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## **CLIMATE CHANGE, FORESTS AND FEDERALISM: SEEING THE TREATY FOR THE TREES**

BLAKE HUDSON\*

*Despite numerous attempts over the past two decades – including most recently at the Copenhagen climate discussions in late 2009 – international forest and climate negotiations have failed to produce a legally binding treaty addressing global forest management activities. This failure is due in large part to a lack of U.S. leadership. Though participation of the U.S. in ongoing forest and climate negotiations is essential, the potential limiting effects of federalism on the U.S.'s treaty power in the area of forest management has not been fully explored. Such an exploration is necessary given the debate among constitutional law scholars regarding the scope of the treaty power, the history of the U.S. invoking federalism in order to inhibit treaty formation and participation, and the constitutional reservation of primary land use regulatory authority for state and local governments. This article argues that due to great uncertainty surrounding the question of whether federalism limits the federal government's ability to enter into and implement a legally binding treaty directly regulating forest management activities via prescriptive mechanisms, voluntary, market-based mechanisms – like REDD, forest certification and ecosystem service transaction programs – should be included within any binding treaty aimed at forests in order to facilitate U.S. participation and avoid challenges to treaty implementation in the U.S.*

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\* Assistant Professor of Law, Stetson University College of Law, Gulfport, Florida. For their comments and insights, I wish to thank Curtis Bradley, James Salzman, Jonathan Wiener, Ben Cashore, Erika Weinthal, Brigham Daniels, Mike Allen, Lou Virelli, Jeff Minneti and Troy Rule, although they are not responsible for any of the conclusions drawn in this article. I would also like to thank the Global Institute of Sustainable Forestry at the Yale School of Forestry & Environmental Studies for allowing me to present the arguments put forth in this article as part of the Yale Forest Forum Leadership Seminar. Finally, I wish to thank Duke University School of Law and Duke University's Nicholas School of the Environment for allowing me to present this article and receive valuable insights provided by the faculty.



## INTRODUCTION

Nations with federal systems should consider the compatibility of treaties with their constitutional orders before concluding them, because any errors are almost certainly not a basis for extricating themselves afterward...International Law obliges nations to explore the limits of their constitutional structure to comply with treaties.<sup>1</sup>

Recently I visited a parcel of private forestland in Alabama. I walked down a hill to a creek that runs through an impressive stand of oaks, poplars, sycamores and pines. The creek happens to establish the property line shared with the adjacent landowner. Upon reaching the bottom of the hill I observed that the forest that once stretched across the creek now stopped *at* the creek. The adjacent landowner had recently clear-cut the property and had removed the timber all the way down to the water line on the opposite bank. This Alabama forester's action was clearly contrary to the state of Alabama's suggested Best Management Practices (BMPs) for forests, which state that a forested buffer zone should be left along watersheds in order to "[p]rotect banks, beds, and floodplains from erosion; control direct deposition of pollutants; provide shade, food, and cover for aquatic ecosystems; [and] filter out pollutants from uplands."<sup>2</sup> Though

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<sup>1</sup> Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 456; 492 (2003).

<sup>2</sup> Alabama's Best Management Practices for Forestry, Streamside Management Zone Minimum Standards 5, [http://www.forestry.state.al.us/Publications/BMPs/2007\\_BMP\\_Manual.pdf](http://www.forestry.state.al.us/Publications/BMPs/2007_BMP_Manual.pdf) (last visited Mar. 12, 2010). The state of Alabama delegates authority to the Alabama Forestry

private forest management regulation, and land use regulation generally, has long been the purview of state and local regulatory authority in the United States, federal and international regulatory bodies have taken a growing interest in forest management decisions of the kind made by this Alabama forester.<sup>3</sup>

The international community has increasingly focused on global standardization of forest management practices, and for numerous reasons – based on both environmental and economic concerns. Preventing poor forest management decisions not only protects local environmental goods and services, like clean water and biodiversity, but it also provides global goods and economic incentives in the form of carbon sequestration values – potentially tapped for inclusion in the ever-growing market in carbon – as governments seek to battle the effects of climate change. Efforts over the past twenty years to address national and local forest management activities and achieve harmonization of forest practices within a legally binding international treaty, however, have failed – due in large part to the unwillingness of the United States to support such a treaty.<sup>4</sup>

