA) review only applies to actions by federal agencies, but other federal laws require states to seek federal approval for many large projects, and these federal approvals must abide by NEPA. See *Sw. Williamson Cnty. Cmty. Ass'n v. Slater*, 243 F.3d 270, 278–79 (6th Cir. 2001). Therefore, even if a state project does not receive any federal funding, if that project requires federal agency approval, then it must abide by NEPA. See *id.* For judicial review of federal agency actions, see Administrative Procedure Act, 5 U.S.C. § 706. For congressional review of federal agency actions, see Congressional Review Act, 5 U.S.C. §§ 801–808. For federal agency review of state programs or proposals, see, e.g., National Environmental Policy Act of 1969, 42 U.S.C. § 4321.

21. See, e.g., 23 C.F.R. § 771.109 (2025) (requiring state and local governments to submit certain highway project proposals to the relevant federal agency for review).

approves the state program, the agency will issue a license or other authorization to the state, allowing the state to proceed with the program.²² At this point, the judicial and legislative branches of government may intervene. Congress may attempt to pass a joint resolution disapproving of the federal agency's action, which, if successful, repeals that agency action and stops the state program in its tracks.²³ Courts can also step in and review the action, overturning it on various grounds or upholding it.²⁴ This is a simplified overview of a process that subsequent sections of this Note will describe in detail.²⁵ However, despite this process's complexity and divergent pathways, the main consequence is the same: many federally approved state projects are slowed and sometimes halted by this complex combination of decision points.²⁶

The bottleneck caused by this complex review process for state projects requiring federal approval has broad consequences and applications beyond congestion pricing.²⁷ A wide range of programs, including state-run healthcare exchanges and state-issued vehicle emissions standards, also require federal approval and are thus subject to this regime.²⁸ Therefore, in

22. See Bridget A. Fahey, *Coordinated Rulemaking and Cooperative Federalism's Administrative Law*, 132 YALE L.J. 1320, 1333 (2023) [hereinafter Fahey, *Coordinated Rulemaking*]; see, e.g., *Value Pricing Pilot Program Agreement*, METRO. TRANSP. AUTH. (Nov. 21, 2024), <https://new.mta.info/document/158201> [<https://perma.cc/5LFQ-T3L5>].

23. See MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., IF10023, THE CONGRESSIONAL REVIEW ACT (CRA): A BRIEF OVERVIEW 1–3 (2026), <https://www.congress.gov/crs-product/IF10023> [<https://perma.cc/RNG9-JLL4>].

24. See, e.g., *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51–52 (1983) (overturning National Highway Traffic Safety Administration's car safety regulations in part because the agency did not adequately consider reasonable alternative options before finalizing the rule); *Almay, Inc. v. Califano*, 569 F.2d 674, 682–83 (D.C. Cir. 1977) (using the arbitrary and capricious standard to overturn an Federal Drug Administration rule because the agency did not support the rule with enough evidence).

25. See *infra* Part I.A.

26. See EZRA KLEIN & DEREK THOMPSON, ABUNDANCE 97 (2025) (noting that after the enactment of NEPA, costs to build highways in the United States tripled and continue to rise).

27. See *id.* at 94 (discussing how regulatory approvals have slowed California's progress to build a high-speed rail line from Los Angeles to the Bay Area).

28. For healthcare exchanges, see *Section 1332: State Innovation Waivers*, CTRS. FOR MEDICARE & MEDICAID SERVS. (May 21, 2026), <https://www.cms.gov/marketplace/states/section-1332-state-innovation-waivers> [<https://perma.cc/3UWA-PY33>]; RYAN J. ROSSO, CONG. RSCH. SERV., R44760, STATE INNOVATION WAIVERS: FREQUENTLY ASKED QUESTIONS 2 (2026), <https://www.congress.gov/crs-product/R44760> [<https://perma.cc/XS4G-MDBJ>]. For emissions standards, see *Vehicle Emissions California Waivers and Authorizations*, EPA, <https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations> [<https://perma.cc/YC9Y-CVKA>] (last updated Feb. 10, 2026); BENJAMIN M. BARCZEWSKI, KATHRYN G. KYNETT & EMILY N. PETERSON, CONG. RSCH. SERV., R48168, CALIFORNIA AND THE CLEAN AIR ACT (CAA) WAIVER: FREQUENTLY ASKED QUESTIONS 5 (2025), <https://www.congress.gov/crs-product/R48168> [<https://perma.cc/WR5A-3FJL>].

a country founded on principles of federalism and state innovation, this type of statutory regime—one that includes federal agency review, congressional review, and potential federal judicial review for entirely state-run and funded government programs—does not effectively align with those founding principles and is ripe for reform.²⁹

In Part I, this Note explores the details of this type of statutory regime, using congestion pricing as an example.³⁰ In Part II, this Note demonstrates how this type of statutory regime stagnates progress in realms well beyond the issue of traffic in lower Manhattan and violates our founding principles of federalism.³¹ Finally, in Part III, this Note proposes a new statutory framework for state programs that require federal approval.³² This proposed structure entitles states to act as the “laboratories of democracy” envisioned by Justice Brandeis and Alexander Hamilton.³³ Additionally, this new structure will enable states to implement policies more efficiently while maintaining robust judicial review and mitigating the risk that executive turnover will lead to the revocation of a federally approved program.

I. THE CURRENT SYSTEM THAT STATES MUST NAVIGATE

States seeking to implement programs that require federal agency approval must navigate a series of regulatory, legislative, and judicial processes that can delay—and, in some cases, terminate—those programs. This Part will discuss the various roadblocks to program implementation, detailing these government approval processes in the order in which a state would likely need to navigate them when seeking federal approval. First, Part I.A will briefly examine the federal agency review process and its role in slowing implementation.³⁴ Second, Part I.B will discuss the process of judicial review and how courts evaluate whether a federal agency’s approval is both ripe for review and valid on its merits.³⁵ Third, Part I.C will discuss

29. See Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 975–76 (2019) (describing the United States’ approach to state experimentation and federalism).

30. See *infra* Part I.

31. See *infra* Part II.

32. See *infra* Part III.

33. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); THE FEDERALIST NO. 17 (Alexander Hamilton) (explaining that “State governments” would be “the immediate and visible guardian of life and property” for Americans because they will “regulat[e] all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake”). See generally Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187 (2022) (describing the concept of states as “laboratories of democracy”).

34. See *infra* Part I.A.

35. See *infra* Part I.B.

the Congressional Review Act and how that law inserts Congress into the agency approval process.³⁶ Fourth, Part I.D will briefly discuss the final impediment slowing down or stopping these state programs: rule rescission.³⁷

A. The Federal Agency Review Process

State projects, such as congestion pricing, must undergo extensive federal review before the state can implement the program.³⁸ While federal review of state programs is not unusual, it is often tied to federal funding³⁹ or other uniquely federal interests, such as collective action problems.⁴⁰ The first type of state program requiring federal approval is often referred to as conditional spending, and it is common across the federal government.⁴¹ For the second category, the federal government often employs “preemption,” or the creation of federal law in a particular area, to compel states to act in ways they might not otherwise.⁴² For example, federal environmental regulations establish minimum national standards and often permit states to implement more stringent rules.⁴³ Notably, congestion pricing does not squarely fit into either of those two boxes because it involves no federal funding,⁴⁴ and its

36. See *infra* Part I.C.

37. See *infra* Part I.D.

38. See Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENV'T L.J. 179, 189 (2005); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 577 (2011) [hereinafter Gluck, *Intrastatutory Federalism*].

39. See Tyler & Gerken, *supra* note 33, at 2212.

40. See Tyler & Gerken, *supra* note 33, at 2211. Collective action problems arise when a group (or, in this case, a state) does not pursue a given policy because it does not want to disadvantage itself in relation to other states. See Joshua D. Sarnoff, *The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENV'T L. & POL'Y F. 225, 278 (1997) (discussing a symptom of a collective action problem, a race to the bottom). Congress and the federal government can overcome these problems because their legislation generally impacts all states. See *id.* at 284.

41. See Tyler & Gerken, *supra* note 33, at 2212 (“as of 2018, there were 1,274 federal programs distributing funds to the states” (footnote omitted)).

42. See Tyler & Gerken, *supra* note 33, at 2212–13. For a broad review of the nuances of federal preemption of state law, see RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 677–85 (7th ed. 2015).

43. See Tyler & Gerken, *supra* note 33, at 2213.

44. See Letter from Dominika Tarczynska, David Farber & Christine S. Poscablo, Assistant U.S. Att’ys, to Erin Hendrixson, Senior Trial Att’y, U.S. Dep’t of Transp. 8–9 (Apr. 11, 2025), <https://www.courthousenews.com/wp-content/uploads/2025/04/congestion-pricing-internal-memo-doj.pdf> [https://perma.cc/M4EM-VWCM] (stating that the federal government did not provide “financial assistance” to the Metropolitan Transportation Authority to implement congestion pricing). Note that the government unintentionally filed this letter with the court.

environmental impacts are largely contained within the state of New York.⁴⁵ Nonetheless, the federal review process for each of these types of programs, including congestion pricing, is similar.⁴⁶

This Section will survey the federal agency review process for three types of programs. While this Section will broadly discuss the federal review process, it will use an example in each of these categories to help illustrate the process. For federally funded, state-run programs, this Section will use the Affordable Care Act (ACA) as an example.⁴⁷ For areas where the federal government seeks to prevent races to the bottom, this Note will focus on the Clean Air Act and its National Ambient Air Quality Standards (NAAQS).⁴⁸ Additionally, while it does not cleanly fit into either of these categories, this Section will discuss the agency review process for congestion pricing and identify the similarities in these processes.

45. See Jack Hartzimemos, *New York City's Congestion Pricing Toll—How Will It Affect New York's Air Pollution?*, GEO. ENV'T L. REV. BLOG (Apr. 8, 2024), <https://www.law.georgetown.edu/environmental-law-review/blog/new-york-citys-congestion-pricing-toll-how-will-it-affect-new-yorks-air-pollution/> [<https://perma.cc/8BXA-LA99>]; Tom Wright, Kate Slevin & Zoe Baldwin, *Reminder: New Jersey and New York Both Benefit from Congestion Pricing*, REG'L PLAN. ASS'N (Dec. 19, 2024), <https://rpa.org/news/lab/reminder-new-jersey-and-new-york-both-benefit-from-congestion-pricing> [<https://perma.cc/RP7M-27DM>]. But see Press Release, Josh Gottheimer, Congressman, Gottheimer Fights NY Congestion Tax Which Will Be a New Lung Tax on NJ Families and Children (Jan. 2, 2025), <https://gottheimer.house.gov/posts/release-gottheimer-fights-ny-congestion-tax-which-will-be-a-new-lung-tax-on-nj-families-and-children> [<https://perma.cc/P362-S9ZC>] (arguing that congestion pricing will increase “cancer-causing pollution” in New Jersey); Winnie Hu & Elise Young, *New Jersey Challenges N.Y.C. Congestion Pricing in Federal Court*, N.Y. TIMES (Apr. 3, 2024), <https://www.nytimes.com/2024/04/03/nyregion/nj-congestion-pricing-federal-court.html> (on file with the *Fordham Urban Law Journal*).

46. See *What Is the National Environmental Policy Act?*, EPA, <https://www.epa.gov/nepa/what-national-environmental-policy-act> [<https://perma.cc/Z3JV-8U7X>] (last visited July 16, 2026).

47. See generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.) (codifying the Affordable Care Act's federal-state partnership programs).

48. See *About Air Quality Implementation Plans*, EPA, <https://www.epa.gov/air-quality-implementation-plans/about-air-quality-implementation-plans> [<https://perma.cc/H9FV-FQLX>] (last visited July 16, 2026).

I. The Administrative Procedure Act

The Administrative Procedure Act (APA) governs the procedure for these federal review processes.⁴⁹ The APA is a “super-statute.”⁵⁰ It is the baseline set of rules and procedures for administrative actions by federal agencies.⁵¹

Justice Scalia remarked in 1978 that the APA is a “subconstitution, in the field of administrative process.”⁵² The APA has a few key provisions relevant to this Note. First, the APA defines the types of agency actions to which its procedures apply: rules and orders.⁵³ Rules are formed through rulemaking and are agency actions that state the “future effect” of a given law.⁵⁴ Orders, formed through adjudications, are a catchall for any final agency actions that are not rules,⁵⁵ including agency-issued licenses.⁵⁶ Second, separate from establishing federal agency procedures, the APA also prescribes standards for judicial review of agency action.⁵⁷ States seeking federal agency approval for a project must work within both of these boundaries—those dictating the agency process and those dictating the judicial review process—to successfully navigate their project through agency review.

Returning to the examples of the Affordable Care Act (ACA) and state air quality plans, states must work within the APA’s processes to get both their healthcare marketplaces and air quality plans approved by the relevant federal agencies.⁵⁸ This is similar to the mandatory process New York undertook to obtain approval for its congestion pricing plan from the Federal

49. See 5 U.S.C. §§ 551–559.

50. See William N. Eskridge, Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1894 (2023).

51. See Christopher J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 NOTRE DAME L. REV. 1963, 1964 (2023).

52. See *id.* at 1964 (quoting Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363). Justice Scalia was a noted critic of the federal government’s role in environmental regulation. See Richard J. Lazarus, *The Scalia Court: Environmental Law’s Wrecking Crew Within the Supreme Court*, 47 HARV. ENV’T L. REV. 407, 449–51 (2023).

53. See 5 U.S.C. § 551.

54. See *id.* § 551(4)–(5).

55. See *id.* § 551(6)–(7).

56. See *id.* § 551(6).

57. See *id.* §§ 702–706.

58. See *Basic Information About Air Quality SIPs*, EPA, <https://www.epa.gov/air-quality-implementation-plans/basic-information-about-air-quality-sips> [https://perma.cc/29QH-X65N] (last updated Dec. 22, 2025); see *State-Based Exchanges*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/ccio/resources/fact-sheets-and-faqs/state-marketplaces> [https://perma.cc/LC49-NZK9] (last updated Apr. 7, 2026).

Highway Administration.⁵⁹ All agency approvals of state plans require that (1) the state submit a proposal to the relevant federal agency, (2) the federal agency determine that the proposal abides by the relevant statutes and regulations, and (3) the agency publish its final decision in the Federal Register.⁶⁰ While not comprehensive, these steps align with the APA's requirements for federal agency actions,⁶¹ and apply not only to the ACA and state air quality plans, but also to congestion pricing.⁶²

The Supreme Court has ruled that while the APA establishes procedural requirements for agencies to follow, those requirements are just the floor; Congress can direct an agency to follow more stringent procedures.⁶³ For state healthcare exchanges, the relevant statute is the ACA.⁶⁴ For state air quality plans, the Clean Air Act is the relevant statute.⁶⁵ For congestion pricing, federal statutory authority is primarily derived from the Intermodal

59. See METRO. TRANSP. AUTH., CENTRAL BUSINESS DISTRICT (CBD) TOLLING PROGRAM: FINAL ENVIRONMENTAL ASSESSMENT, at i (Apr. 2023) [hereinafter MTA, FINAL ENVIRONMENTAL ASSESSMENT], <https://www.mta.info/document/111101> (on file with the *Fordham Urban Law Journal*) (“The Final EA was prepared consistent with . . . regulations, as codified in 40 Code of Federal Regulations (CFR) Parts 1500–1508 and 23 CFR 771 respectively to evaluate the potential environmental impacts of, and identify mitigation measures for, the Project, in consideration of public and agency input. The Final EA responds to comments received from the public and agencies on the EA that was published in August 2022. . . . [T]he FHWA will issue a final agency decision for the Project.”).

