



States Are Not Stakeholders – Legal Primer

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.