Despite past failures, national governments continue to discuss approaches to achieving global forest management. The United Nations Forum on Forests (UNFF)<sup>5</sup> remains the primary forum for “stand-alone” forest treaty negotiations,<sup>6</sup> which aim to promote sustainable forestry, preserve the numerous ecosystem services provided by forests and address climate change. In addition, the potential of coordinated global forest management to facilitate carbon sequestration has become a focal point of the post-Kyoto climate negotiations, as national governments are increasingly seeking both regulatory and market-based solutions to climate change.<sup>7</sup> The U.S. Congress has considered numerous bills proposing a

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Commission to develop BMPs for the management of forests in watersheds. Section 9-10A-4 of the Code of Alabama establishes “guidelines for protecting forested watersheds,” and states that “[a]ny management guidelines developed by watershed management authorities to protect forested watersheds shall follow the best management practices established by the Alabama Forestry Commission as they pertain to forested watersheds.” Code of Alabama - Title 9: Conservation and Natural Resources, ALA. CODE § 9-10A-4 (2010). Alabama’s BMPs include provisions for “streamside management zones” (SMZs), which are to be harvested for forest products in such a way “as to protect the forest floor and under story vegetation from damage.” Alabama’s Best Management Practices, at 4. The minimum standards state that SMZs should be established no less than 35 feet from a “definable bank,” and within the SMZ only partial harvesting of trees is appropriate. *Id.* at 5. This partial harvesting should leave a minimum residual forest cover of no less than 50% “crown cover.” *Id.* “Crown” is defined as “The top of a tree consisting of trunk and expanding branches.” *Id.* at 24.

<sup>3</sup> See *infra* notes 10 and 135.

<sup>4</sup> See *infra* note 24 and accompanying text.

<sup>5</sup> Concluded its 8<sup>th</sup> session in May 2009.

<sup>6</sup> By “stand-alone” this article refers to negotiations that are outside the context of climate treaty negotiations.

<sup>7</sup> For example, the European Union Emission Trading System was launched in 2005.



carbon cap-and-trade scheme for regulating industrial carbon emissions.<sup>8</sup> Various state governments have already begun to participate in similar schemes.<sup>9</sup> Because forest carbon sequestration capability provides a potentially significant solution to climate change, there is movement toward incorporating global forest management into a post-Kyoto climate treaty, though such a treaty has yet to materialize since Climate Change Conference number fifteen (COP-15) took place in Copenhagen at the end of 2009.<sup>10</sup>

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<sup>8</sup> Lieberman-Warner Climate Security Act of 2007; Dingell-Boucher Draft Legislation of 2008; American Clean Energy and Security Act of 2009 (Waxman-Markey Bill).

<sup>9</sup> For example, the Regional Greenhouse Gas Initiative (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Vermont), the Midwestern Regional GHG Reduction Accord (Illinois, Iowa, Kansas, Michigan, Minnesota and Wisconsin, and the Canadian province of Manitoba), and the Western Climate Initiative (Arizona, California, Montana, New Mexico, Oregon, Utah and Washington, and the Canadian provinces of British Columbia, Manitoba, Ontario and Quebec), see [http://www.pewclimate.org/what\\_s\\_being\\_done/in\\_the\\_states/regional\\_initiatives.cfm](http://www.pewclimate.org/what_s_being_done/in_the_states/regional_initiatives.cfm).