60. See *id.* at 0-1 (“When FHWA reviews an application to the VPPP, it must evaluate the potential environmental effects of the proposed action in accordance with the National Environmental Policy Act (NEPA)”). Note that “VPPP” is the Value Pricing Pilot Program, which is the federal program New York applied for its congestion pricing program to be a part of.

61. See 5 U.S.C. § 554. Note that fair notice to all affected parties and opportunities for the public to participate in some form are both also key features of the APA's procedural requirements. See *id.*

62. See MTA, FINAL ENVIRONMENTAL ASSESSMENT, *supra* note 59, at 0-1.

63. Cf. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 545–46 (1978) (ruling that a court may not simply add procedures on top of the prescribed APA processes); see also *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 351–52 (1st Cir. 2004) (“An agency must . . . offer a reasoned explanation for [a] change [from its prior regulations]. If the agency fails to furnish such an explanation, or if the proffered explanation fails to demonstrate that the agency fully considered its new course, the revised rules must be set aside.”). But see Kristin E. Hickman & Mark R. Thomson, *Textualism and the Administrative Procedure Act*, 98 NOTRE DAME L. REV. 2071, 2093–94 (2023) (arguing that while the Court ruled in *Vermont Yankee* that it may not add procedural requirements beyond those within the APA, the Court did not define what procedures are in the APA, which leaves space for lower courts to make that determination); Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2057–58 (2011) (finding that courts have continued to add procedural requirements post-*Vermont Yankee*).

64. See *Initial Guidance to States on Exchanges*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/cciio/resources/files/guidance_to_states_on_exchanges [<https://perma.cc/AJW8-5MM3>] (last updated Sep. 10, 2024).

65. See EPA, *supra* note 58.

Surface Transportation Efficiency Act (ISTEA), but the National Environmental Policy Act (NEPA) is also relevant, as it requires federal agencies to consider the environmental effects of their actions.⁶⁶ All of these statutes add procedures to the minimum APA process.

These federal statutes also provide procedures and guardrails for state actions that require federal approval or funding.⁶⁷ In line with this, Professor Abbe Gluck proposes that the ACA's structure, which relies heavily on states for on-the-ground implementation, is the modern manifestation of federalism.⁶⁸ She describes the ACA as "invit[ing] the states to serve as central policy-makers and implementers."⁶⁹ However, this invitation comes with a key string attached: the requirement for federal agency review and approval.⁷⁰ This makes the relevant federal agency a key veto point for any state policy with federal oversight authority.⁷¹ But, importantly, this federal agency approval of a state program is not the final hurdle a state must overcome when seeking to implement a program; courts may review these programs as well.⁷²

B. Judicial Review of Agency Actions

After an agency approves or denies a state proposal, federal courts can review the agency's decision.⁷³ The APA prescribes federal courts' involvement in the agency action review process.⁷⁴ The APA allows courts to review final agency actions,⁷⁵ but it has largely been the courts'

66. See MTA, FINAL ENVIRONMENTAL ASSESSMENT, *supra* note 59, at ES-3-4, 0-1 ("Before a Federal agency makes a decision, . . . NEPA . . . requires the Federal agency to understand and disclose the environmental effects of the action."); see also Kevin Beck, *Connecticut Yankee in King Rehnquist's Court: An Alternative History of Hybrid Rulemaking*, 30 GEO. MASON L. REV. 565, 585 (2023).

67. See Fahey, *Coordinated Rulemaking*, *supra* note 22, at 1337-40; see also Jerron R. Wheeler, *Medicaid's Broken Promise to Children*, 82 WASH. & LEE L. REV. 1847, 1854-56 (2026) (describing the process for federal approval of a state's Medicaid program).

68. See generally Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 FORDHAM L. REV. 1749 (2013) [hereinafter Gluck, *Federalism from Federal Statutes*].

69. *Id.* at 1750.

70. See Fahey, *Coordinated Rulemaking*, *supra* note 22, at 1341-43.

71. See *id.*

72. See *id.* at 1369-71.

73. See 5 U.S.C. § 704; see also *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020-23 (D.C. Cir. 2000) (ruling that an EPA guidance document is a final agency action, and thus reviewable by federal courts under the APA).

74. See 5 U.S.C. §§ 704-706. The APA also sets certain restrictions on judicial review of agency actions. See Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371, 374, 406-07 (2008).

75. See 5 U.S.C. § 704.

responsibility to define what a “final agency action” is and, thus, which types of agency actions they may review.⁷⁶

While federal courts previously deferred to federal agency interpretations in various settings,⁷⁷ that practice largely did not include deferring to an agency’s definition of final agency action.⁷⁸ This lack of deference regarding finality predates *Loper Bright Enterprises v. Raimondo*,⁷⁹ the 2024 Supreme Court opinion that places federal courts as the primary adjudicator for questions of law regarding agency actions.⁸⁰ Nonetheless, this lack of deference does seem to align with that doctrine.⁸¹ The determination of what a final agency action is, and how much deference an agency should be afforded in its actions, is essential to understanding how courts review federal approvals of state programs. For example, if an agency believes that it followed the right process to approve a state program, but a court disagrees, then the court may vacate or set aside that approval.⁸²

Therefore, to explain the legal and practical obstacles challenged state programs face, this Section will review two key concepts related to judicial review of agency actions. First, this Section will review finality and the tests that federal courts use to determine if an agency action is “final.” Second, this Section will briefly review the doctrine of agency deference, how this doctrine has shifted post-*Loper Bright*, and how deference interacts with finality.

76. See McKee, *supra* note 74, at 385–89.

77. See *Kisor v. Wilkie*, 588 U.S. 558, 584 (2019) (ruling that courts have “the final authority to approve—or not—the agency’s reading of a . . . rule,” but not mentioning judicial review of whether an agency action was final).

78. See *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61–62 (2004) (directing courts to find the definition of “final agency action” in the text of the APA) (citing 5 U.S.C. §§ 702–704); see also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576–77 (1992) (describing the requirement that a litigant must prove individualized, concrete injury for their lawsuit to proceed in federal court).

79. 603 U.S. 369, 392–94 (2024). See also *Norton*, 542 U.S. at 61–62.

80. See *Loper Bright*, 603 U.S. at 392–94.

81. See *id.* (“Section 706 [of the APA] makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. Under the APA, it thus ‘remains the responsibility of the court to decide whether the law means what the agency says.’”) (emphasis in original) (quoting *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring)).

82. See *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 614–16 (2012) (overturning federal agency’s approval of California Medicaid program because federal agency did not follow appropriate approval process under the APA).

1. Finality of Agency Actions

The federal judiciary's preference to review final actions dates to the founding of the United States.⁸³ Since the founding, the purpose of the Supreme Court has been to resolve actual conflicts between parties.⁸⁴ This requirement, spelled out in 1793 by the first Chief Justice of the U.S. Supreme Court, John Jay, is tied to the separation of powers established in the Constitution.⁸⁵ This issue was quickly tested by President Washington in 1793 when he sought advice from Chief Justice Jay.⁸⁶ Jay declined Washington's request, stating that he could not give the President advice because the Court would not "extrajudicially decid[e] . . . questions."⁸⁷ Chief Justice Jay is simply restating a provision that Washington signed a few years earlier at the Constitutional Convention.⁸⁸ Nonetheless, Jay's declination of Washington's request for advice set an important precedent moving forward that judges decide controversies, rather than give preemptive advice.

The history of the finality requirement for judicial review of agency decisions begins with *Hayburn's Case* in 1792.⁸⁹ There, the Supreme Court declined to decide on a petition concerning a soldier's government pension because the War Department had not yet issued its final decision.⁹⁰ In the time since *Hayburn's Case*, the Court has formalized its process for determining if an agency decision is final,⁹¹ further solidifying the core holding of *Hayburn's Case*, that judicial review of agency actions is limited to final actions.⁹² Therefore, to satisfy the standing requirements in federal court, plaintiffs challenging an agency action must prove that the action was

83. See U.S. CONST. art. III, § 2 (describing the courts as only having jurisdiction over active "cases" or actual "controversies").

84. See Letter from Sup. Ct. Js. to George Washington, President (Aug. 8, 1793) (telling President Washington the Court is a venue of "last resort" and will not "extrajudicially decid[e] . . . questions" because the Constitution instructs heads of executive departments to give opinions to the president, but does not include the Court in that provision) <https://founders.archives.gov/documents/Washington/05-13-02-0263> [<https://perma.cc/9PK7-9YH4>].

85. See *id.*

86. See *id.* (noting that the court's role is not to provide advice to the president).

87. See *id.*

88. See *id.*

89. See 2 U.S. (2 Dall.) 408, 410 (1792) (quoting a letter from the circuit court of the District of North Carolina, which states that the court shall not make a final decision, because the agency decision is not yet final).

90. See *id.* at 410.

91. See Beau J. Baumann & Greg Mina, Note, *Clowning Around with Final Agency Action*, 28 CORNELL J.L. & PUB. POL'Y 329, 337–38 (2018).

92. See *id.* at 339–41.

final in addition to showing an actual injury traceable to the defendant.⁹³ While courts prefer to review final agency actions that caused actual harm to plaintiffs, they will sometimes review agency decisions before they take effect when those decisions meet certain criteria.⁹⁴

2. Ripeness of Judicial Challenges to Federal Agency Actions

The ripeness doctrine comes from common law, but its cousin, finality, is codified in the APA.⁹⁵ Finality is tied to ripeness because it also seeks to limit a court's scope of review to active controversies that have caused actual injury.⁹⁶ Ripeness is a requirement for all cases brought in federal court, whereas finality is only required for matters that concern agency action.⁹⁷ The APA limits judicial review to "final agency actions,"⁹⁸ but courts often use their discretion and authority to create various tests to determine whether a given agency action is "final."⁹⁹

In *Bennett v. Spear*, a case challenging a Fish and Wildlife Service (FWS) opinion regarding endangered species protection, the Supreme Court established the modern test for finality of agency decisions.¹⁰⁰ The first part

93. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *Bennett v. Spear*, 520 U.S. 154, 167–68 (1997) (explaining that the plaintiff bears the burden of proving "each element of Article III['s] standing [requirements]").

94. See *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148–50 (1967) (holding that a pre-enforcement challenge was ripe for judicial review).

95. See 5 U.S.C. § 704 (limiting judicial review of agency actions to "final agency action for which there is no other adequate remedy"); *Abbott Lab'ys*, 387 U.S. at 149–50; see also 33 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 8361 (2d ed. 2024) ("As part of the [Court's] discussion [in *Abbott Laboratories*] of whether this challenge was ripe for review, the Court determined that the rule constituted 'final agency action' under the APA.").

96. See STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 915 (6th ed. 2006) ("APA § 704['s] [finality requirement] can be understood to have codified the 'ripeness requirement' . . . for . . . [federal court] . . . jurisdiction[.]").

97. See Stephen Hylas, Note, *Final Agency Action in the Administrative Procedure Act*, 92 N.Y.U. L. REV. 1644, 1657–61 (2017).

98. See 5 U.S.C. § 704.

99. See, e.g., *Soundboard Ass'n v. Fed. Trade Comm'n*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) ("Agency actions are final if two independent conditions are met: (1) the action 'marks the consummation of the agency's decisionmaking process' and is not 'of a merely tentative or interlocutory nature;' and (2) it is an action 'by which rights or obligations have been determined, or from which legal consequences will flow.'" (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)); *Abbott Lab'ys*, 387 U.S. at 151 (explaining that courts undertaking this finality inquiry should evaluate whether the agency action is "informal, or only the ruling of a subordinate official, or tentative" (internal citations omitted)).

100. See 520 U.S. at 157, 177–78. The full test states that, "[f]irst, the action must mark the 'consummation' of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature . . . [a]nd second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* (internal citations omitted).

of the test instructs courts to determine if the agency action is the “consummation of the agency’s decision-making process.”¹⁰¹ The second part of the test directs courts to determine if that agency action creates “rights,” “obligations,” or “legal consequences.”¹⁰² A court must find that a plaintiff satisfies both parts of the *Bennett* test for it to rule that an agency action is final.¹⁰³ In the years since *Bennett*, the Supreme Court and lower federal courts have applied this test to a wide range of agency actions, yet they continue to grapple with the definition of “final agency action.”¹⁰⁴ The D.C. Circuit previously ruled that agency guidance documents, interpretive rules, policy statements, notices, and letters are not considered final agency actions.¹⁰⁵ However, other federal courts have ruled that agency-issued fee notices are final and reviewable.¹⁰⁶

101. *Id.*

102. *Id.*

103. See *Soundboard Ass’n*, 888 F.3d at 1267. For cases dealing with *Bennett*’s first prong, see *Natural Resource Defense Council v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020) (quoting *Soundboard Ass’n*, 888 F.3d at 1267); see also *POET Biorefining, LLC v. EPA*, 970 F.3d 392, 404 (D.C. Cir. 2020); *National Organization of Veterans’ Advocates, Inc. v. Secretary of Veterans Affairs*, 981 F.3d 1360, 1378–79 (Fed. Cir. 2020).

104. For interpretive rules and policy statements, see *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 96, 103 (2015) (ruling that interpretive rules and policy statements do not have the “force and effect of law” and therefore, are not final agency actions). For guidance documents, policy statements, and interpretive rules, see *Ass’n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015) (ruling these agency actions do not carry the force of law so they are not final under the second prong of the *Bennett* test). For policy statements being non-final actions, see *Center for Auto Safety v. National Highway Traffic Safety Administration*, 452 F.3d 798, 807–08 (D.C. Cir. 2006). For agency guidance being non-final, see *Valero Energy Corp. v. Environmental Protection Agency*, 927 F.3d 532, 536 (D.C. Cir. 2019) (ruling EPA guidance document was non-final because “had no legal consequences for any regulated party”); see also *Sierra Club v. EPA*, 955 F.3d 56, 63 (D.C. Cir. 2020). For staff letters being non-final, see *Soundboard Ass’n*, 888 F.3d at 1263 (ruling FTC staff opinion letter is non-final because it “does not constitute the consummation of the Commission’s decision-making process”).

105. See *supra* text accompanying note 104.

106. See, e.g., *Sunshine State Reg’l Ctr., Inc. v. Jaddou*, No. 23-CV-60795, 2023 WL 3712916, at *6 (S.D. Fla. May 25, 2023) (ruling that fee notices are final agency actions).

Therefore, while federal courts have found that many types of agency actions satisfy the *Bennett* test, there are limits,¹⁰⁷ and the Supreme Court has endorsed a “pragmatic” approach to finality.¹⁰⁸

Agencies may not artificially protract their own agency processes to avoid a court finding that their actions are final.¹⁰⁹ In *Sackett v. EPA*, the Supreme Court held that a compliance order from the Environmental Protection Agency (EPA) was a final agency action under the *Bennett* test because it created a “legal obligation” for the plaintiffs.¹¹⁰ The government argued that compliance orders are not final agency actions because they are unenforceable until a separate agency action is taken to make them enforceable.¹¹¹ Because the EPA took no subsequent action, the government argued that the compliance order was not a final action.¹¹² Justice Scalia, writing for a unanimous Supreme Court, wholly rejected this argument, in part because compliance orders coerce voluntary compliance and a regulated party that “voluntar[ily]” complies with a compliance order is no longer at risk of the agency seeking a court order for enforcement.¹¹³ Consequently, Justice Scalia ruled that compliance orders issued pursuant to the Clean Water Act are subject to judicial review as final agency actions under the APA.¹¹⁴ In *Sackett*, the Court illustrated the scope of the pragmatism outlined in *Abbott Laboratories* by ruling that agency actions, which present entities with the choice of voluntary compliance or face possible legal actions, are final actions under the *Bennett* test and the APA.¹¹⁵

The finality of an agency action, whether challenged at the pre-enforcement or post-enforcement stage, is essential for a challenge to succeed. Courts, working within the requirements of the APA, have created

107. See *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm’n*, 324 F.3d 726, 731 (D.C. Cir. 2003) (“[A] statement of the agency’s intention to make a preliminary determination that the sprinkler heads present a substantial product hazard, and a request for voluntary corrective action. These agency activities do not constitute final agency action within the meaning of the APA”); see, e.g., *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020) (ruling that an informal letter from a subordinate agency official is not the culmination of an agency’s decision-making process). For pre-*Bennett* limiting of finality, see *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 239–44 (1980) (ruling that an administrative complaint is not a final agency action).

