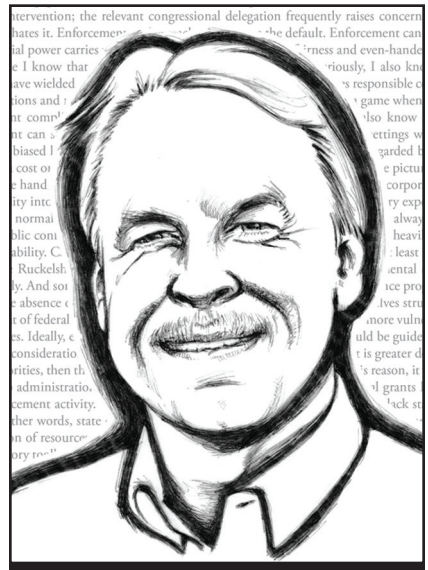
Closing Statement

Dialogue Begins on Plotting the Future of Cooperative Federalism



Scott Fulton
President

One hot topic in the regulatory reform discussion is what to do about the federal-state relationship. The idea of cooperative federalism is hard-wired into most EPA-administered statutes: the federal government sets minimum national standards, states develop programs to implement these standards, EPA delegates implementation responsibility to states, and EPA oversees state performance in meeting the national standards.

Rubs in the relationship have tended to emerge in three key areas: how minimum national standards are set, federal oversight of state permitting systems, and federal intervention in the enforcement context. And the rubs have intensified as state programs have matured in capacity and expertise.

When it comes to national standards, the issue tends to be whether states are given adequate voice in standard setting. For permit oversight, the key issue is whether states have enough flexibility in deciding permit terms. In enforcement, the issues tend to revolve around disagreements over sanctions and federal intervention.

The Environmental Council of States recently released an important new statement on the topic titled "Cooperative Federalism 2.0," which is noteworthy in terms of validating some key contributions that the states — and the country — need from a federal environmental agency. Perhaps even more important, CF 2.0 offers a new model for federal oversight of delegated programs.

In terms of the EPA role, CF 2.0 calls for federal leadership in a number of key areas: national standard setting (with input from the states), national science and technology leadership, implementation of non-delegated (or non-delegable) programs, and delegation and evaluation of state programs.

The new oversight model contemplated by CF 2.0 is a potential game-changer. It proposes that the current system, which in many instances allows for case-by-case federal oversight and intervention, be replaced with an audit system that would spot-check state performance, with EPA deferring to the states unless the audit indicates a serious problem, such as a documented failure to make progress toward national minimum standards, or a failure to adequately resource implementation.

In the enforcement context, CF 2.0 would view direct federal enforcement as appropriate only in limited circumstances, such as where a state requests such engagement, where an audit suggests a need for a greater federal presence, and where "particular circumstances compel federal action."

Now another ingredient to add to the mix: the Macbeth Dialogues recently launched by ELI in partnership with ECOS and with the support of the American College of Environmental Lawyers. This project, undertaken in honor and memory of our dear departed colleague Angus Macbeth, seeks to convene experts and key stakeholders to examine the federal-state relationship and identify law and policy solutions for optimizing government roles going forward.

We began the dialogues with a small Chatham House Rules gathering in July. We will expand from there, with some surveying and public-facing meetings to test some of the leading ideas that emerge. In particular, look for our programs the afternoon before our annual Award Dinner on October 18 to be dedicated to this topic.

While there are many questions to tease out, the discussions thus far suggest potential for consensus around some key themes, such as the idea of moving environmental protection in the direction of an "environmental protection enterprise," with both the public and private sectors having important roles to play in delivery, and the notion that interstate dimensions still matter and warrant greater federal attention than intrastate issues. Another theme is that consistency in implementation remains important as a means of ensuring fairness among states and a level playing field for businesses, but that greater state flexibility in implementation should be possible without compromising the goal of overall consistency.

Another theme: Where states can do as good a job, or better, perhaps the feds should stand down, consistent with the principle of subsidiarity. Also, agreement may be possible around an audit approach that can serve as the primary system for federal oversight of delegated programs, in lieu of routine, case-by-case review and intervention.

Finally, consensus may emerge around the idea that the public and market forces are the new "gorillas in the closet," with private environmental governance mechanisms increasingly driving beyond-compliance behaviors without the intervening hand of government — a factor that should shape the role of the government going forward.

Thanks to all of you who have supported and continue to offer donations in support of ELI's Macbeth Dialogues.