<sup>10</sup> See A. Karsenty, S. Gueneau, D. Capistrano, B. Singer and J-L. Peyron, *Summary of the Proceedings of the International Workshop "The International Regime, Avoided Deforestation and the Evolution of Public and Private Policies Towards Forests in Developing Countries" held in Paris, 21-23rd November 2007*, 10(3) THE INT'L FORESTRY REV. 424 (2008); T. Johns, F. Merry, C. Stickler, D. Nepstad, N. LaPorte, and S. Goetz, *A Three-Fund Approach to Incorporating Government, Public and Private Forest Stewards Into a REDD Funding Mechanism*, 10(3) THE INT'L FORESTRY REV. 458 (2008); A. Angelsen, *REDD Models and Baselines*, 10(3) THE INT'L FORESTRY REV. 465 (2008); K. Levin, C. McDermott, and B. Cashore, *The Climate Regime as Global Forest Governance: Can Reduced Emissions from Deforestation and Forest Degradation (REDD) Initiatives Pass a 'Dual Effectiveness' Test?*, 10(3) THE INT'L FORESTRY REV. 538 (2008). At the Bali round of the United Nations Framework Convention on Climate Change (UNFCCC) in December 2007, the parties agreed to initiate a plan, which was intended to be finalized at COP-15 in Copenhagen in 2009, that would lead to the development of "next steps" for countries to take to address climate change. United States Government Accountability Office (GAO), *Climate Change: Expert Opinion on the Economics of Policy Options to Address Climate Change* 17 (2008), available at <http://www.gao.gov/new.items/d08605.pdf> (last visited Mar. 12, 2010). The United Nations Department of Economic and Social Affairs (UNDESA) described the Bali talks as placing "greater attention [on forests] in climate change deliberations not only because of their role in mitigating and adapting to climate change, but also due to growing concerns over carbon emissions, resulting from deforestation and forest degradation in developing countries where emissions are considerable and increasing." UN-DESA Policy Brief No. 16, *Finance for Forests and Climate Change 2*, United Nations Department of Economic and Social Affairs (2009), available at <http://www.un.org/esa/policy/policybriefs/policybrief16.pdf> (last visited Mar. 12, 2010). Furthermore, at UNFF-8 in April, 2009, many called for both forest carbon and non-carbon values to be addressed within any future climate agreement. Climate-L, UNFF8 Discusses Role of Forests in Future Climate Change Regime, <http://climate-l.org/2009/04/23/unff8-discusses-role-of-forests-in-future-climate-change-regime/> (last visited Mar. 12, 2010; also see referenced press releases). Also in April, 2009 the UNDESA issued a policy brief asserting that "the global climate change agreement should include actions on deforestation and forest degradation within the wider context of sustainable forest management." UN-DESA Policy Brief No. 15, *Finance for Forests and Climate Change*, United Nations Department of Economic and Social Affairs (2009), available at <http://www.un.org/esa/policy/policybriefs/policybrief15.pdf>

If either a stand-alone forest treaty or a climate treaty incorporating forest management were to arise in the near future, a natural question would be “how would such a treaty affect federal and state forest management regulation in the U.S.?” A more salient question, however, would be to ask the inverse: “how does the relationship between federal and state regulatory authority in the U.S. affect stand-alone forest or climate treaty negotiations?” More specifically, how does U.S. federalism complicate the U.S.’s role in forest management treaty formation given that the federal government is granted authority under the Constitution to negotiate treaties, while state governments maintain primary land use regulatory authority?

This article seeks to expand a recently published policy analysis summarizing the political science theory in the field of global forest regime formation and suggesting policy mechanisms for avoiding the consequences of potential federalism-based complications.<sup>11</sup> The article further develops and explores the *legal* bases for, and implications of, U.S. federalism’s potential limiting effect on the treaty power in the area of global forest management. Such an exploration is important as a vigorous debate continues among constitutional law scholars regarding the scope of the treaty-making power established in Article II of the U.S. Constitution. As discussed below, many scholars argue that, in light of recent U.S. Supreme Court decisions<sup>12</sup> reasserting federalism constraints on the power of the federal government (i.e. the “new federalism”<sup>13</sup>), federalism acts as a restraint on the ability of the U.S. to implement international treaties requiring the passage of federal legislation that would not, standing alone, pass constitutional muster.<sup>14</sup> Other scholars, supporting the “nationalist” perspective, assert that the treaty power is not so limited. They argue that if implemented pursuant to an international treaty, the federal government may assert regulatory authority over

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(last visited Mar. 12, 2010). More explicitly, UNDESA advocated that “[a]t Copenhagen in December 2009, it is crucial that countries agree to include reducing emissions from deforestation and forest degradation in a post-2012 climate regime” (UN-DESA No. 16).