108. See *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 599 (2016) (quoting *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 149 (1967)).

109. See *Sackett v. EPA*, 566 U.S. 120, 129–30 (2012).

110. See *id.* at 125–27. Note that the Court reheard the *Sackett* case in 2023; however, the Court did not readdress the finality issue in its *Sackett II* opinion and instead focused on navigable waters. See *Sackett v. EPA (Sackett II)*, 598 U.S. 651, 663 (2023).

111. *Sackett*, 566 U.S. at 129.

112. See *id.*

113. *Id.* at 128–29.

114. See *id.* at 130–31.

115. See *Sackett*, 566 U.S. at 126, 129–31.

various criteria to evaluate the finality of an agency action, and plaintiffs must satisfy these criteria. But a finality determination is not the end of a court's inquiry into a challenged agency action. The next Section will discuss another key element of a court's review of agency actions, deference.

3. Pre- and Post-Enforcement Review

Federal courts reviewing agency actions before those actions take effect must determine whether judicial review is appropriate at that time.¹¹⁶ Courts and scholars often refer to this posture of review as “pre-enforcement.”¹¹⁷ To do this, courts often deploy the “clear and convincing evidence” standard to guide their decision-making.¹¹⁸ Under this standard, courts afford plaintiffs the presumption of reviewability despite their pre-enforcement challenge to agency action. Therefore, the government must prove that there was legislative intent to disallow pre-enforcement judicial review.¹¹⁹ This places these plaintiffs in an advantageous position, as the government bears the burden of proving that judicial review should be barred under this posture.¹²⁰

While pre-enforcement review by courts is possible, the bar is high for courts to grant it, and courts primarily review “ripe” post-enforcement challenges to final agency actions.¹²¹ Generally, these challenges arise after a final agency action has taken effect. In *Abbott Laboratories*, a case concerning a pre-enforcement challenge to an U.S. Food and Drug Administration (FDA) rule dealing with drug labeling, the Supreme Court defined ripeness with a two-part test requiring courts “to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of

116. See *Abbott Lab'ys*, 387 U.S. at 141; Hylas, *supra* note 97, at 1656–57.

117. See Adam Crews, *The Executive Power of the Federal Courts*, 56 ARIZ. ST. L.J. 695, 752–53 (2024) (describing this posture for federal courts as “pre-enforcement review”); Cary Coglianese & Daniel E. Walters, *The Great Unsettling: Administrative Governance After Loper Bright*, 77 ADMIN. L. REV. 1, 14–15 (2025) (using the same “pre-enforcement” language); *West Virginia v. EPA*, 597 U.S. 697, 756 (2022) (Kagan, J., dissenting); *New York v. U.S. Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 564 (S.D.N.Y. 2019) (quoting *N.Y.C.L. Union v. Grandeau*, 528 F.3d 122, 132 (2d Cir. 2008)).

118. *Abbott Lab'ys*, 387 U.S. at 141 (quoting *Rusk v. Cort*, 369 U.S. 367, 379–80 (1962)); Hylas, *supra* note 97, at 1656–57 (quoting *Abbott Lab'ys*, 387 U.S. at 141).

119. See *Abbott Lab'ys*, 387 U.S. at 141 (“[O]nly upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.”) (quoting *Rusk*, 369 U.S. at 379–80)); Hylas, *supra* note 97, at 1657 (quoting *Abbott Lab'ys*, 387 U.S. at 141).

120. See *Abbott Lab'ys*, 387 U.S. at 148.

121. See *Abbott Lab'ys*, 387 U.S. at 148 (“The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy ‘ripe’ for judicial resolution.”). The intricacies and nuances of ripeness doctrine are outside the scope of this Note.

withholding court consideration.”¹²² In essence, the ripeness test from *Abbott Laboratories* is a temporal inquiry that asks a court if the issue before it is appropriate for judicial review at that moment.¹²³ While employing this test from *Abbott Laboratories*, courts continue to grapple with the definition of ripeness and when an agency action is appropriate for judicial review.¹²⁴ In *Abbott Laboratories*, the Court employed that two-part test to evaluate the FDA’s action and determined that the FDA’s action was a final agency action, and thus the pre-enforcement challenge could proceed.¹²⁵

4. Agency Deference

Agency deference is the idea that courts grant weight to an agency’s expertise and decisions within that agency’s mandate.¹²⁶ There are different forms of deference that courts have traditionally granted to agencies under this practice, but they are currently in flux following the Supreme Court’s 2024 ruling in *Loper Bright Enterprises v. Raimondo*.¹²⁷ In *Loper Bright*, the Court overruled *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* and found that courts have a duty to interpret statutes, so courts cannot defer to agencies on questions of law.¹²⁸ Prior to *Loper Bright*, federal courts traditionally granted agencies some leeway to interpret their relevant statutes in the first instance.

Despite this significant shift in administrative law jurisprudence, agency deference is still important to understand. Agency deference is the idea that courts reviewing an agency’s actions should defer to that agency’s reasoning in various ways.¹²⁹ Over time, there have been three main forms of deference: *Chevron*, *Auer*, and *Skidmore*.¹³⁰ Each form of deference directs

122. *Id.* at 149.

123. *See id.* at 148–49.

124. *See, e.g., Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58–59, 64 (1993) (ruling that a challenge of INS regulations brought by a class of undocumented immigrants was not ripe because the regulations did not impose a penalty on the class); *Toilet Goods Ass’n v. Gardner*, 387 U.S. 158, 162–64 (1967) (ruling that a pre-enforcement challenge to FDA regulations concerning inspector access were not ripe because inspection was not mandatory).

125. *See Abbott Labs*, 387 U.S. at 149–51 (“[T]he regulations in issue we find to be ‘final agency action’ within the meaning of § 10 of the Administrative Procedure Act, 5 U.S.C. § 704 . . .”).

126. *See Crews, supra* note 117, at 752.

127. 603 U.S. 369, 411 (2024).

128. *See id.* at 394–95, 412.

129. *Cf.* Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103, 105–06, 110–11 (2018) [hereinafter Walker, *Attacking Auer and Chevron Deference*].

130. *See generally id.*

a reviewing court to defer to the agency in slightly different contexts.¹³¹ *Chevron* deference directs a court to defer to the agency's interpretation of a statute that grants that agency some general authority when (1) the statute is ambiguous and (2) the agency's interpretation is reasonable.¹³² *Auer* deference directs courts to defer to an agency's interpretation of its own regulations "unless [that interpretation] is plainly erroneous or inconsistent with that agency's regulations."¹³³ Finally, *Skidmore* deference instructs a court to grant deference to an agency when it interprets its own statute.¹³⁴ Under *Skidmore* deference, a court shall consider "the degree of the agency's care, its consistency, formality, . . . relative expertness, and . . . the persuasiveness of the agency's position."¹³⁵ Each form of deference directs a court to approach an agency's determination slightly differently. For example, while *Chevron* and *Skidmore* deference would apply when an agency interprets its own statute, *Auer* deference applies when an agency interprets its own regulations.¹³⁶

Among these three types of deference, *Chevron* deference dominated the administrative law landscape from its decision in 1984 until the Court's reversal in 2024.¹³⁷ In the years prior to *Loper Bright*, the Court whittled away at *Chevron*'s reach until finally overturning it in 2024.¹³⁸ The full impact of *Loper Bright* is still unclear.¹³⁹ The Court declared that previous

131. See generally *id.* Notably, in *Kisor v. Wilkie* the Court modified the test for *Auer* deference, but did not overturn *Auer*. See 588 U.S. 558, 573–74 (2019); see also Christopher J. Walker, *What Kisor Means for the Future of Auer Deference: The New Five-Step Kisor Deference Doctrine*, YALE J. ON REG.: NOTICE & COMMENT (June 26, 2019) [hereinafter Walker, *What Kisor Means for the Future of Auer Deference*], <https://www.yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine/> [https://perma.cc/W9LQ-HRBP].

132. See *id.* at 110–11; *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984), overruled by *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

133. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer v. Robbins*, 519 U.S. 452, 461 (1997); Walker, *Attacking Auer and Chevron Deference*, *supra* note 129, at 105.

134. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

135. See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (citing *Skidmore*, 323 U.S. at 139–40).

136. See *United States v. Nasir*, 17 F.4th 459, 471 (3d Cir. 2021) (describing the scope of *Auer* deference).

137. See Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 140–41 (2003).

138. See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) ("Chevron is overruled.").

139. See generally Christopher J. Walker, *What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference*, YALE J. ON REG.: NOTICE & COMMENT (June 28, 2024) [hereinafter Walker, *Future of Chevron Deference*], <https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/> [https://perma.cc/3RHK-493T].

cases relying on *Chevron* remain valid and that *Skidmore* deference remains good law, but did not address the status of *Auer* deference.¹⁴⁰ Courts have also continued to apply *Skidmore* deference in various ways since *Loper Bright*.¹⁴¹

There is also limited clarity regarding *Loper Bright*'s consequences on finality. Previously, courts afforded some deference to an agency's claim that its actions are not final, but this may no longer be the case in a post-*Chevron* universe.¹⁴² However, the *Bennett* test, which predates *Loper Bright*, already grants courts some authority to determine when an agency action is final.¹⁴³ It is possible that, after *Loper Bright*, courts will rely more heavily on the *Bennett* test and less on an agency's claim of the finality of its actions.¹⁴⁴

For parties seeking a review of agency action, judicial review is a powerful tool, as the previous Section demonstrates. Judicial review allows plaintiffs, often regulated parties, to challenge final agency actions and seek review in federal court. However, judicial review has some weaknesses. First, courts are unpredictable, and especially in an era where courts grant agencies less deference, it is not always possible to know how a court might decide on a challenge to an agency action. Second, courts are slow, and the judicial review process for agency action can often take years.¹⁴⁵

140. See *Loper Bright*, 603 U.S. at 476 (Kagan, J., dissenting) (arguing that while the majority declared that *Skidmore* deference is still good law, there are still doubts about its durability due to this decision); Chad Squitieri, *Auer After Loper Bright*, YALE J. ON REG.: NOTICE & COMMENT (Oct. 15, 2024), <https://www.yalejreg.com/nc/auer-after-loper-bright-by-chad-squitieri/> [<https://perma.cc/N7DF-6QRE>] (explaining that even though the Court does not mention *Auer* in *Loper Bright*, *Auer* deference seems to no longer be good law). Notably, the Court upheld *Auer* deference in *Kisor v. Wilkie*, 588 U.S. 558, 573–74 (2019).

141. See *Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024); see also *Perez v. Owl, Inc.*, 110 F.4th 1296, 1307–08 (11th Cir. 2024).

142. See *Hylas*, *supra* note 97, at 1666.

143. See *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

144. See *N.M. Cattle Growers' Ass'n v. U.S. Forest Serv.*, No. CIV 23-0150 JB/GBW, 2025 WL 327265, at *59, *62, *79–80 (D.N.M. Jan. 29, 2025) (ruling that while the Court appears to no longer support the use of *Auer* deference, the modified *Auer* deference test from *Kisor v. Wilkie* is still good law, so courts must follow it) (citing *Kisor*, 588 U.S. at 575); see also *Stenson Tamaddon, LLC v. U.S. Internal Revenue Serv.*, 742 F. Supp. 3d 966, 987–89 (D. Ariz. 2024) (denying any deference to an agency post-*Loper Bright* and ruling that multiple actions by the I.R.S. are final agency actions under *Bennett*). See generally Walker & MacGuidwin, *supra* note 51.

145. See Jody Freeman & Matthew C. Stephenson, *The Untapped Potential of the Congressional Review Act*, 59 HARV. J. ON LEGIS. 279, 295, 327 n.86 (2022).

C. The Congressional Review Act

In the immediate time after a federal agency approves a state program, Congress has an opportunity to intervene in the approval process.¹⁴⁶ The Congressional Review Act (CRA) provides an alternative to judicial review for the repeal of agency actions that can be much quicker but comes with a multitude of limitations.¹⁴⁷ The CRA is not the only tool Congress can use to repeal agency actions. Congress has the power to pass legislation to override agency rules.¹⁴⁸ However, the CRA creates a fast-track procedure for Congress to achieve this override.¹⁴⁹ Therefore, when seeking to repeal an agency action, the CRA can be a powerful tool if certain conditions are met.

The Congressional Review Act was signed into law by President Clinton in 1996 and requires congressional review of agency rules.¹⁵⁰ This law was passed as a response to the Supreme Court's 1983 ruling in *INS v. Chadha* that one-chamber vetoes are unconstitutional.¹⁵¹ One-chamber veto provisions allowed a single chamber of Congress to block agency regulations (seemingly allowed by the underlying statute) by a majority vote.¹⁵² Prior to *Chadha*, Congress inserted one-house vetoes into a wide range of statutes

146. See Congressional Review Act, 5 U.S.C. §§ 801–808. Note that Congress can always seek to pass legislation that either rescinds a particular agency action or prohibits a state from undertaking a particular policy; however, that path would likely be subject to both the filibuster and all of the other normal procedures associated with congressional legislation. Notably, that path would require either the president's signature or a veto override. See generally *Enactment of a Law*, CONGRESS.GOV, <https://www.congress.gov/help/learn-about-the-legislative-process/enactment-of-a-law> [<https://perma.cc/4Z4N-WSDX>], (last visited June 20, 2026).

147. See Cary Coglianese, *Solving the Congressional Review Act's Conundrum*, 75 ADMIN. L. REV. 79, 88–89 (2023) (describing how Congress may disapprove of an agency action via the CRA, but the agency may still be obligated by statute to act—in violation of that disapproval).

148. See Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 288 (1996); see also Jesse M. Cross, *Revisiting the Congressional Review Act*, 11 TEX. A&M L. REV. 1, 49 (2023).

149. See Freeman & Stephenson, *supra* note 145, at 281, 285. This fast-track procedure includes a joint resolution requiring a simple majority vote of each chamber, filibuster protections, and a prohibition on amendments.

150. See Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 96 (1997); see also 5 U.S.C. § 801(a)(1)(A) (“Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress . . .”).

151. See 462 U.S. 919, 958–59 (1983); see also Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe “Substantially the Same,” and Decline to Defer to Agencies Under Chevron*, 70 ADMIN. L. REV. 53, 59–60 (2018).

152. See Freeman & Stephenson, *supra* note 145, at 283.

that granted regulatory authority to agencies.¹⁵³ However, the Court in *Chadha* struck down these types of veto provisions in part because they do not comply with Article I, Section VII's bicameralism and presentment requirements.¹⁵⁴ Post-*Chadha*, for Congress to reject a regulation under the CRA, both chambers must pass a joint resolution, and the president must sign that resolution.¹⁵⁵ Therefore, while the CRA grants Congress broad power to repeal regulations, it requires agreement among both chambers and the White House.¹⁵⁶

Beyond the political limitations of a single party likely needing control of both chambers of Congress and the White House for a CRA joint resolution to pass, there are timing and content restrictions within the CRA. An agency must submit all of the rules it promulgates to Congress.¹⁵⁷ Once an agency submits a rule to Congress, Congress then has sixty legislative days to pass the joint resolution.¹⁵⁸ If Congress does not pass a joint resolution within that time, the rule goes into effect, and Congress can no longer rescind it under the CRA.¹⁵⁹ In practice, because of this timing requirement, the CRA is generally used only at the start of a new presidential administration to rescind rules enacted near the end of the previous administration.¹⁶⁰

153. *See id.*

154. U.S. CONST. art. I, § 7, cl. 2 (creating the bicameralism and presentment requirements for acts of Congress); *see* Cole, *supra* note 151, at 60–61; *Chadha*, 462 U.S. at 950–52. *See generally* THE FEDERALIST NO. 51 (James Madison) (discussing the importance of distributing power among different parts of government). Bicameralism requires both chambers of Congress to pass any bill before it can become a law. *See Chadha*, 462 U.S. at 948–49. After both chambers pass a bill, presentment requires that the bill is presented to the president for either signature or veto. *See id.* at 946–47. Both bicameralism and presentment are required for any act of Congress to become a law. *See id.* at 946; *see also* Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1601–02 (2008).

