



## States Are Not Stakeholders – Legal Primer

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**Some truths are so basic that, like the air around us, they are easily overlooked.**

- Justice O'Connor (on State sovereignty in *New York v. U.S.*, 505 U.S. 144, 187 (1992)).

**States are sovereigns.**

- U.S.C.A. Const. Amend. 10.
- The U.S. Supreme Court has recognized that the States entered the federal system with their sovereignty intact. *Blatchford v. Native Vill. Of Noatak*, 501 U.S. 775, 779 (1991).

**The U.S. Supreme Court and Congress recognize that States are entitled to the degree of respect due a co-equal governmental institution.**

- See, e.g. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); *Alden v. Maine*, 527 U.S. 706, 750 (1999); *Printz v. U.S.*, 521 U.S. 898, 928 (1997); *New York v. U.S.*, 505 U.S. 144, 156-57 (1992); federal agency enabling acts; Unfunded Mandates Reform Act, 2 U.S.C. § 1501 *et. seq.* (Guidelines and Instructions for Implementing Section 204, *State, Local, and Tribal Government Input*); *Federalism*, E.O. 13132.

**Congress has, through various statutes, expressly recognized States' unique status as sovereignties with their own inherent authority – as well as instances in which States serve as co-regulators with federally-delegated authority – and has directed federal agencies to consult with States accordingly.**

- As recognized by the U.S. Supreme Court, Congress directs federal agencies to defer to State authority in areas such as: land and water use and zoning, education, domestic relations, criminal law, property law, local government, taxation, and fish and game.
- Congress directs federal agencies to co-regulate with the States under statutes such as: Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act, and Comprehensive Environmental Response, Compensation, and Liability Act.

**Because States are sovereign, the U.S. Supreme Court provides the States with unique consideration for the purposes of invoking federal court jurisdiction.** *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (finding states are not “normal litigants.”).

Federal agencies are directed by Executive Order 13132, *Federalism* to adhere to fundamental federalism principles and develop an accountable process to ensure meaningful and timely input from States when formulating policies that have federalism implications.

**Will litigation be the ultimate form of State involvement over federal regulatory policies?**

Proper agency consultation with states produces more informed, effective, and durable administrative rules, regulations, and policies.