<sup>11</sup> Blake Hudson and Erika Weinthal, *Seeing the Global Forest for the Trees: How US Federalism can Coexist with Global Governance of Forests*, 1(4) J. OF NAT. RESOURCES POL’Y RES. 353 (2009).

<sup>12</sup> *New York v. United States*, 505 U.S. 144 (1992); *U.S. v. Lopez*, 514 U.S. 549 (1995); *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997); *Printz v. U.S.*, 117 S. Ct. 2365 (1997); *U.S. v. Morrison*, 529 U.S. 598 (2000).

<sup>13</sup> Swaine, *supra* note 1.

<sup>14</sup> *See id.*; Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000); Katrina F. Kuh, *Harnessing the Treaty Power in Support of Environmental Regulation of Activities That Don’t “Substantially Affect Interstate Commerce”*: Recognizing the Realities of the New Federalism, 22 VA. ENVTL. L.J. 167 (2004); Nicholas Q. Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005); Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327 (2006).

subject matters – even those traditionally regulated by state governments – that it would be unable to in the absence of a treaty.<sup>15</sup>

It is unlikely that the debate over whether federalism places limits on the U.S.'s treaty-making power will be resolved anytime soon.<sup>16</sup> Given the record of the U.S. allowing federalism to inhibit its participation in international treaties in the past,<sup>17</sup> however, it is crucial to explore questions regarding federalism's potential effect on international forest negotiations. As such, this article argues that due to the uncertainty surrounding the scope of the treaty power, and because federalism limits federal regulatory authority over land use activities like forest management, for any international forest treaty to succeed at the national and sub-national levels – and thus promote the protection of carbon, ecosystem service, and other sustainable management values of forests – the U.S. will need to go to the bargaining table promoting voluntary, market-based programs for the management of forests globally.

The incorporation of market-based mechanisms – such as reduction of emissions from deforestation and degradation (REDD), forest certification, and ecosystem service transaction programs – into an international treaty would avoid failure of treaty implementation in the U.S., in addition to potentially spurring

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<sup>15</sup> David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000). Professor Hollis succinctly detailed the two camps that have emerged regarding the scope of the treaty power: “In one camp lie the reigning ‘nationalists.’ Nationalists contend that the Supreme Court definitively, and correctly, resolved the question of federalism constraints on the treaty power in *Missouri v. Holland*. The Restatement (Third) of the Foreign Relations Law of the United States encapsulates this view, relying on *Missouri* for the proposition that ‘the Tenth Amendment, reserving to the several States the powers not delegated to the United States, does not limit the power to make treaties or other agreements.’ Nationalists thus reject the idea that federalism imposes subject matter limitations on the conclusion or implementation of treaties, even for subjects Congress could not otherwise regulate in the treaty’s absence. In the other camp reside the rebellious ‘new federalists.’ New federalists reject the orthodoxy’s view of *Missouri* in light of: (1) the Supreme Court’s renewed willingness to protect states’ rights under the banner of federalism; and (2) the expansion of treaty-making to include new procedures and subjects previously thought to be of distinctly local concern. New federalists contend that the Court could, or should, restrict the subjects the United States may regulate by treaty – or Congress’s ability to implement them – to accord with existing limits on Congress’s enumerated powers. They also support imposing other federalism-based restrictions, such as the anticcommandeering principle, to restrain the processes by which the federal government imposes treaty obligations on the states. Thus, new federalists suggest the Supreme Court should read *Missouri* more narrowly or overrule it entirely.” Hollis, *supra* note 14, at 1330-1331.