155. *See* Cole, *supra* note 151, at 60–61; *see also* 5 U.S.C. § 802. Note that if the president does not sign the resolution, then veto override by Congress is possible, but unlikely because it would require a two-thirds majority in both chambers. *See Chadha*, 462 U.S. at 994 (White, J., dissenting); Gerhard Peters & John T. Woolley, *Presidential Vetoes*, U.C. SANTA BARBARA: AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/data/presidential-vetoes> [https://perma.cc/5JEC-AA7T] (last updated Jan. 8, 2026) (noting that Congress has overridden a presidential veto just six times in this century).

156. *See* Cross, *supra* note 148, at 17.

157. *See* 5 U.S.C. § 801(a)(1)(A); *see also* Cross, *supra* note 148, at 7.

158. *See* Cole, *supra* note 151, at 61; *Summary of the Congressional Review Act*, EPA, <https://www.epa.gov/laws-regulations/summary-congressional-review-act> [https://perma.cc/XSG4-MFC2] (last updated Feb. 23, 2026).

159. *See id.* at 61–62.

160. *See* Bridget C.E. Dooling, *Into the Void: The GAO's Role in the Regulatory State*, 70 AM. U. L. REV. 387, 396 (2020). Note that due to novel use of the CRA by both the first and second Trump administrations, this practice may be changing. The first Trump Administration

The CRA also limits the type of agency actions that are reviewable by Congress under the statute. Specifically, the CRA uses a broad definition of rules,¹⁶¹ but does not include “rule[s] of particular applicability” and rules that do “not substantially affect the rights or obligations of non-agency parties.”¹⁶² A reading of the plain meaning of this language suggests that the CRA cannot be used to rescind agency adjudications (i.e., orders) or rules that apply only to specific regulated parties.¹⁶³ Despite this limitation, this definition of “rule” includes both legislative rules, which create legal obligations and “‘prescribe’ law,” and interpretive rules, which are “‘agency statement[s] . . . of general applicability’ that ‘interpret law.’”¹⁶⁴ This broad definition of “rule” has helped Congress rescind a wide range of agency actions during President Trump’s second term.¹⁶⁵ One set of these newly targeted agency actions is EPA-issued waivers that California obtained years

used the CRA to rescind a years-old Consumer Financial Protection Bureau memo, arguing that it had never been submitted to Congress, so the sixty-day clock had not run. Similarly, in that example, the government argued that this memo was a rule subject to the CRA after the Government Accountability Office reached that conclusion. *See* Richard Murphy, *Judicial Review of Administrative Action*, in 33 WRIGHT & MILLER’S FED. PRAC. & PROC. § 8361 (2d ed. 2024); Cole, *supra* note 151, at 55–56.

161. 5 U.S.C. § 551(4) (“‘rule’ means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy”).

162. *Id.* § 804(3). The full text of the first carveout identifies that the CRA does not apply to “any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing.” *Id.*

163. Note that the second Trump Administration is interpreting this definition of “rule” to include state waivers issued by EPA. While the president does not have any formal authority to define CRA-eligible rules, the president’s broad definition of “rule” appears to be a display of soft-power aimed at influencing the Republican-controlled 119th Congress’ use of the CRA. This issue is still being litigated, and it will be interesting to see how the courts evaluate this expansive reading of the CRA. *See* Lisa Friedman, *Trump’s Plan to Repeal Climate Policy Could Upend Shift to Electric Cars*, N.Y. TIMES (Feb. 26, 2025), <https://www.nytimes.com/2025/02/26/climate/republicans-california-waiver-electric-cars.html> (on file with the *Fordham Urban Law Journal*). The EPA continues to challenge California’s emissions regulations under the CRA, and on June 12, 2026, notified the state of additional waivers that it now views as being rules and subject to the CRA. *See* Press Release, U.S. Env’t Prot. Agency, EPA Fulfills Statutory Obligation by Transmitting Four California Waiver Rules to Congress (June 12, 2026), <https://www.epa.gov/newsreleases/epa-fulfills-statutory-obligation-transmitting-four-california-waiver-rules-congress> [<https://perma.cc/AG2U-LPZ6>].

164. *See* Freeman & Stephenson, *supra* note 145, at 299 (quoting 5 U.S.C. § 551(4)).

165. *See* Jack Jones & Richard L. Revesz, *The Weaponization of the Congressional Review Act in 2025*, REGUL. REV. (Feb. 3, 2026), <https://www.theregreview.org/2026/02/03/jones-revesz-the-weaponization-of-the-congressional-review-act-in-2025/> [<https://perma.cc/9Z2Z-99V4>] (noting that Congress rescinded twenty-two agency actions in the first year of the second Trump Administration alone).

ago to allow it to set its own emissions standards.¹⁶⁶ The Government Accountability Office, a congressional entity, has consistently found that these EPA waivers were not subject to the CRA.¹⁶⁷ Congress rescinded some of these waivers during the first year of the second Trump Administration and is on track to target more of them in the second half of 2026.¹⁶⁸ However, despite this significant power that Congress possesses through the CRA, such as legislative review of agency actions, the CRA's previously discussed limitations—including timing, the type of agency action, and control of Congress and the White House—are meaningful and restrict Congress from rescinding a wide range of agency actions. Despite these limitations, as demonstrated by Congress in 2025 and 2026, the CRA can be a powerful tool to rescind agency actions.

D. Rule Rescission

Even after a state program receives final agency approval and survives both judicial review and the Congressional Review Act window, one vulnerability remains: agency rescission.¹⁶⁹ An agency that previously approved a state program may later attempt to withdraw that approval, either because of a change in administration, a shift in policy priorities, or a reinterpretation of the underlying statute.¹⁷⁰ This Section examines the legal standards governing agency rescission and the challenges that states face when an agency seeks to revoke a previously issued approval.

Agency rescission is subject to the same procedural and substantive requirements as original agency action.¹⁷¹ The Supreme Court has consistently held that an agency must provide a reasoned explanation for changing course, and an agency's rescission of a prior policy is subject to arbitrary and capricious review under the APA.¹⁷² In *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm*, the Court held

166. See *supra* note 163 and accompanying text.

167. See EDDA EMMANUELLI PEREZ, U.S. GOV'T ACCOUNTABILITY OFF., GAO-B-337179, OBSERVATIONS REGARDING THE ENVIRONMENTAL PROTECTION AGENCY'S SUBMISSION OF NOTICES OF DECISION ON CLEAN AIR ACT PREEMPTION WAIVERS AS RULES UNDER THE CONGRESSIONAL REVIEW ACT 9 (2025), <http://gao.gov/products/b-337179> [<https://perma.cc/KT7N-38Q6>] (reaffirming its 2023 finding that the CRA does not apply to EPA waivers).

168. See *supra* note 163 and accompanying text.

169. See, e.g., *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 12 (2020).

170. See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part).

171. See *id.* at 41 (majority opinion) (“[w]e believe that the rescission or modification of [a regulation] is subject to the same [arbitrary and capricious] test”).

172. See *id.* at 41–43; *Regents of the Univ. of Cal.*, 591 U.S. at 19–20.

that “an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change.”¹⁷³ This requirement ensures that agencies do not reverse course solely based on the policy preferences of a new administration.¹⁷⁴ Instead, agencies must demonstrate that the reversal is supported by the administrative record and consistent with the agency’s statutory mandate.¹⁷⁵

The Supreme Court’s decision in *Department of Homeland Security v. Regents of the University of California* reinforced and expanded this principle.¹⁷⁶ In *Regents*, the Court held that the Department of Homeland Security’s rescission of the Deferred Action for Childhood Arrivals (DACA) program was arbitrary and capricious.¹⁷⁷ The Court found that the agency failed to consider important aspects of the problem, including the reliance interests of the hundreds of thousands of individuals who had built their lives around the program.¹⁷⁸ The Court emphasized that when an agency rescinds a prior policy upon which parties have relied, the agency must “assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.”¹⁷⁹ This reliance interest requirement has significant implications for states that have invested substantial resources in federally approved programs.

The procedural requirements for agency rescission vary depending on the type of agency action being rescinded.¹⁸⁰ For rescission of rules—agency actions of general applicability that prescribe future conduct—the agency must generally follow the APA’s notice-and-comment procedures.¹⁸¹ This means that before rescinding a rule, an agency must publish a notice of proposed rulemaking, provide an opportunity for public comment, and publish a final rule with a statement of its basis and purpose.¹⁸² Additionally, interpretive rules, issued by agencies and understood as general statements

173. 463 U.S. at 42.

174. See Haiyun Damon-Feng, *Administrative Reliance*, 73 DUKE L.J. 1743, 1746–47, 1787, 1789–90 (2024).

175. See William Vester, *Turning Square Corners: Regents and Arbitrary-and-Capricious Review’s Distributional Stakes*, 134 YALE L.J. 2182, 2197, 2205 (2025).

176. See 591 U.S. at 21.

177. See *id.* at 29–30.

178. See *id.*

179. *Id.* at 33–34.

180. See *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 101 (2015).

181. See *id.* at 95–96; see also Administrative Procedure Act, 5 U.S.C. § 551(5) (defining “rule making” as the “agency process for formulating, amending, or repealing a rule”).

182. See *Perez*, 575 U.S. at 95–96.

of agency policy, do not need to go through an APA process to be rescinded but do not carry the force of law.¹⁸³

II. THE FEDERALISM MODELS OF CONGESTION PRICING, THE AFFORDABLE CARE ACT, AND THE CLEAN AIR ACT

In Part II, this Note will present the congestion pricing example and compare it to two well-established modern examples of federalism: the Affordable Care Act's health insurance exchanges and Medicaid expansion, and the Clean Air Act's air quality standards and associated state and federal implementation plans. Courts have upheld both forms of federalism, surviving challenges from Congress and the executive.¹⁸⁴ Part II will demonstrate that while the federalist framework within those two statutes shares similarities with congestion pricing, there are key differences that muddy the federal interest in this form of transportation policy. Part II will start with a review of the federal statute underlying congestion pricing.¹⁸⁵ It will then illustrate the difficulties this type of statutory regime places on state policymaking by examining the process by which congestion pricing was proposed and eventually approved.¹⁸⁶ Then, Part II will discuss two examples of durable modern federalism—the Affordable Care Act and the Clean Air Act—and highlight the similarities and differences between the federalism in those laws and that contained within congestion pricing.¹⁸⁷ Finally, Part II will highlight some problems congestion pricing's form of federalism poses for various forms of review, including congressional and judicial review.¹⁸⁸

A. Congestion Pricing

1. Congestion Pricing's Federal Statute

Tolling on interstate highways is prohibited by default under Title 23; however, that provision contains a wide range of exceptions.¹⁸⁹ One key

183. *See id.* at 96–97.

184. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585–86 (2012) (striking down penalties for states that did not expand Medicaid, but upholding the positive incentive program that provides funding for states that chose to expand Medicaid); *Sierra Club v. EPA*, 161 F.4th 934, 949–50 (6th Cir. 2025) (leaving the EPA's NAAQS program untouched on review).

185. *See* discussion *infra* Part II.A.

186. *See* discussion *infra* Part II.A.

187. *See* discussion *infra* Parts II.B, II.C.

188. *See* discussion *infra* Part II.D.

189. *See Federal Highway Tolling Programs*, FED. HIGHWAY ADMIN. (last visited Mar. 31, 2025) (on file with the *Fordham Urban Law Journal*).

exception is the Value Pricing Pilot Program (VPPP), established by the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA).¹⁹⁰ ISTEA and its amendments direct the Secretary of Transportation to create a program for tolling interstates if the goal is “congestion mitigation and air quality improvement.”¹⁹¹ This exception allows states to establish tolling programs on interstate highways if the program seeks to reduce traffic congestion and improve air quality, *and* the federal government grants approval.¹⁹² These types of programs are often called “Congestion Pricing” because states charge drivers to discourage vehicle congestion in a given area.¹⁹³ States can apply for admission into this program, and the Secretary of Transportation, in consultation with the EPA Administrator, will determine if the state’s proposal achieves those two goals.¹⁹⁴ The EPA Administrator is specifically tasked with determining whether the state’s proposal complies with the Clean Air Act.¹⁹⁵ Therefore, the current VPPP is a program that allows the federal Department of Transportation to grant waivers to states seeking to place tolls on interstate highways for “congestion mitigation and air quality improvement.”¹⁹⁶ This is the federal program that New York sought entry into and was admitted to, allowing the state to implement congestion pricing.¹⁹⁷

2. New York State’s Traffic Mobility Act

In 2019, the New York legislature created the state’s congestion pricing program by statute with the MTA Reform and Traffic Mobility Act (“Traffic

190. See 23 U.S.C. § 149; *Value Pricing Pilot Program*, FED. HIGHWAY ADMIN. [hereinafter FED. HIGHWAY ADMIN., *VPPP*], https://ops.fhwa.dot.gov/congestionpricing/value_pricing/ (last visited Mar. 31, 2025) (on file with the *Fordham Urban Law Journal*).

191. See 23 U.S.C. § 149; see also Oliver A. Pollard, III, *Smart Growth and Sustainable Transportation: Can We Get There from Here?*, 29 FORDHAM URB. L.J. 1529, 1548 n.117 (2002) (describing the impact of 23 U.S.C. § 149).

192. See 23 U.S.C. § 149

193. See *Road Pricing*, FED. HIGHWAY ADMIN. (last visited Sep. 10, 2026) <https://www.fhwa.dot.gov/roadpricing/> [<https://perma.cc/N49T-22JY>] (“Congestion pricing includes toll[s] . . . to affect travel demand and reduce congestion.”).

194. See 23 U.S.C. § 149(b) (describing the types of state projects that are eligible for the VPPP); FED. HIGHWAY ADMIN., *VPPP*, *supra* note 190.

195. See 23 U.S.C. § 149. See generally Clean Air Act, 42 U.S.C. § 7401. Acceptance into the VPPP initially granted federal money to the state to fund its congestion mitigation project, but Congress stopped authorizing those funds in 2012. FED. HIGHWAY ADMIN., *VPPP*, *supra* note 190.

196. 23 U.S.C. § 149(b).

197. See MTA, FINAL ENVIRONMENTAL ASSESSMENT, *supra* note 59, at 0–1 (“[New York is] seeking the acceptance of the Project into the Federal Highway Administration’s (FHWA) Value Pricing Pilot Program (VPPP), through which FHWA can provide tolling authority to state, regional, or local governments to implement congestion pricing programs.”).

