Let California experiment

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In announcing the U.S. Environmental Protection Agency's denial of California's request for a "waiver" allowing California and 16 piggybacking states to devise their own more aggressive car greenhouse gas pollution strategies, EPA Administrator Stephen Johnson mentioned concerns with a "patchwork" of disparate state standards. He also alluded to the new energy bill as justification. President Bush echoed that point, in a press conference asking if it is "more effective to let each state make a decision how to proceed ... or is it more effective to have a national strategy?"

If Johnson's press statement and the president's comments reflect the so-far undisclosed underlying legal and policy justification, it is unsound in policy and likely in violation of the Clean Air Act. This choice heightens risks of regulatory laxity, inertia and undercuts incentives for innovation and learning in an area — climate change policy — where pragmatic learning is needed most.

(ENLARGE)
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The "patchwork" argument fails on two fronts, one statutory, and the other due to its implicit policy perspective. First, the Clean Air Act offers only a limited break from a uniform federal standard for motor vehicle pollution. California, due to its size and long-standing Los Angeles air pollution woes, is statutorily granted a special capacity to seek waivers from EPA and devise its own motor vehicle requirements. A California standard must be at least as protective as the otherwise applicable federal floor. A statutory hurdle for California to show "compelling circumstances and extraordinary conditions" must be met, but California has met that many times before with other pollutants. In connection with greenhouse gases, California is a massive contributor and could, with less polluting cars, make a major dent in U.S. emissions. Due to its coastal location and vulnerability to heat crises, California is also unusually vulnerable to climate change harm. California seems well grounded in its request, despite some residual statutory uncertainties. EPA might succeed in defending its denial, but could have more easily defended a grant of the waiver request.

But Johnson errs in his "patchwork" claim. If granted, the waiver would result in only the federal and California standards. Other states could follow the California approach, but the Air Act explicitly prohibits any "third car," let alone the patchwork of car regulations industry has complained about and Johnson echoed yesterday. A patchwork risk is a legal myth.

Second, the patchwork argument also is flawed fundamentally in thinking about climate policy challenges. The alternative of federal plus California regulation is a choice that could foster innovation and effectively counter several pervasive regulatory risks. Industry's desire for a single federal approach is understandable. It would ease car industry burdens, perhaps give it a chance to focus pressure on federal legislators and regulators, and provide regulatory stability. But from an environmental perspective sensitive to climate challenges, policies reflected in the Clean Air Act, and regulatory risks, this industry desire provides scant justification.

The Bush administration frequently touts the benefits of markets. EPA's denial effectively kills the market for regulatory and technical innovation and mutual learning. The Clean Air Act has long encouraged such innovation

and learning by allowing simultaneous California and federal standards. Unless rejected in the courts or by a new president, EPA's decision gives the federal government the sole regulatory role. If the federal government acts wisely and aggressively, progress may be made. It may, however, drag its feet, embrace laxity, or simply make poor choices or ones that quickly become outdated. With the alternative possibility of California innovation and piggybacking states, then no single regulator would control the agenda. Car companies would have incentives to compete to become California market leaders, as would technological innovators. Diverse regulatory approaches could be tested.

Perhaps most importantly, the pervasive threat of regulatory inertia would be lessened with federal and California regulation. If only federal regulation is possible, industry has every incentive to drag its feet, challenge federal choices in regulatory and judicial venues, and do the minimum possible. Case doctrine makes challenges to regulatory inaction difficult to win. In contrast, if the markets of California and following states were at risk, then industry would have less control and have incentives to meet regulatory and technical challenges, and perhaps push federal regulators to embrace similar or identical approaches.

A patchwork was never a legal possibility, but EPA has squandered the possible benefits of limited regulatory diversity and market competition. The result will likely be a delay — the U.S. continuing to be a climate change laggard and more avoidable greenhouse gas emissions.

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