<sup>16</sup> As an example of how deep the rift between the two camps runs, Professor Hollis noted, “[t]o support their textual and structural conclusions, both nationalists and new federalists turn to history...nationalists claim that the Framers did not envision constitutional limitations for treaties...New federalists review the same materials and reach the opposite conclusion...Beyond the Founding materials, both sides present subsequent historical evidence to bolster – or undermine – their respective interpretations. Often they rely on the same source.” *Id.* at 1340-1342.

<sup>17</sup> See *infra* notes 104-106 and accompanying text.

treaty creation in the first instance given the crucial role of the U.S. in international environmental treaty formation.<sup>18</sup> Market-based mechanisms, unlike prescriptive dictates, will allow U.S. forest owners to participate in the federal program on a voluntary basis. The federal government, in turn, would not be required to engage in the direct regulation of private lands – a role traditionally reserved for state governments under the U.S. federal system.<sup>19</sup> Thus the federalism complications of direct federal prescriptive regulation of private forestlands would be avoided and the treaty could be successfully implemented domestically.

This argument employs legal analysis and an assessment of the resulting policy effects to demonstrate how to best reconcile U.S. federalism with the treaty power and global governance of forests. Part II briefly summarizes how climate change provides an opportunity to remedy past failures to achieve binding global governance of forests and further details the current state of international forest governance negotiations. Part III describes and explains how the U.S., though integral to the success of any international treaty on forests, maintains a potential federalism-based veto power, and how this potential impediment to forest treaty formation may be avoided. Part IV summarizes the current state of debate on potential federalism constraints on the treaty power, including an examination of the seminal treaty power case of *Missouri v. Holland*, and concludes that the debate raises serious questions about whether the U.S. federal government may directly regulate certain private land uses, such as forest management, despite entering into a binding international treaty for the management and protection of forests. Part V concludes that due to the uncertainty over federalism's potential limiting effects on the treaty power, market-based, voluntary mechanisms could pave the way for the U.S. to enter into, and implement, a global treaty aimed at forest management, notwithstanding the continued debate on federalism and the scope of the treaty power.

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<sup>18</sup> See *infra* notes 50 and 51 and accompanying text.

<sup>19</sup> Hudson, *supra* note 11, at 354. This is not to say that the U.S. is the only federal country that might face issues of domestic implementation as described in this article, though analysis of those systems is beyond the scope of this article. For example, Canada's *Constitution Act* of 1867 grants the provincial governments *exclusive* responsibility for forest management. In fact, scholars have noted that the 1982 amendments to Canada's Constitution placed it "beyond dispute that the provinces are primarily responsible for forest management." DAVID R. BOYD, *UNNATURAL LAW: RETHINKING CANADIAN ENVIRONMENTAL LAW AND POLICY* 133 (Vancouver: UBC Press 2003). It should be noted, however, that under the Canadian Constitution the federal government does retain the role of participating in international negotiations "related to the conservation and use of forests." *Id.* at 132.



## II. CLIMATE CHANGE – AN OPPORTUNITY TO REMEDY PAST FAILURES TO ACHIEVE A BINDING GLOBAL TREATY ON FORESTS

Though global forest management treaty discussions have repeatedly met difficulties over the past two decades, increasing concern over climate change has opened the door for greater coordinated international action on forests. This new opportunity raises many questions for private forest owners in the U.S. Could the Alabama forester noted above have been persuaded to leave the forest intact if economically valuable carbon credits were made available, or if paid by industrial polluters seeking to offset emissions, under potential nation-wide carbon legislation? If so, these carbon incentives would have the effect of not only preserving carbon values, but also of promoting sustainable forestry and the protection of numerous other goods and services provided by forests.

Perhaps a more important question is at what scale are these protections and incentives most appropriately implemented – at the state, federal or international level? Would a nation-wide policy on carbon open up the carbon market beyond our nation's borders, giving forest owners the further sustainable management incentives provided by access to the worldwide carbon market, if the federal government acted pursuant to a global treaty? Relatedly, and regardless of potential carbon values, which entities are best situated to design forest management directives that will capture the full environmental and economic value of the resource? Local communities and state governments, which have on-the-ground access to the best information and are able to more efficiently allocate resources, or national and international governmental or private bodies, which maintain an increasing stake in how local forest resources are managed?