Mobility Act”), which directed the Metropolitan Transportation Authority (MTA) to implement a central business district tolling program in New York City.¹⁹⁸ That law, enacted as part of New York’s 2019 budget, directed the Triborough Bridge and Tunnel Authority (TBTA), a subsidiary of the MTA, to establish tolls around Manhattan’s central business district with the goal of reducing congestion and raising money for the MTA.¹⁹⁹

3. Federal Review and Approval

Implementing congestion pricing required approval from the federal Department of Transportation via the FHWA because the tolling impacts federally funded highways.²⁰⁰ As part of its application for admission into the VPPP, the MTA submitted an environmental assessment to FHWA in July 2022.²⁰¹ Next, the FHWA reviewed the MTA’s application materials to ensure it complied with relevant federal environmental laws and determine if congestion pricing would have adverse environmental effects.²⁰² In April 2023, FHWA determined that the program would not have significant negative environmental impacts.²⁰³ FHWA’s finding allowed the agency in June 2023 to issue a notice in the Federal Register stating that FHWA found that congestion pricing complies with federal environmental law, and that New York’s proposal is admitted into the federal value pricing program.²⁰⁴ Notably, this approval explicitly stated that the approval was a final agency action and that its publication limited judicial review.²⁰⁵

198. See Traffic Mobility Act, N.Y. VEH. & TRAF. LAW §§ 1701, 1704 (McKinney 2026).

199. See *id.* § 1704-a(1). While New York’s congestion pricing program has multiple government entities that manage and implement it, this Note will refer to the MTA as its overseer for simplicity.

200. See Bronin, *supra* note 16, at 332–33; see also Benjamin Krohnengold, *Keeping the Streets Clear: Advancing Transportation Equity by Limiting Exemptions Under New York City’s Central Business District Tolling Program*, 47 FORDHAM URB. L.J. 1009, 1034 (2020) (describing the impact of tolls on revenue and traffic congestion).

201. See METRO. TRANSP. AUTH., CENTRAL BUSINESS DISTRICT TOLLING PROGRAM: ENVIRONMENTAL ASSESSMENT, at ES-3 (2022), <https://www.mta.info/document/93446> [<https://perma.cc/Q7ZH-4HUT>].

202. See Notice of Final Federal Agency Actions on the Central Business District Tolling Program, New York, New York, 88 Fed. Reg. 41998, 41998–99 (June 28, 2023) (listing many of the statutes that FHWA ensured New York’s program complied with).

203. See FED. HIGHWAY ADMIN., FINDING OF NO SIGNIFICANT IMPACT: CENTRAL BUSINESS DISTRICT (CBD) TOLLING PROGRAM (2023), <https://www.mta.info/document/114186> [<https://perma.cc/U3GX-X577>].

204. See Notice of Final Federal Agency Actions on the Central Business District Tolling Program, New York, New York, 88 Fed. Reg. at 41998.

205. See *id.* at 41999.

4. New York's Implementation and Back and Forth with FHWA

One year after this notice was published in the Federal Register, June 30, 2024, the congestion pricing program was set to commence, but on June 5, 2024, New York Governor Kathy Hochul delayed the program indefinitely.²⁰⁶ As a result of this pause, the MTA and FHWA exchanged correspondence regarding whether the two agencies must reopen the approval process, and the FHWA stated that it did not.²⁰⁷ In November 2024, Governor Hochul announced that congestion pricing would begin in January 2025 with lower toll rates.²⁰⁸ At that time, the MTA and FHWA corresponded again regarding the potential need for renewed licensing approval.²⁰⁹ The FHWA again stated that additional federal government approval was not necessary.²¹⁰ The relevant state, local, and federal entities signed a final agreement that authorized congestion pricing to commence at the start of 2025.²¹¹

This complex back-and-forth between the federal government and New York illustrates the difficulty courts face in determining finality. Using the *Bennett* test's second prong, the Supreme Court directs lower courts to look for the agency action that contained legal consequences.²¹² However, it is possible that none of FHWA's actions had any actual legal consequences,

206. See Press Release, Kathy Hochul, Video, Audio & Rush Transcript: Governor Hochul Addresses New Yorkers on Affordability and the Cost of Living, GOVERNOR KATHY HOCHUL (June 5, 2024), <https://www.governor.ny.gov/news/video-audio-rush-transcript-governor-hochul-addresses-new-yorkers-affordability-and-cost> [<https://perma.cc/STR2-2F4W>]; Grace Ashford, *Hochul Halts Congestion Pricing in a Stunning 11th-Hour Shift*, N.Y. TIMES (June 5, 2024) (on file with the *Fordham Urban Law Journal*).

207. See Letter from Richard J. Marquis, FHWA Div. Adm'r, to Allison L.C. de Cerreño, Chief Operating Officer, MTA Bridges & Tunnels, Stephanie Winkelhake, P.E., Chief Engineer, N.Y. State Dep't of Transp. & Eric Beaton, Deputy Comm'r for Transp. Plan. & Mgmt., N.Y.C. Dep't of Transp. (June 14, 2024), <https://www.mta.info/document/142701> [<https://perma.cc/MM95-DZEE>].

208. See Letter from Richard J. Marquis, FHWA Div. Adm'r, to Allison L.C. de Cerreño, Chief Operating Officer, MTA Bridges & Tunnels, Stephanie Winkelhake, P.E., Chief Engineer, N.Y. State Dep't of Transp. & Eric Beaton, Deputy Comm'r for Transp. Plan. & Mgmt., N.Y.C. Dep't of Transp. (Nov. 21, 2024), <https://www.mta.info/document/158196> [<https://perma.cc/L83E-T8HQ>] (discussing phasing in the new toll rates); METRO. TRANSP. AUTH., CENTRAL BUSINESS DISTRICT (CBD) TOLLING PROGRAM: REEVALUATION 2 (2024), <https://www.mta.info/document/158191> [<https://perma.cc/3D4N-NXWY>] (establishing these new lower toll rates).

209. See Letter from Richard J. Marquis to Allison L.C. de Cerreño et al., *supra* note 208.

210. See *id.*

211. See generally Agreement Between Fed. Highway Admin., N.Y. State Dep't of Transp. & N.Y.C. Dep't of Transp. Regarding Value Pricing Pilot Program (Nov. 21, 2024) [hereinafter VPPP Agreement], <https://www.mta.info/document/158201> [<https://perma.cc/8MLQ-S9N8>].

212. See *Bennett v. Spear*, 520 U.S. 154, 157–58, 177–78 (1997).

because Governor Hochul’s “indefinite[] pause” demonstrated that the State was the ultimate decider of when to start the program.²¹³

5. Current Trump Administration Attempt at Repeal

On February 19, 2025, United States Secretary of Transportation Sean Duffy sent a letter to the MTA stating that the FHWA should not have approved New York’s congestion pricing plan for multiple reasons.²¹⁴ Duffy has control over this process because FHWA is a component of the United States Department of Transportation.²¹⁵ Duffy stated that FHWA was incorrect in its determination that New York’s congestion pricing qualifies for the Value Pricing Pilot Program (VPPP).²¹⁶ As a result, Duffy sent a letter to Governor Hochul in which he claimed to rescind FHWA’s approval of the program.²¹⁷ In Duffy’s purported rescission, he claimed that FHWA’s initial approval of the program did not adequately explain the basis for approval.²¹⁸ This letter from Secretary Duffy—and a subsequent letter from the FHWA commissioner, stating that New York must end congestion pricing—illustrates the landscape in which this Note’s analysis takes place.²¹⁹ Notably, while Duffy explained the rationale for his decision, he did not use the prescribed APA process for FHWA’s change in position.²²⁰

213. See Kathy Hochul, Governor of N.Y., Remarks on “Affordability and the Cost of Living” (June 5, 2024) (transcript available at <https://www.governor.ny.gov/news/video-audio-rush-transcript-governor-hochul-addresses-new-yorkers-affordability-and-cost>) (discussing her rationale for pausing the congestion pricing program).

214. Ana Ley et al., *Trump Administration Moves to End New York’s Congestion Pricing Tolls*, N.Y. TIMES (Feb. 19, 2025), <https://www.nytimes.com/2025/02/19/nyregion/trump-congestion-pricing-nyc.html> (on file with the *Fordham Urban Law Journal*); Letter from Sean P. Duffy, U.S. Sec’y of Transp., to Kathy Hochul, Governor of N.Y. (Feb. 19, 2025), https://ops.fhwa.dot.gov/memorandum/VPPPletter_termination_021925.pdf [<https://perma.cc/Y23T-ZYD7>].

215. *About FHWA*, U.S. DEP’T OF TRANSP. FED. HIGHWAY ADMIN. (last updated Feb. 3, 2025) [hereinafter *About FHWA*], <https://highways.dot.gov/about/about-fhwa> [<https://perma.cc/MX6R-D3X5>].

216. Letter from Sean P. Duffy, Sec’y of Transp., to Kathy Hochul, Governor of N.Y., *supra* note 214, at 3.

217. *See id.*

218. *See id.* at 4.

219. *See* Letter from Gloria M. Shepherd, Exec. Dir., Fed. Highway Admin., to Marie Therese Dominguez & Ydanis Rodriguez, Comm’rs, N.Y. Dep’t of Transp., Catherine T. Sheridan, President, MTA Bridges & Tunnels (Feb. 20, 2025), https://ops.fhwa.dot.gov/memorandum/Cordon_Outgoing_letter.htm [<https://perma.cc/D5QP-7UXA>].

220. *See* Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983) (describing the APA’s requirement that agencies “must examine the relevant data and articulate a satisfactory explanation for its action” that rescinds a prior agency action).

Instead, he seemingly conducted a rule rescission with only an informal letter.

6. Existing Congestion Pricing Litigation

The validity of New York's congestion pricing program has been under review by federal courts throughout its implementation process. In three major federal lawsuits, litigants have challenged the validity of congestion pricing and the federal government's attempted withdrawal of its approval. Two of these cases are currently being litigated in federal courts in Manhattan and New Jersey.²²¹ The third case, brought by two upstate New York counties, was dismissed by the district court, and the Second Circuit recently upheld that dismissal on appeal.²²² In the New Jersey case, the State of New Jersey challenged the federal government's approval of congestion pricing, arguing that it was arbitrary and capricious.²²³ In December 2024, the court ruled that FHWA's actions were neither arbitrary nor capricious.²²⁴ While this litigation is still ongoing, it is now largely focused on the scope of the court's ruling and the impact of the FHWA's attempted revocation of its approval of the project.²²⁵ Therefore, the validity of congestion pricing has largely been settled in the New Jersey case.

i. M.T.A. v. Duffy

The second case dealing with the validity of congestion pricing is *Metropolitan Transportation Authority v. Duffy*.²²⁶ In *Duffy*, New York state argues that FHWA's attempted revocation of its prior congestion pricing

221. See *New Jersey v. U.S. Dep't of Transp.*, 761 F. Supp. 3d 729, 746 (D.N.J. 2024) (granting and denying various motions related to New Jersey's challenge to congestion pricing); *Metro. Transp. Auth. v. Duffy*, 784 F. Supp. 3d 624, 696–98 (S.D.N.Y. 2025) (granting New York's motion for a preliminary injunction against the federal government in a case where New York is more broadly challenging the federal government's rescission of its approval of congestion pricing).

222. See *Cnty. of Rockland v. Triborough Bridge & Tunnel Auth.*, 791 F. Supp. 3d 433, 456 (S.D.N.Y. 2025), *aff'd*, No. 25-1963, 2026 WL 2014952 (2d Cir. July 13, 2026) (granting the MTA's motion to dismiss); *Cnty. of Rockland v. Triborough Bridge & Tunnel Auth.*, No. 25-1963, 2026 WL 2014952, at *5–6 (2d Cir. July 13, 2026) (affirming the district court's dismissal of all of the counties' claims).

223. See *New Jersey*, 761 F. Supp. 3d at 746.

224. See *id.* at 769.

225. See Plaintiff State of New Jersey's Opposition to Defendants' Motion to Stay Proceedings at 1–2, 6–8, *New Jersey v. U.S. Dep't of Transp.*, No. 2:23-cv-03885 (D.N.J. Mar. 24, 2025), ECF No. 245.

226. See *generally Duffy*, 784 F. Supp. 624.

approval was arbitrary and capricious, and *ultra vires*.²²⁷ In March 2026, the court ruled for the MTA, finding that the federal government's actions in seeking to rescind approval for congestion pricing were "arbitrary and capricious."²²⁸ The court centered its ruling on the fact that the federal Department of Transportation deviated from its standard practices without engaging in or laying out any "reasoned decision making."²²⁹ The court compared the extensive pre-implementation review process, discussed in Parts II.A.1 through II.A.4, with the short letter that Secretary Duffy used to rescind the approval, in illustrating the lack of evidence-backed reasoning required to adequately support a rescission.²³⁰ In effect, the court found that the absence of a record supporting the agency's change in position on congestion pricing, and the agency's overall lack of engagement with that prior evaluation, made the agency's purported rescission arbitrary and capricious.²³¹

Additionally, the court applied the *Regents* reliance-interest framework discussed in Part I.D to congestion pricing.²³² The court found that the federal Department of Transportation did not adequately consider the reliance interests of New York and the MTA as *Regents* requires.²³³ Here, the MTA had extensive reliance interests including hundreds of millions of dollars in financial obligations, backed by expected congestion pricing revenue, and physical infrastructure that the MTA installed and operates.²³⁴ Given that these reliance interests were largely unaddressed by the federal government, the court granted summary judgment to the MTA on those grounds.²³⁵ This ruling demonstrates that courts will meaningfully scrutinize agency rescissions under the *Regents* standard, particularly when states have made substantial investments in reliance on federal approvals.

Secretary Duffy's attempt to rescind FHWA's approval of congestion pricing illustrates the consequences of failing to follow proper procedures. The federal court's finding that the rescission was arbitrary and capricious

227. Complaint at 36, 41, *Metro. Transp. Auth. v. Duffy*, No. 25-CV-1413 (LJL), (S.D.N.Y. Feb. 19, 2025), ECF No. 1. *Ultra vires* means an "unauthorized" action or an act that is "beyond the scope of power allowed . . . by law." *Ultra Vires*, BLACK'S LAW DICTIONARY (12th ed. 2024).

228. *Metro. Transp. Auth. v. Duffy*, No. 25-CV-1413 (LJL), 2026 WL 588117, at *42 (S.D.N.Y. Mar. 3, 2026).

229. *Id.*

230. *See id.* at *45.

231. *See id.*

232. *See id.* at *45–47.

233. *See id.* at *45–47.

234. *See id.*

235. *See id.* at *47.

rested in part on Secretary Duffy's procedural deficiency.²³⁶ This example underscores the importance of procedural regularity in agency rescission, and illustrates that even when an agency has substantive grounds for changing course, it must do so through the proper channels.²³⁷

The legal framework governing agency rescission thus provides some protection for states that have received federal approval for their programs.²³⁸ But, even when states ultimately prevail in court, the period of uncertainty during litigation can disrupt program implementation.²³⁹ Moreover, courts may ultimately uphold an agency rescission if the agency provides an adequate reasoned explanation and follows proper procedures.²⁴⁰ This means that, in practice, judicial review provides only a procedural check, not a substantive guarantee of durability for states seeking to implement programs that require federal approval.

Notably, Judge Liman in his March 2026 decision in this case found that “[a] central feature of the ISTEAs was a form of cooperative federalism.”²⁴¹ Judge Liman went on to find that the cooperative federalism in ISTEAs directs “the Federal Government and the states [to] work cooperatively to experiment with ways to reduce traffic and enhance air quality in the national interest.”²⁴² This is an explicit acknowledgment that the federal congestion pricing program is one of cooperative federalism, in which states and the federal government must work together.²⁴³ Citing various statements by lawmakers at the time of ISTEAs's passage, Judge Liman found that a goal of the statute was to give states flexibility to solve their transportation and traffic problems in the way that worked best for them, and that the federal government would provide support for these solutions.²⁴⁴ Traditional cooperative federalism requires cooperation, and the federal government's attempted repeal of New York's congestion pricing plan illustrates what happens when that federal-state cooperation breaks down.

