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## The Emerging Role of State and Local Governments in Regulating Autonomous Vehicles

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Perkins Coie LLP

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## Traditional Federal & State Roles

### Federal Role

*“what can be sold”*

- Safety standards
- Emissions standards
- Consumer protection



### State and Local Role

*“who” can operate  
“where, when, how” vehicles are used*

- Driver licensing
- Vehicle registration
- Insurance requirements
- Product liability
- Rules of the road



## AVs Emerge ...

- **Initially, a regulatory vacuum**
  - Absence of AV-specific safety standards at the federal level
  - Absence of clear prohibition in most state and local laws on use of AV

*“Automated vehicles are probably legal in the United States.”*  
(Bryant Walker Smith, Nov. 2012)

## Regulatory Response to AVs, so far

- **Wave of State legislation**
  - 29 States have enacted AV laws\*
  - Most allow testing & set insurance req'mts; some allow full deployment.
- **NHTSA relies on guidance**
  - NHTSA issues guidance to manufacturers
  - No steps taken to issue AV-specific FMVSS

\* National Conference of State Legislatures, Autonomous Vehicles Legislative Database (as of June 2018)

## NHTSA's Message to States

*“NHTSA is responsible for regulating motor vehicles and motor vehicle equipment, and States are responsible for regulating the human driver and most other aspects of motor vehicle operation... DOT strongly encourages States to allow DOT alone to regulate the safety design and performance aspects of ADS technology. If a State does pursue ADS performance-related regulations, that State should consult with NHTSA.”*

NHTSA, “Automated Driving Systems 2.0: A Vision for Safety” (Sept. 2017).

## On the Horizon

- **State laws will continue to evolve**
  - Allowing deployment, not just testing
  - Allowing testing w/o driver present
- **Federal legislation may be enacted**
  - AV bill passed in House, pending in Senate
  - Each would **preempt** State and local regulation of AVs to some extent.

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## The House Bill

- **Self-Drive Act (passed by House)**
  - Preempts States from adopting standards **“regarding the design, construction, or performance”** of AVs.
  - Preserves States authority over vehicle registration, licensing, etc., *unless* it is **“an unreasonable restriction on** the design, construction, or performance” of AVs.

H.R. 3388, Sec. 3. (passed by House 9/6/2017).

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## The Senate Bill

- **AV Start Act (pending in Senate)**
  - Preempts States from adopting standards “regulating the design, construction, or performance” of AVs with respect to specified subject areas.
    - “Unreasonable restriction” language was initially included, later dropped.

S. 1885, Sec. 3. (approved by Senate Commerce Committee 10/4/2017; pending in Senate).

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## State Agencies' Response

### On the Self-Drive Act:

“Unfortunately, the bill currently being considered by the House seeks to significantly expand federal pre-emption of states by moving beyond the traditional definition of motor vehicle safety to encroach on vehicle operations, currently under the states’ purview.”

National Governor’s Association et al. Letter, Sept. 5, 2017.

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### On the AV Start Act:

“The AV START Act would benefit from further defining the term “performance” to exclude the act of complying with traffic laws, thereby firmly associating it with the current federal responsibilities. With this approach, state and local laws will continue to focus on the operational safety laws regulating motor vehicles and their operators....”

National Governor’s Association et al. Letter, Nov. 8, 2017.

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## Let's Take A Closer Look

- **The Law of Preemption**
  - Basics of Preemption
  - Preemption & NHTSA
- **What it *Might* Mean for State/Local Govts**
  - Emerging State and local AV laws
  - Potential impact of preemption language
  - What becomes the 'new normal'?

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## The Law of Preemption

## Federal Preemption – The Basics

- Can be express or implied
- But courts ‘do not lightly infer preemption’
  - Especially in areas traditionally subject to State regulation.

“[I]n a field which the States have traditionally occupied ... we start with the assumption that the historic police powers of the States were not to be superseded ... unless that was the clear and manifest purpose of Congress.”

*Wyeth v. Levine, 555 U.S. 555, 556 (2009)*

## NHTSA & Preemption: Safety Standards

- **The Safety Act:**
  - Preempts any State and local regulation of “the same aspect of performance” covered by a NHTSA safety standard. [49 USC 30103]
- **What the courts have held:**
  - Does not ‘occupy the field’ of vehicle safety.
  - Preemption found when State law conflicts with or ‘frustrates’ a NHTSA standard.

## NHTSA & Preemption: Safety Standards

- **Typical issues in case law:**
  - Claims for liability under State common law
  - Court-ordered recalls
  - State stds that exceed federal requirements
- **Rarely if ever litigated**
  - State laws restricting when, where, and how NHTSA-compliant vehicles are used

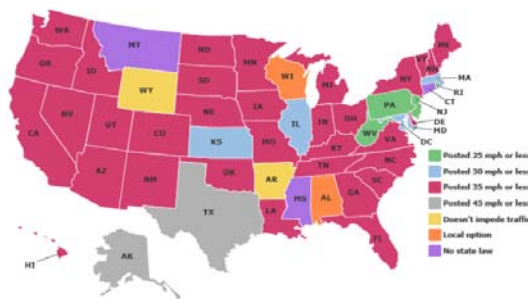
## Example: Low-Speed Vehicles

### NHTSA Role:

- Sets safety standards that LSVs must meet

### State/Local Role:

- Determine where LSVs can be used and applicable requirements.



IHS, Low and Medium Speed Vehicles, <http://bit.ly/2N6ffo9>.



## Example: Hybrid Taxis

- **Federal law (EPCA) gives NHTSA exclusive role in setting fuel economy standards:**
  - States may not adopt any law “related to” fuel economy standards set by NHTSA.
- **Courts:**
  - Local laws mandating hybrid taxis are “related to” fuel economy & thus preempted.

