

Advisory Preemption

We are living in an era of dramatic and unpredictable innovation. Federal agencies have been at the forefront of updating substantive legal rules to meet new challenges not originally contemplated by Congress. Yet some of these innovations – for example, the emergence of new technologies like autonomous vehicles, smart homes, and drones, or business innovations like the rise of the sharing economy – upset longstanding legislative equilibria not only for substantive legal rules, but also for *federalism*. For example, for the past fifty years, the federal statute regulating motor vehicle safety in the United States has delegated authority to the federal government to regulate the safety of the “vehicle,” but left it up to the states to regulate “driver” behavior through insurance, licensing, and tort rules. The rise of autonomous vehicles erodes the bright line between vehicles and drivers, as vehicle hardware and software can now operate functions once exclusively in the control of humans behind the wheel.

Innovation gives rise to innovation uncertainty – the many unknowns that arise temporarily as a result of technological or business innovation, including what the most significant risks and benefits of the activity are, how those risks and benefits will be distributed, what path the innovation may take in its development, and the timing of that development, among others. Will “local” or “national” concerns predominate? This innovation uncertainty raises important questions both about which level of government should decide how to govern *now* in the current state of uncertainty, and who should decide *in the future*. Significant uncertainty about the unpredictable path that innovation may take requires flexibility to shift beyond an initial or longstanding allocation of regulatory authority among the federal, state, and local governments.

This Article identifies a new method that federal agencies can use to achieve this time-limited flexibility, what I call a *suggestion of preemption*, and defends its use as a normative matter, using autonomous vehicle technology safety regulation as a case study. Ordinary preemption, by Congress, courts, or agencies, can shift the balance of power from the states to the federal government. In contrast, a *suggestion of preemption* has the opposite effect. In a suggestion of preemption, an agency recommends in published policy guidance, but does not mandate, that states limit their legislative and rulemaking actions, and sets a timetable for revisiting the allocation of authority. Suggestions of preemption thus serve multiple salutary purposes. First, they clarify the agency’s current view of its regulatory authority both for the states and for regulated industry. Second, they offer flexibility in the allocation of regulatory authority if innovation takes an unpredictable path. And they are “suggestions” rather than “threats,” because while the federal agency believes it may hold a supremacy trump card, the circumstances are sufficiently uncertain that technological development may undermine that trump card, or the agency may choose not to use it at all. Thus, a suggestion of preemption can open a dialogue with states and industry; it does not shut the door. Although suggestions of preemption impose costs in regulatory uncertainty, they promote normative values such as innovation and precaution about the risks of innovation. And while they lack the procedural protections of notice-and-comment rulemaking that are designed to promote democratic legitimacy, suggestions of preemption, by not freezing for all time the policy preferences of past regulators, promote a different kind of democratic legitimacy – legitimacy in time. Most significantly, suggestions of preemption can temporarily insert *de facto* dynamic, overlapping jurisdiction under conditions of innovation uncertainty, even into a dual federalism scheme.