In Part III, this Note proposes statutory reforms that would provide more robust protection by limiting executive rescission authority for federally approved state programs. However, first, Parts II.B and II.C will discuss the forms of federalism in the Affordable Care Act and the Clean Air

236. *See id.* at *65, *67.

237. *See id.* at *41–42, *67.

238. *See id.*

239. *See* Bronin, *supra* note 16, at 347 (discussing the harms that the Trump Administration's congestion pricing decision caused for New York).

240. *See, e.g.,* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 29–30 (2020).

241. *Duffy*, 2026 WL 588117, at *36.

242. *Id.*

243. *See id.*

244. *See id.*

Act. Part II will then conclude with Section II.D, which will compare congestion pricing's form of federalism with the federalism models in those two statutes.

B. The Affordable Care Act

Federalism is central to the implementation of two key ACA programs: health insurance exchanges and Medicaid expansion. Medicaid expansion involves extensive federal funding for states because the federal government currently covers ninety percent of the costs for states that elected to expand Medicaid eligibility.²⁴⁵ Health insurance exchanges present a more complicated picture.²⁴⁶ Under the ACA, states are given a range of options for how to approach these exchanges.²⁴⁷ Some states choose to run their own exchanges while others opt to participate in federally run exchanges.²⁴⁸ There are also hybrid varieties of each of these options that states can select.²⁴⁹ The federalism inherent in this regime is most apparent in the first option: state-run exchanges.²⁵⁰ States that select this option are eligible for a wide range of federal grants to help them design and manage their exchanges.²⁵¹

This version of federalism, in which the federal government gives states a choice to participate in a program while maintaining a federally run backup for those that do not opt in, is described as "parallel federalism."²⁵² Under the parallel federalism of the ACA's health insurance exchanges, a state may choose to run its own exchange, but if that state ever abandons that effort, the federal government will step in and establish a federal-run exchange in

245. See Gluck & Huberfeld, *supra* note 12, at 1790.

246. See Bridget A. Fahey, *Health Care Exchanges and the Disaggregation of States in the Implementation of the Affordable Care Act*, 125 YALE L.J.F. 56, 58–60 (2015) [hereinafter Fahey, *Health Care Exchanges*].

247. See *id.*

248. See *id.* at 59–60.

249. See *id.* at 58–60.

250. See generally *id.*

251. See Gluck & Huberfeld, *supra* note 12, at 1759; see also Fahey, *Health Care Exchanges*, *supra* note 246, at 59 ("the [ACA] allocated virtually unlimited funds to support the establishment of state exchange").

252. See Gluck, *Intrastatutory Federalism*, *supra* note 38, at 585–86 ("Under parallel federalism schemes, the states are the default and preferred implementers of the new federal program, but there is a federal 'fallback': the federal government must operate these programs should states prove unable to do so or if they opt out."). Gluck notes that this form of federalism gained popularity after the Supreme Court ruled in *Printz v. United States* that the federal government cannot commandeer state government officials. See Gluck, *Intrastatutory Federalism*, *supra* note 38, at 585–86; see also Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561, 1584–87 (2015) [hereinafter Fahey, *Consent Procedures*] (detailing the Court's anti-commandeering doctrine). See generally *Printz v. United States*, 521 U.S. 898 (1997).

that state.²⁵³ However, this form of parallel federalism does not exist for the ACA's Medicaid expansion.

In its original form, the ACA's Medicaid expansion was intended to be a more coercive version of the parallel federalism of the insurance exchanges.²⁵⁴ However, the Supreme Court's ruling in *National Federation of Independent Business v. Sebelius* (*NFIB*) took much of the teeth out of the federalism underlying Medicaid expansion.²⁵⁵ In that ruling, the Court found that the penalty originally included in the ACA for states that did not expand Medicaid was unconstitutional, and struck that provision from the statute.²⁵⁶ Medicaid expansion in the ACA was designed to expand pre-existing federal Medicaid spending.²⁵⁷ Medicaid, in its pre-ACA form, was a classic example of "cooperative federalism."²⁵⁸ The federal government worked with the states and provided federal dollars to administer pre-ACA Medicaid.²⁵⁹ States that chose to expand Medicaid continued receiving their full allotment of federal Medicaid funds while those that did not expand did not get their allotment.²⁶⁰ However, the Court in *NFIB* struck down this scheme, ruling that it was an unconstitutional use of congressional spending authority.²⁶¹ Therefore, what is left of Medicaid expansion post-*NFIB* is the opt-in program described below.²⁶²

The Court's *NFIB* ruling led to the two forms of federalism now present in the ACA. The health insurance exchange program represents parallel federalism, a structure in which the federal government not only sets a minimum standard but also steps in for a state that chooses not to participate.²⁶³ Additionally, the federal government often collaborates with states within this parallel structure to create hybrid insurance exchanges that meet federal standards and a given state's specific needs.²⁶⁴ On the other hand, parallel federalism is absent in Medicaid expansion.²⁶⁵ Due to *NFIB*,

253. See Fahey, *Health Care Exchanges*, *supra* note 246, at 56–57; see also 42 U.S.C. § 18041(c)(1) ("if the Secretary determines . . . that [a] . . . state . . . will not have an . . . [E]xchange . . . the Secretary shall . . . establish and operate such Exchange within the State").

254. See Gluck & Huberfeld, *supra* note 12, at 1729.

255. See 567 U.S. 519, 579–80 (2012); Gluck & Huberfeld, *supra* note 12, at 1728–29.

256. See *NFIB*, 567 U.S. at 579–80.

257. See Gluck & Huberfeld, *supra* note 12, at 1728–29.

258. See Gluck, *Federalism from Federal Statutes*, *supra* note 68, at 1750.

259. See *id.*

260. See Gluck & Huberfeld, *supra* note 12, at 1731.

261. See *id.* at 1728–29.

262. See *id.*

263. See Gluck, *Intrastatutory Federalism*, *supra* note 38, at 585–86; see also Fahey, *Consent Procedures*, *supra* note 252, at 1565.

264. See Gluck & Huberfeld, *supra* note 12, at 1730–31.

265. See *id.* at 1730–31.

there is no federal backup option for states that do not opt in to Medicaid expansion.²⁶⁶ Instead, in those states that do not expand, residents making between 101% and 138% of the federal poverty level are ineligible for Medicaid coverage. Conversely, in states that do expand, residents in the same income range are eligible.²⁶⁷

After the ACA's passage, many states opposed expanding Medicaid, and after *NFIB*, states were given the option to expand.²⁶⁸ But over time, as the federal government became more willing to grant states waivers from various program-related regulatory requirements, many more states signed on.²⁶⁹ As of June 2026, only ten states remain holdouts.²⁷⁰ States want to maximize their power, and gaining access to a program like expanded Medicaid, which is ninety percent funded by the federal government, seems to squarely fit into that realm.²⁷¹

In sum, there are two main forms of federalism in the ACA. The first form of federalism in the ACA is the more classic form in Medicaid expansion, where states have total discretion to participate or not. The second form of federalism in the ACA is in the exchanges, where states retain participation discretion, but the federal government acts as a back-up for states that choose to opt out. These two forms of federalism in the ACA illustrate two federalism models that are broadly accepted by federal courts. In these models, the federal government incentivizes state action through federal funding or minimum standards. The ACA's examples are not the only modern manifestation of federalism,²⁷² but it still appears that the federal government's review and approval of congestion pricing does not fit within those models.

266. See Sarah M. Lyon et al., *Medicaid Expansion Under the Affordable Care Act: Implications for Insurance-Related Disparities in Pulmonary, Critical Care, and Sleep*, 11 ANNALS AM. THORACIC SOC'Y 661, 662 (2014); see also Abbe R. Gluck et al., *The Affordable Care Act's Litigation Decade*, 108 GEO. L.J. 1471, 1532–33 (2020).

267. See Lyon et al., *supra* note 266, at 662–63.

268. See Gluck & Huberfeld, *supra* note 12, at 1729, 1735–46.

269. See Gluck & Huberfeld, *supra* note 12, at 1735–46; see *Status of State Medicaid Expansion Decisions*, KAISER FAMILY FOUND., <https://www.kff.org/medicaid/status-of-state-medicaid-expansion-decisions/> [<https://perma.cc/XXS4-LMTJ>] (last visited June 20, 2026) [hereinafter KAISER FAMILY FOUND., *Medicaid Expansion*].

270. KAISER FAMILY FOUND., *Medicaid Expansion*, *supra* note 269.

271. See Gluck & Huberfeld, *supra* note 12, at 1790; see also Fahey, *Health Care Exchanges*, *supra* note 246, at 58–60.

272. See Damien Schiff, *Keeping the Clean Water Act Cooperatively Federal—Or, Why the Clean Water Act Does Not Directly Regulate Groundwater Pollution*, 42 WM. & MARY ENV'T L. & POL'Y REV. 447, 448 (2018) (describing the Clean Water Act as an example of federal law creating a modern program based in federalism).

C. The Clean Air Act

Another example of a federalism model that is often litigated but does not perfectly fit with congestion pricing's state-federal scheme is the air quality regulatory structure established by the Clean Air Act.²⁷³ Congress passed the Clean Air Act in 1970, which tasked the EPA with regulating air pollution by establishing National Ambient Air Quality Standards (NAAQS).²⁷⁴ While the federal government, through the EPA, sets the NAAQS, states must create State Implementation Plans (SIPs) to meet those standards.²⁷⁵ Under the Clean Air Act, states are given significant leeway to meet the NAAQS; however, every state's SIP must be reviewed and approved by the EPA.²⁷⁶ If the EPA rejects a state's SIP and the state does not fix the outstanding issues, then the EPA can force a Federal Implementation Plan (FIP) onto that state.²⁷⁷

This structure is akin to the federalism in the ACA's healthcare exchanges.²⁷⁸ The federal government sets standards, and states may develop their own plans to follow them on their own terms.²⁷⁹ However, if the state's plan is inadequate, then the federal government will step in and implement its own plan.²⁸⁰ The Supreme Court left this scheme largely untouched in *Massachusetts v. EPA*, suggesting that this federalism structure is likely constitutional as well.²⁸¹ While the Court in the past has been

273. See generally Clean Air Act, 42 U.S.C. § 7401.

274. See *Summary of the Clean Air Act*, ENV'T PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-clean-air-act> [<https://perma.cc/2Q6S-ANUA>] (last visited July 17, 2026).

275. See Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework Is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799, 816–18 (2008).

276. See *id.* at 818.

277. See *id.* But see *Ohio v. Env't Prot. Agency*, 603 U.S. 279, 292–93 (2024) (granting a stay of EPA's FIPs for multiple states because EPA's final rule was not “reasonably explained”) (quoting *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021)). The issue before the Court in *Ohio v. EPA* was the stay of an injunction related to EPA FIPs; however, the Court's ruling and analysis create doubt about the durability of this statutory regime more broadly.

278. Compare Gluck, *Intrastatutory Federalism*, *supra* note 38, at 585–86 (describing the ACA's health insurance exchanges as “parallel federalism”), with Doremus & Hanemann, *supra* note 275, at 817–18 (explaining how the federal government will step in when states cannot abide by the EPA's NAAQS).

279. See Doremus & Hanemann, *supra* note 275, at 817–18.

280. See *id.* at 818.

281. See generally 549 U.S. 497 (2007). But see Doremus & Hanemann, *supra* note 275 and accompanying text; *West Virginia v. Env't Prot. Agency*, 597 U.S. 697, 732–35 (2022) (restricting a program that was part of a different, non-NAAQ, element of the Clean Air Act). Note that in *Ohio v. EPA*, the Court did create some doubt about the future stability of this type of statutory scheme. See 603 U.S. at 292–93.

skeptical of other aspects of the Clean Air Act, it has left NAAQS and the federalism underlying them largely intact.²⁸²

The Clean Air Act's federalism appears to have largely worked. Under the Clean Air Act, as of June 2026, the EPA approved the air quality plans of forty-one states.²⁸³ That leaves just nine states to be impacted by some form of federal implementation plan.²⁸⁴ This illustrates how this model of federalism functions, with the vast majority of states choosing to comply voluntarily and on their own terms. However, for the few states that do not comply with the Clean Air Act, the EPA imposes a federally crafted air quality plan on them.²⁸⁵

Montana is an example of a state that initially chose not to comply with the Clean Air Act, but eventually reached an agreement with the EPA.²⁸⁶ Under federal law, in 2007, Montana was required to submit a regional haze plan to the EPA as part of its Clean Air Act obligations, but the state declined to do so.²⁸⁷ Therefore, the EPA enacted a federal implementation plan for haze in Montana.²⁸⁸ Montana was subject to this federal air quality plan until 2023, when the EPA approved its revised state implementation plan, which better addressed haze, and repealed the original federal plan.²⁸⁹ Montana's experience with a federal implementation plan illustrates how the Clean Air Act's federalism is supposed to work. While the state initially did not comply, over time, it found that compliance on its own terms was superior to being forced to abide by federal ones.

Later, in 2015, the Ninth Circuit held that the EPA's approval of other—non-haze—parts of Montana's air quality plan was arbitrary and capricious, vacating those approvals and sending them back to the EPA for further

282. See *West Virginia*, 597 U.S. at 733–36 (dealing with NAAQS); *Michigan v. EPA*, 576 U.S. 743, 747, 759–60 (2015) (dealing with the National Emissions Standards).

283. See *About Air Quality Implementation Plans*, EPA, <https://www.epa.gov/air-quality-implementation-plans/about-air-quality-implementation-plans> [https://perma.cc/9CF4-8F8V] (last visited Aug. 16, 2026).

284. See *id.*

285. See *id.* (listing only nine states that are subject to FIPs).

286. See *id.*; *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1139–40 (9th Cir. 2015) (describing the history of Montana's attempts to comply with the Clean Air Act).

287. See *Finding of Failure to Submit State Implementation Plans Required by the 1999 Regional Haze Rule*, 40 C.F.R. § 52 (2009).

288. See *Montana State Implementation Plan and Regional Haze Federal Implementation Plan*, 40 C.F.R. § 52.1396 (2012).

289. See 40 C.F.R. § 52.1370; see also *Montana: State Implementation Plan and Regional Haze Federal Implementation Plan*, 77 Fed. Reg. 57864 (proposed Sep. 18, 2012) (to be codified at 40 C.F.R. § 52) (the EPA's proposed rule regarding Montana's SIP, which includes a detailed history of Montana's air quality plans).

review.²⁹⁰ The EPA, in its 2023 rule approving Montana’s state air quality plan, explained that it was also promulgating this rule to help it comply with that court ruling.²⁹¹ This sequence demonstrates how courts can intervene and influence the Clean Air Act’s federalism scheme when a law, in this case the Administrative Procedure Act, is violated by the federal agency.²⁹² However, given a different set of facts and the same posture, the court could have similarly ruled that the state’s plan violated the law and needed to be modified.

The durability of both the ACA and Clean Air Act federalism models is not accidental.²⁹³ Both statutes create genuine federal interests that align with state participation.²⁹⁴ Under the ACA, the federal government has a fiscal interest in state-run exchanges because they reduce the federal government’s day-to-day exchange management responsibilities.²⁹⁵ Under the Clean Air Act, the federal government has an environmental interest in state compliance because air pollution does not respect state boundaries.²⁹⁶ These aligned interests create a stable equilibrium: states benefit from federal funding or flexibility, and the federal government benefits from state implementation of federal policy goals.²⁹⁷ It is this alignment of interests—absent in the congestion pricing context—that accounts for the durability of these federalism structures across multiple administrations and decades of implementation.