*See, e.g., Metropolitan Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156–58 (2d. Cir. 2010).

## Federal Preemption – Takeaways

- **Lots of uncertainty remains:**
  - Will preemption language be enacted?
  - What will it say? How will courts interpret?
- **But reasonable to expect that:**
  - Feds exclusively set AV safety standards;
  - State & local govts retain at least some discretion to regulate *use* of AVs.

## Federal Preemption - Two Scenarios for AVs

### “Narrower Preemption”

#### Federal

*Exclusive federal regulation of AV safety standards*

#### State & Local

Broad authority to determine when, where, and how AVs are used

### “Broader Preemption”

#### Federal

*Exclusive federal regulation of AV safety standards and restricts State & local govts from regulating or prohibiting use of AVs*

#### State & Local

Limited authority to determine when, where and how AVs are used

??

## And don't forget **State** preemption

- States can preempt local governments from regulating AVs.
- State enacts AV law, prohibits any local laws regulating or restricting use of AVs.
- **Examples to date:**
  - Illinois, Nebraska, Nevada, North Carolina, Tennessee, Texas.\*

\* National Conference of State Legislatures, Autonomous Vehicles Legislative Database (as of June 2018)

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## Looking Ahead – Potential State and Local Regulation of AVs

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## State Regulation of AVs: A Look Ahead

- **As AVs become commonplace, States will need to update virtually aspects of their motor vehicle codes:**
  - Driver licensing
  - Vehicle registration
  - Insurance requirements
  - Rules of the road

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## Driver Licensing

### Today:

- States require all drivers to be licensed; require testing as precondition for license.

### With AVs, States may:

- Allow HAVs to be operated w/o licensed driver
- Clarify that passenger in an HAV is not a 'driver'
- Shift some 'driver' responsibilities to 'provider'

## Vehicle Registration

### Today:

- States require all vehicles to be registered; attach many other requirements to registration.

### With AVs, States may:

- Register AVs based on capability level.
- Impose other requirements as precondition for registration – e.g., representations of AV's safety.
- Require AV type to be displayed on license plate.

## Rules of the Road

### Today:

- State and local governments establish and enforce traffic safety laws.

### With AVs, States may:

- Require AVs to comply with same traffic laws that apply to other vehicles
- Establish traffic laws specific to AVs – e.g., to address AV-human interactions.

## Example: California Vehicle Code

### State can restrict use of specific roads

*“The department may restrict the use of, or close, any State highway whenever the department considers such closing or restriction of use necessary: (a) For the protection of the public. ...”*

California Streets & Highways Code, § 124.

### Local govts can restrict which vehicles use which roads

*“Local authorities, for those highways under their jurisdiction, may adopt rules and regulations by ordinance or resolution on the following matters: ... (c) Prohibiting the use of particular highways by certain vehicles....”*

California Vehicle Code, §21101.

## Uniform State Law – in development

- Effort under way to develop a ‘uniform law’ for State regulation of AVs.\* It would:
  - Recognize that AVs are lawful.
  - Require AVs to abide by traffic laws.
  - Address insurance & liability issues.
  - Define ‘driver’ as the ‘provider’ of the AV.
  - Require ‘provider’ to ‘register’ with State.

\*Nat'l Conf. of Commissioners on Uniform State Laws, Uniform Law Commission, Highly Automated Vehicles Act (June 2018 Draft)

## The Harder Questions

- Can States limit where AVs are used – e.g.**
- Limit AVs to certain routes?
  - Allow AVs only in designated lanes?
  - Allow AVs only within geofenced areas?

## The Harder Questions (cont'd)

Can States allow some types of AVs but not others, based on safety considerations – e.g.

- Allow Level 4 and 5 AVs, but not Level 3?

*“Regulators and product designers should bar the use of partially automated vehicles (NHTSA Level 3) on any roadway without controlled access, like city streets.”*  
National Association of City Transportation Officials, Policy Statement on Automated Vehicles (June 22, 2016)

## The Harder Questions (cont'd)

Can States require AVs to have specific capabilities – e.g.

- Require AVs to have ‘safety override’?
- Require AVs to have V-to-I system?
- Require remote-operator capability?

*“The HAV shall have a safety override means or process to engage and disengage the ADS technology that is easily accessible to the operator, should manual intervention be required. The ADS shall also be able to be disengaged by law enforcement and other emergency responder personnel.”*

Pennsylvania Autonomous Vehicle Testing Policy, Draft Final Report (Nov. 2016).

## The Harder Questions (cont'd)

Can States require AVs to perform tasks normally performed by human drivers – e.g.,:

- Contact emergency responder after crash?
- Pull over when directed by police?
- Provide registration to law enforcement?

## The Harder Questions (cont'd)

Can States require AVs to make their AV status visible to other on the roadway – e.g.,

- Display an 'indicator light' in AV mode?
- Display other external marking of AV status?

*"For vehicles that are not fully self-driving and that may require manual intervention or manual temporary control when an operator is physically located in the vehicle, the vehicle shall be equipped with a visual indicator inside the cabin to indicate when the ADS is engaged."*

Pennsylvania Autonomous Vehicle Testing Policy, Draft Final Report (Nov. 2016).



## The Harder Questions (cont'd)

### Can States impose data-sharing requirements as a condition of registration – e.g.

- Require fleet owners to submit operational data to the State?
- Establish privacy requirements to limit the types of data that AV operators can release?

## Takeaways

### Closing thoughts

- Traditionally, State and local powers to regulate road usage are expansive.
- Federal preemption will likely restrict but not entirely preclude State and local regulation.
  - Wording is key – e.g., “related to”
- For local governments, *State* preemption may be a bigger issue than Federal.

# Thank You



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