The federalism in the ACA and the Clean Air Act both include incentives for states to take action on their own.²⁹⁸ These proven models of federalism also include provisions requiring federal agencies to issue related rules and orders that federal courts and Congress can review and potentially modify or

290. See *Nat’l Parks Conservation Ass’n*, 788 F.3d at 1148–49 (vacating and remanding the approval back to the EPA).

291. See *Montana: State Implementation Plan and Regional Haze Federal Implementation Plan*, 88 Fed. Reg. 41321 (June 26, 2023) (“This action also addresses the United States Court of Appeals for the Ninth Circuit’s June 9, 2015 vacatur and remand of portions of the FIP.”).

292. See *Nat’l Parks Conservation Ass’n*, 788 F.3d at 1149.

293. For the ACA, see Gluck & Huberfeld, *supra* note 12, at 1726–28. For the Clean Air Act, see Daniel P. Selmi, *Federal Implementation Plans and the Path to Clean Power*, 28 GEO. ENV’T L. REV. 637, 650–51 (2016).

294. See Gluck & Huberfeld, *supra* note 12, at 1793–94; Selmi, *supra* note 293, at 653.

295. See Gluck & Huberfeld, *supra* note 12, at 1768–69.

296. See Selmi, *supra* note 293, at 653.

297. See Doremus & Hanemann, *supra* note 275, at 817; Gluck & Huberfeld, *supra* note 12, at 1784–86.

298. See discussion in this Part and *supra* Part II.B.

repeal.²⁹⁹ Courts consistently uphold these broader federalism models,³⁰⁰ while undertaking an extensive review of an agency's final action post-*Chevron*.³⁰¹

D. Congestion Pricing Is Not a Clean Fit for Either Regime

Congestion pricing is not a good fit with the federalism in the ACA³⁰² or the Clean Air Act.³⁰³ ISTEA, the federal law authorizing the federal congestion pricing program, utilizes a distinct structure from those two statutes.³⁰⁴ There are three key differences that distinguish ISTEA from those two established forms of federalism.³⁰⁵ First, ISTEA does not present a federal backup option.³⁰⁶ If a state does not participate in ISTEA's congestion pricing program, then the federal government will not step in.³⁰⁷ Second, there is no federal money directly attached to congestion pricing in ISTEA.³⁰⁸ ISTEA applicants are expected to obtain federal approval, but

299. See *supra* discussion Parts I.B, II.B, II.C.

300. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012) (upholding the ACA's Medicaid expansion as an opt-in program for states); Ohio v. Env't Prot. Agency, 603 U.S. 279, 292–94, 300 (2024) (granting a motion for stay of an FIP under the Clean Air Act but leaving the broader federal-state air quality system untouched); see also Metro. Transp. Auth. v. Duffy, No. 25-CV-1413 (LJL), 2026 WL 588117, at *36, *45 (S.D.N.Y. Mar. 3, 2026) (upholding ISTEA's system of federal-state cooperation for state congestion pricing plans).

301. See, e.g., Texas v. U.S. Env't Prot. Agency, 170 F.4th 328, 337–38, 360 (5th Cir. 2026) (describing the scope of a court's review of agency decision making post-*Loper Bright*, and remanding EPA's rejection of Texas's SIP back to the EPA for further evaluation).

302. See generally 42 U.S.C. § 18041(c)(1) (establishing the ACA's state health insurance exchange standards and procedures).

303. See generally Clean Air Act, 42 U.S.C. §§ 7405, 7410 (describing the EPA's role in approving state air quality plans, and the availability of federal grants to states to support implementation of those plans).

304. Compare Intermodal Surface Transportation Efficiency Act, 23 U.S.C. § 129 (establishing a program for states without providing any federal funding or backstop), with Affordable Care Act, 42 U.S.C. § 18041(c)(1) (allowing states to create their own health insurance exchanges that meet certain standards, and providing a federal exchange for non-participating states), and Clean Air Act, 42 U.S.C. §§ 7405, 7410 (requiring states to establish air standards, providing funds to support those state plans, and providing a federal backstop plan for non-compliant states).

305. These two forms of federalism can be distinguished based on the type of federal backstop each contains. For a description of the federal backup option in the ACA's federalism regime, see Gluck, *Intrastatutory Federalism*, *supra* note 38, at 585–86. For a description of the federal backup option in the Clean Air Act, see Doremus & Hanemann, *supra* note 275, at 818. See also *supra* note 252 and accompanying text.

306. See generally FED. HIGHWAY ADMIN., *VPPP*, *supra* note 190 (describing VPPP as a pilot program that does not have a federal parallel).

307. See generally FED. HIGHWAY ADMIN., *VPPP*, *supra* note 190.

308. See generally FED. HIGHWAY ADMIN., *VPPP*, *supra* note 190.

that approval does not grant access to any federal funding.³⁰⁹ These two elements differentiate the structure of ISTEA from the parallel and cooperative federalism regimes established by the ACA and the Clean Air Act.³¹⁰ The following Section will explore the differences between the federal-state authority delegations for ISTEA's congestion pricing program and the federalism of the ACA and the Clean Air Act.

I. Congestion Pricing Does Not Fit the ACA's Federalism Regime

The two major forms of federalism in the ACA do not line up with how the federal government approached congestion pricing. As discussed above, the ACA's health insurance marketplaces and Medicaid expansion contain distinct forms of federalism.³¹¹

Congestion pricing does not fit with either of these schemes. The parallel federalism of the exchanges is fully misaligned. Outside of some potential nuances with federally owned land, there is no parallel system of federally operated tolls.³¹² The federal government is not in the tolling business.³¹³ If anything, given the federal government's default ban on tolls on federally funded highways, the federal government largely seems to be an impediment to the implementation of these types of state programs because of the broad scope of this default toll ban.³¹⁴ In New York, even though the actual tolls are largely on Manhattan streets, some Manhattan streets receive federal funding, so federal approval was required.³¹⁵ Consequently, given the lack

309. See FED. HIGHWAY ADMIN., *VPPP*, *supra* note 190.

310. For a description of the federal backup option in the ACA's federalism regime, see generally Gluck, *Intrastatutory Federalism*, *supra* note 38, at 585–86. See also *supra* note 252 and accompanying text. For a description of the federal backup option in the Clean Air Act, see generally Doremus & Hanemann, *supra* note 275, at 816–18.

311. See *supra* Part II.B, II.C.

312. See generally ROBERT S. KIRK, CONG. RSCH. SERV., R44910, TOLLING U.S. HIGHWAYS AND BRIDGES (2017), <https://www.congress.gov/crs-product/R44910> (on file with the *Fordham Urban Law Journal*).

313. See generally Guy Seidman & Aviv Gaon, *The Mystery of the “Free” Open Road*, 52 FORDHAM URB. L.J. 623 (2025).

314. See 23 U.S.C. § 301 (prohibiting tolls by default on federally funded highways); 23 U.S.C. § 129 (creating exceptions—including congestion pricing—to the § 301 ban on tolls). Although New York's congestion pricing infrastructure itself was located on state or local streets, federal approval was required because the Central Business District Tolling Program imposed tolls in an area that included federally funded highway facilities, and FHWA therefore treated the program as requiring tolling authority under the Value Pricing Pilot Program. See VPPP Agreement, *supra* note 211 (New York “intends to toll an area which includes portions of highway facilities that have been constructed, reconstructed, rehabilitated, restored, resurfaced or maintained with [federal] funds”).

315. See Stephen Nessen, *Can Trump Legally Kill Congestion Pricing in NYC? We're About to Find Out*, GOTHAMIST (Feb. 19, 2025), <https://gothamist.com/news/can-trump->

of a federal government-run tolling scheme, congestion pricing's federalism model does not fit within parallel federalism. On the other hand, congestion pricing's fit within the cooperative federalism model of Medicaid expansion is a closer question.

The federal congestion pricing program and Medicaid expansion share some similarities, but congestion pricing also does not fit Medicaid's cooperative federalism model. Like Medicaid expansion, congestion pricing is an opt-in model.³¹⁶ States can choose to participate and submit their project proposals to the federal government for approval.³¹⁷ However, the key distinction between these two programs concerns funding.³¹⁸ Ninety percent of Medicaid expansion is funded with federal dollars.³¹⁹ Conversely, with congestion pricing, there is no federal money offered.³²⁰ While that has not always been the case,³²¹ the current lack of federal funding attached to congestion pricing distinguishes it from the cooperative federalism of Medicaid expansion.³²² Therefore, congestion pricing appears to be a program originally designed for cooperative federalism, but without the requisite federal funding.

2. Congestion Pricing Does Not Fit the Clean Air Act's Federalism Regime

Congestion pricing does not fit cleanly into the federalism inherent in the Clean Air Act either. The Clean Air Act's State Implementation Plan program is another example of parallel federalism because, if a state fails to meet the NAAQS, the federal government can step in and implement a

legally-kill-congestion-pricing-in-nyc-were-about-to-find-out [https://perma.cc/ATX2-M55Z] (noting that because some of Manhattan's streets receive federal subsidies, the MTA needed federal approval to launch the tolls).

316. See Lyon et al., *supra* note 266, at 662.

317. See Lyon et al., *supra* note 266, at 662.

318. See generally David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2556 (2005) (describing the importance of decentralizing government power and granting authority to the states to allow those "states to become laboratories of democracy").

319. See Gluck & Huberfeld, *supra* note 12, at 1790.

320. See FED. HIGHWAY ADMIN., *VPPP*, *supra* note 190.

321. The VPPP initially included millions in funding for the federal Department of Transportation to issue to states to implement and operate congestion pricing programs; however, Congress has not authorized new funding for this program since 2012. See U.S. DEP'T TRANSP. FED. HIGHWAY ADMIN., REPORT ON THE VALUE PRICING PILOT PROGRAM THROUGH APRIL 2018, at ii (2016), <https://rosap.nhtl.bts.gov/view/dot/53667> [https://perma.cc/K9NF-TZNM].

322. There is another model of federalism called "Uncooperative Federalism," but that model is also an imperfect match for the congestion pricing situation because it describes states pushing against federal policy, whereas this situation appears to be the opposite. The federal government is effectively pushing back against previously approved state policy. See generally Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

federal implementation plan.³²³ Congestion pricing does not have a federal backup.³²⁴ Therefore, from the outset, the federalism within these two programs does not appear to align. However, another element must be considered in this comparison.

The absence of both a federal backup and meaningful monetary incentives leaves congestion pricing in a federalism no-man's-land.³²⁵ This misalignment creates the worst of both worlds: federal control without federal commitment and state innovation without federal protection. The congestion pricing saga illustrates the consequences of this structural deficiency.³²⁶ New York invested years of effort and substantial resources in obtaining federal approval, only to face the threat of unilateral rescission when a new administration took office.³²⁷ The reforms proposed in Part III aim to address this vulnerability by requiring Congress to design future federal-state programs with federalism structures that create durable alignment between federal and state interests.³²⁸

III. A DURABLE REGULATORY STRUCTURE FOR POLARIZED TIMES

Federal-state cooperative statutory schemes can create a constant struggle for power between states and the federal government.³²⁹ The federalist structures in both the ACA and the Clean Air Act demonstrate this system working successfully.³³⁰ The federal government offers either money or the potential for federal intervention to encourage states to comply, and states largely fall in line.³³¹ The effectiveness of this regime is particularly clear in the ACA.³³²

323. See Doremus & Hanemann, *supra* note 275, at 818.

324. See *supra* Part II.A.

325. For a discussion of the lack of federal dollars attached to the VPPP, see *supra* note 195 and accompanying text.

326. See generally *Metro. Transp. Auth. v. Duffy*, No. 25-CV-1413 (LJL), 2026 WL 588117 (S.D.N.Y. Mar. 3, 2026).

327. See Dave Colon, *The Toll of History: MTA Board Approves \$15 Congestion Pricing Fee*, STREETS BLOG NYC (Mar. 28, 2024), <https://nyc.streetsblog.org/2024/03/28/the-toll-of-history-mta-board-approves-15-congestion-pricing-fee> [https://perma.cc/C594-PMR5] (quoting Janno Lieber, MTA Chairman and President, “[MTA] had more than 50 public meetings and 25,000 comments” during the final public hearing phase of the congestion pricing planning process); see also *supra* Part II.A (describing congestion pricing’s multi-year planning and review process).

328. See *infra* Part III.

329. See generally THE FEDERALIST NO. 51 (James Madison).

330. See generally KAISER FAMILY FOUND., *Medicaid Expansion*, *supra* note 269; Doremus & Hanemann, *supra* note 275, at 817–18.

331. See generally KAISER FAMILY FOUND., *Medicaid Expansion*, *supra* note 269; Doremus & Hanemann, *supra* note 275, at 817–18.

332. See generally Gluck & Huberfeld, *supra* note 12.

The story is similar to the ACA's health insurance exchanges.³³³ By law, the federal government operates ACA insurance exchanges for any state that does not establish its own.³³⁴ However, states that create their own marketplaces can tailor them to their own priorities and population needs.³³⁵ As of June 2026, twenty-one states have selected this option and manage their own marketplaces.³³⁶ Rather than requiring states to create their own marketplaces, the ACA encourages states to form their own by offering incentives.³³⁷ The federal government has money available for states that want to design their own marketplace.³³⁸ States also gain policymaking authority when they replace the federal default with a marketplace designed to reflect its own priorities.

Although the ACA and Clean Air Act provide well-established models of federal-state implementation, Congress has not used those models consistently across federal programs. Congestion pricing illustrates that mismatch: ISTEA required federal approval before New York could implement its tolling program, but the statute did not create a federal substitute program or pair approval with ongoing federal funding.³³⁹ Because ISTEA gives the federal government authority to approve the state proposal without supplying either a federal backstop or a continuing fiscal partnership,³⁴⁰ the federal role is best understood as a gatekeeping function rather than as the kind of ongoing federal-state implementation structure present in the ACA and the Clean Air Act.

333. See generally Fahey, *Health Care Exchanges*, *supra* note 246.

334. See Fahey, *Health Care Exchanges*, *supra* note 246, at 57 (“[T]he [ACA] also gives the states an escape hatch. If a state declines to establish a state-based exchange, it is deemed ‘not an electing State’ and the statute directs HHS to ‘establish and operate’ a federal exchange ‘within the state.’”).

335. See generally Gluck, *Intrastatutory Federalism*, *supra* note 38, at 577–80.

336. See KAISER FAMILY FOUND., *State Health Insurance Marketplace Types, 2014–2026*, <https://www.kff.org/affordable-care-act/state-indicator/state-health-insurance-marketplace-types/?activeTab=map&currentTimeframe=0&selectedDistributions=marketplace-type&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [https://perma.cc/JXM7-P29C] (last visited Aug. 16, 2026).

337. See generally Gluck, *Intrastatutory Federalism*, *supra* note 38, at 577–80 (describing the initial expectation, but not requirement, that all states would create their own marketplaces).

338. See Fahey, *Health Care Exchanges*, *supra* note 246, at 59 (“the Act allocated virtually unlimited [federal] funds to support the establishment of state exchanges”).

339. See *Metro. Transp. Auth. v. Duffy*, No. 25-CV-1413 (LJL), 2026 WL 588117, at *36, *45 (S.D.N.Y. Mar. 3, 2026) (describing ISTEA's federalism structure and ruling that the federal government's actions were arbitrary and capricious).

340. See FED. HIGHWAY ADMIN., *VPPP*, *supra* note 190 (describing the lack of federal parallel program or federal funding).

A. Recommendations for Systemic Reform

The ACA's Medicaid expansion and the Clean Air Act's NAAQS demonstrate how federal law can influence states to enact policies through monetary and non-monetary incentives.³⁴¹ On the other hand, the federal government's approach to congestion pricing illustrates how federal agencies that do not want to cooperate with state policymaking can be an obstacle to progress.³⁴² Instability and inconsistency in federal approvals, as shown here with congestion pricing, can persist across presidential administrations and political ideologies, but the issues those inconsistencies create for citizens remain the same. This Section proposes three reforms to address these vulnerabilities. First, Congress should design future state-federal programs with either parallel federalism structures or meaningful monetary incentives.³⁴³ Second, where such structures are not feasible, Congress should limit executive rescission authority.³⁴⁴ Third, Congress should clarify the scope of the Congressional Review Act to explicitly exclude agency waivers and other adjudicatory decisions.³⁴⁵

The first and most straightforward reform is for Congress to design future state-federal programs with federalism structures that have proven to be durable. The ACA's Medicaid and state exchange programs and the Clean Air Act's NAAQS model offer the two proven templates of parallel federalism and cooperative federalism.³⁴⁶ Both models can foster genuine federal-state buy-in that transcends political cycles and presidential administrations. The ACA's health insurance exchanges exemplify the parallel federalism approach.³⁴⁷ When a state declines to establish its own marketplace, the federal government operates one in its place.³⁴⁸ This structure ensures that the underlying policy goal—expanding access to health insurance—is achieved regardless of any individual state's participation. The Clean Air Act's State Implementation Plan program operates similarly.³⁴⁹ If a state fails to develop an adequate plan to meet the NAAQS, the EPA promulgates a Federal Implementation Plan in its place.³⁵⁰

341. See *supra* discussion Parts II.B and II.C for a discussion of these incentives.

342. See *supra* Part II.A.6.

343. See *supra* note 254 and accompanying text for a discussion of parallel federalism.

344. See *supra* Part I.D for a discussion of rule rescission.

345. See *supra* Part I.C for a discussion of the Congressional Review Act.

346. See *supra* Part II.B for a discussion of the Affordable Care Act and Part II.C for a discussion of the Clean Air Act; *supra* note 254 and accompanying text for a discussion of parallel federalism; *supra* Part II.D.1; Gluck, *Intrastatutory Federalism*, *supra* note 38, at 584–87 (discussing the distinction and definitions of cooperative and parallel federalism).

347. See Gluck, *Intrastatutory Federalism*, *supra* note 38, at 585–87.

348. See Gluck, *Intrastatutory Federalism*, *supra* note 38, at 586–87.

349. See Doremus & Hanemann, *supra* note 275, at 818.

350. See Doremus & Hanemann, *supra* note 275, at 818.

This federal backstop creates a powerful incentive for state compliance while ensuring that the broader regulatory objective is not undermined by state inaction.³⁵¹

Medicaid expansion, by contrast, exemplifies the cooperative federalism model with monetary incentives and has led to forty states opting in.³⁵² This policy structure creates an alignment of interests between the federal government and the states.³⁵³ This ensures that once a state joins the program, it has a strong incentive to remain in it.³⁵⁴ This structure also gives the federal government a strong incentive to work cooperatively with participating states rather than revoke approvals arbitrarily.³⁵⁵

For federal-state programs like congestion pricing that lack both a parallel federal structure and meaningful monetary incentives, Congress should consider retrofitting one of these elements into the existing statutory framework. In the case of congestion pricing, Congress could amend ISTEA to provide federal funds for states that implement congestion mitigation programs. This structure would be similar to the cooperative federalism of the ACA's Medicaid expansion.³⁵⁶ Alternatively, Congress could establish a federal congestion pricing program that would operate on federal highways in states that do not implement their own programs. This would be similar to the parallel federalism of the ACA's healthcare exchanges and the Clean Air Act's NAAQS.³⁵⁷ Either approach would create the kind of federal-state alignment that has proven durable in other contexts.

The second reform addresses programs where parallel federalism or monetary incentives are not feasible. For these programs, Congress would pass legislation that limits the executive branch's authority to rescind agency approvals once a state has received final agency authorization and begun implementation. While passage of this type of legislation may seem unlikely in the current Congress, long-term policy objectives could be bolstered under this model, as it promotes policy durability regardless of which party controls

351. See Doremus & Hanemann, *supra* note 275, at 818.

352. See Gluck & Huberfeld, *supra* note 12, at 1731; KAISER FAMILY FOUND., *Medicaid Expansion*, *supra* note 269.

353. See Gluck & Huberfeld, *supra* note 12, at 1729 (discussing how states may design their own state Medicaid expansion programs, within federal guidelines, and obtain federal approval and funding).

354. See Gluck & Huberfeld, *supra* note 12, at 1729.

355. See Gluck & Huberfeld, *supra* note 12, at 1729 (discussing how states may design their own state Medicaid expansion programs, within federal guidelines, and obtain federal approval and funding).

356. See Gluck & Huberfeld, *supra* note 12, at 1731.

357. See Gluck, *Intrastatutory Federalism*, *supra* note 38, at 585–87; Doremus & Hanemann, *supra* note 275, at 818.

Congress and the White House.³⁵⁸ This model would make it more difficult for a presidential administration to rescind or revoke the agency actions of their predecessors that have already been implemented.

It is important to note that recent executive power Supreme Court decisions, notably *Trump v. Slaughter*, would make this proposal somewhat vulnerable because that case seems to hold that officers exercising executive power must remain subject to presidential control.³⁵⁹ This may seem to create some doubt about the viability of a proposal that requires some of those executive officers to seek congressional approval prior to rescinding any existing agency actions. However, *Slaughter* focuses on executive control of the agency officials themselves, and not the agency actions.³⁶⁰ Therefore, while *Slaughter* may create some doubt about the viability of this proposal, it does seem possible for this proposal to coexist with that case.

Under this model, once a federal agency approves a state's application to participate in a federal-state program, that approval would be revocable only through congressional action or judicial review—not through unilateral executive rescission. This reform would require Congress to amend the relevant authorizing statutes to specify that agency approvals constitute binding commitments that agencies may not subsequently withdraw, except through the processes specified in the statute. This type of legislation would build on the existing Administrative Procedure Act by adding the requirement that agencies must seek congressional approval before rescinding existing rules.³⁶¹

This reform finds support in existing administrative law principles.³⁶² The Supreme Court's decision in *Department of Homeland Security v. Regents of the University of California* reinforced that agencies may not rescind prior policies without providing a reasoned explanation that adequately considers

358. It is important to note that there are separation of powers considerations, which are outside of the scope of this Note, but that Congress would likely want to consider to ensure this type of legislation survives any legal challenges.

359. See *Trump v. Slaughter*, 146 S. Ct. 2283, 2310 (2026).

360. See *id.*

361. Given the Supreme Court's holding in *INS v. Chadha*, this Congressional approval would need to be bicameral and include presentment to the President. See 462 U.S. 919, 958–59 (1983).

362. This reform is best understood as a statutory limits-and-process proposal, not as a transfer of executive authority to Congress or the courts. *Regents* supports the procedural premise that when an agency changes course, it must provide a reasoned explanation and account for serious reliance interests. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020). On the other hand, in a recent case, *Trump v. Slaughter*, the Court cautions against converting that premise into a blanket rule that categorically forbids presidentially accountable agencies from being directly accountable to the president. See 146 S. Ct. 2283, 2310 (2026).

reliance interests.³⁶³ The proposed reform would strengthen this principle for federal-state programs by requiring congressional or judicial action before rescission could occur. This mandates that either a legislative or adjudicative process must occur before an agency rescinds its prior action. This approach preserves the essential checks and balances of the United States' constitutional structure. Congress retains its legislative power to modify or repeal programs through the ordinary legislative process, and federal courts retain their authority to review agency actions for compliance with statutory requirements. What the reform eliminates is the vulnerability to arbitrary executive rescission that the congestion pricing saga so vividly illustrates.³⁶⁴

The benefits of this reform extend beyond any single program. For states, it would provide the certainty and stability necessary to make substantial investments in federally approved programs. New York spent close to \$1 billion in infrastructure and administrative capacity to implement congestion pricing, relying on FHWA's 2023 approval.³⁶⁵ Under the current regime, that investment was placed at risk by a single letter from the Secretary of Transportation.³⁶⁶ The proposed reform would protect such reliance interests by ensuring that states can count on federal approvals remaining in place absent congressional action or a judicial finding of illegality. For the federal government as a whole, the reform would encourage more thoughtful initial decision-making, as agencies would know that their actions are more durable and likely to carry longer-term consequences.

The third reform addresses the recent expansion of the Congressional Review Act to agency waivers and other adjudicatory decisions.³⁶⁷ As discussed in Part I.C, Congress's 2025 use of the CRA to rescind EPA waivers for California's vehicle emissions standards represents a dramatic departure from the statute's traditional understanding.³⁶⁸ The Government Accountability Office found that the CRA is inapplicable to waivers and other agency adjudications because they have specific, and not general, applicability.³⁶⁹ However, over the past year, Congress has gone against that office's conclusion and used the CRA to rescind multiple EPA-issued

363. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020).

364. See discussion *supra* Part II.A.6.i.

365. See Ana Ley, *Up to \$1 Billion May Go to Waste After Hochul's Congestion Pricing Halt*, N.Y. TIMES (July 16, 2024), <https://www.nytimes.com/2024/07/16/nyregion/congestion-pricing-cost-hochul.html> (on file with the *Fordham Urban Law Journal*).

366. Letter from Sean P. Duffy, Sec'y of Transp., to Kathy Hochul, Governor of N.Y., *supra* note 214, at 1–3.

367. See *supra* note 163 and accompanying text.

368. See generally PEREZ, *supra* note 167.

369. See generally PEREZ, *supra* note 167.

waivers.³⁷⁰ Therefore, to close this CRA backdoor, Congress should codify the Government Accountability Office's interpretation by amending the CRA to expressly exclude waivers, licenses, permits, and other agency adjudications from the definition of "rules" subject to the CRA.³⁷¹

This reform is necessary to preserve the stability of state programs that depend on federal waivers or approvals. The CRA's original design contemplated a narrow window of sixty legislative days during which Congress could vote to rescind agency rules before they took effect.³⁷² The application of the CRA to long-standing waivers upends this design and creates uncertainty for states that have built programs around federal approvals.³⁷³ California's emissions standards, for example, had been in place for decades and served as the regulatory foundation for vehicle emissions programs in at least seventeen states.³⁷⁴ The sudden rescission of those waivers through the CRA threatens to destabilize emissions policy nationwide.

The proposed amendment would restore the CRA to its original purpose while preserving Congress's authority to override agency rules through ordinary legislation. Importantly, this reform would not prevent Congress from overturning agency waivers or other adjudications. Instead, it would simply require Congress to rescind those types of agency actions through the regular legislative process, with its attendant procedural protections and deliberative requirements, rather than through the CRA's expedited procedures. This distinction is meaningful. In the Senate, the regular legislative process requires sixty votes to overcome a filibuster, but CRA resolutions require only a simple majority and cannot be filibustered.³⁷⁵ Requiring the regular legislative process for rescinding established waivers, like the EPA California waivers, would ensure that these consequential decisions are not fast-tracked through the CRA, and instead receive the deliberation they deserve.

370. See *supra* note 163 and accompanying text.

371. See generally PEREZ, *supra* note 167 (describing the wide array of types of agency actions that it considers to be "rules" under the CRA).

372. See Cole, *supra* note 151, at 61–62.

373. See, e.g., *supra* note 162 and accompanying text (discussing California's emissions standards); Part II.A (discussing New York's federally approved congestion pricing program).

374. See *Adoption of California's Clean Vehicle Standards by State*, DEP'T OF ENERGY, <https://afdc.energy.gov/laws/california-standards#/tab-zev> [<https://perma.cc/GM58-VK98>] (last visited Aug. 16, 2026); *Zero-emission Vehicle Regulation*, CAL. AIR RES. BD., <https://ww2.arb.ca.gov/our-work/programs/zero-emission-vehicle-program/about> [<https://perma.cc/TR9V-SBH8>] (last visited July 17, 2026).

375. See Freeman & Stephenson, *supra* note 145, at 281.

CONCLUSION

Federalism is one of the oldest concepts in American governance. Granting states the power to innovate and make laws on their own was a goal of the Framers of the Constitution,³⁷⁶ and it continues to animate political discourse today.³⁷⁷ The contemporary battles over state vehicle emissions standards and congestion pricing illustrate how these questions about the boundaries of federal and state authority persist.³⁷⁸ Through the story of the federal government's attempted repeal of congestion pricing, this Note illustrates the failures of some modern versions of federalism.³⁷⁹

The three reforms proposed in Part III offer a path toward more durable federalism.³⁸⁰ First, Congress should design future federal-state programs with either parallel federalism structures, in which the federal government operates a backup program when states opt out, or meaningful monetary incentives. The more recent creation of the ACA's health insurance exchanges and Medicaid expansion, along with the longer-standing Clean Air Act's NAAQS program, demonstrates that such structures are durable and can withstand transitions across multiple administrations.³⁸¹ Second, where such structures are not feasible, Congress should limit executive rescission authority by specifying that agency approvals may be revoked only through congressional action or judicial review.³⁸² This reform would protect state reliance interests while preserving the essential checks and balances of our constitutional structure. Third, Congress should clarify the scope of the Congressional Review Act to exclude waivers, licenses, and other agency adjudications from the statute's expedited disapproval procedures.³⁸³

These reforms would help states function as the "laboratories of democracy" that Justice Brandeis envisioned in 1932.³⁸⁴ This structure will reassure states that federal approvals are durable, protected from arbitrary executive rescission, and subject only to congressional or judicial reversal. This should encourage states to invest more resources in developing and implementing innovative programs, given the lower federal rescission risk.

376. See THE FEDERALIST NO. 43 (James Madison).

377. See, e.g., discussion of New York's congestion pricing program in Part II.A.

378. See *supra* note 162 and accompanying text (discussing California's emissions standards); Part II.A (discussing New York's federally approved congestion pricing program).

379. See discussion *supra* Part II.A.

380. See discussion *supra* Part III.

381. See discussion *supra* Parts II.B, II.C.

382. See discussion *supra* Part III.A.

383. See discussion *supra* Part III.A.

384. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Additionally, when Congress designs federal-state programs with genuine federal interests in state success, that creates buy-in from all stakeholders, federal and state alike. Also, when the Congressional Review Act is confined to the role of checking end-of-administration agency rules, rather than threatening long-standing waivers and approvals, states and regulated parties can build programs with confidence that the regulatory foundation will remain stable.

The congestion pricing example is both a cautionary tale and a source of optimism. It is cautionary because it demonstrates the vulnerability of state programs that depend on federal approval without the protective structures of parallel federalism or monetary incentives. For example, over the past two years, Congress has used the CRA to successfully revoke various federal approvals related to California's environmental laws with a novel use of the CRA on years-old agency actions.³⁸⁵ Regardless, the story of congestion pricing can also be a source of optimism because, as of this writing, the tolls are operating and federal courts have rejected the Trump Administration's attempt to rapidly rescind federal approval of the program.³⁸⁶ This judicial protection vindicates the role of courts in checking arbitrary executive action—but it also underscores the precariousness of relying on litigation as the primary safeguard for state programs. The reforms proposed in this Note would provide pre-reliance protection through statutory design, rather than requiring states to seek post-injury relief through the courts.

In the United States' federalist system, the relationship between federal and state governments will always involve tension and negotiation. But that tension should be productive, channeling the ambitions of federal and state actors toward policy innovation and experimentation rather than toward bureaucratic stalemate and litigation. The current system, as exemplified by the congestion pricing saga, too often produces the latter. By reforming the statutory structures that govern federal-state programs, Congress can create a federalism that honors the founding generation's vision of states as laboratories of democracy while providing the stability and predictability that effective governance requires.

385. *See supra* note 163 and accompanying text.

386. *See* *Metro. Transp. Auth. v. Duffy*, No. 25-CV-1413 (LJL), 2026 WL 588117, at *42–43 (S.D.N.Y. Mar. 3, 2026).