These considerations and questions exemplify the increasingly complex nature of modern forest management. A forested watershed in rural Alabama demonstrates how *private individuals*, subject to *state* regulations, could potentially interact in a *federal* regulatory scheme that might arise out of *global* treaty negotiations. In reality, the forest I visited stretched far beyond the opposite creek bank, and actually extended around the world, as forest managers are increasingly considering the potential of forests to provide not only local communities, but also the global community, with a wealth of ecosystem and economic resources – not the least of which is a substantial means of fighting climate change.<sup>20</sup> Indeed, the harmonization of international forest management

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<sup>20</sup> 20-25% of annual carbon emissions resulting from forest and land use activities are attributable to forest destruction and degradation, more CO<sub>2</sub> than emitted by the transportation sector. Erin C. Myers, *Policies to Reduce Emissions from Deforestation and Degradation (REDD) in Tropical Forests: An Examination of the Issues Facing the Incorporation of REDD into Market Based Climate Policies*, Resources for the Future 4 (2007), available at <http://www.rff.org/documents/RFF-DP-07-50.pdf> (last visited Mar. 12, 2010). See also IPCC Fourth Assessment Report, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 512, Chapter 7

practices has occupied an increasingly important place on the world stage during the last twenty years.

Since the late 1980s, countries promoting formal global action on forest management practices have made numerous attempts to forge a legally binding international forest treaty, but have repeatedly met great difficulty. Various international fora have considered the creation of such a treaty: the 1992 UN Conference on the Environment and Development (UNCED) in Rio de Janeiro; four sessions of the Intergovernmental Panel on Forests (IPF) between 1995 and 1997; four rounds of the Intergovernmental Forum on Forests (IFF) between 1997 and 2000; and most recently numerous sessions of the UNFF in the 2000s.<sup>21</sup> None of these negotiations resulted in a treaty, and some scholars have described forest treaty discussions as “a resounding failure.”<sup>22</sup> Though scholars have suggested a variety of reasons for these failures,<sup>23</sup> one of the most significant

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(2007) (Cambridge University Press), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-chapter7.pdf> (last visited Mar. 12, 2010).

<sup>21</sup> Radoslav S. Dimitrov, Detlef Sprinz, Gerald M. DiGiusto, and Alexander Kelle, *International Nonregimes: A Research Agenda*, 9 INT’L STUDIES REV. 230 (2006). Also see, S. Gueneau and P. Tozzi, *Towards the Privatization of Global Forest Governance?*, 10(3) THE INT’L FORESTRY REV. 550, 552 (2008); Deborah S. Davenport and P. Wood, *Finding the way forward for the International Arrangement on Forests: UNFF -5, -6, and -7*, 15(3) REV. OF EUROPEAN CMTY. AND INT’L ENVTL. L. 316 (2006). Davenport and Wood describe the chronology of discussions over a forest treaty since 1992 as follows: “International forest policy negotiations have often been characterized by political entrenchment . . . . Since the failure at the 1992 [UNCED] in Rio de Janeiro to achieve a legally binding forest convention, several fora have been developed in order to allow international forest policy discussions to continue . . . . [But a] convention specifically addressing forests eluded consensus . . . . [T]he [IPF] was established as an expert body under the UN Commission on Sustainable Development (CSD), with a 2-year work programme intended to combat deforestation and forest degradation. The IPF . . . led to the creation of the [IFF] in 1997. . . . The UNFF was then formed, with a plan of action that centered on implementation of the IPF/IFF proposals for action . . . . [T]he creation of the UNFF had less to do with monitoring the implementation of the proposals for action than it had to do with compromise: the need to counter the disappointment of some at the lack of an agreement to negotiate a forest convention with the creation of a new, more permanent forum with a substantially higher level of political authority.” *Id.* at 316-317.

<sup>22</sup> Radoslav Dimitrov, *Knowledge, Power, and Interests in Environmental Regime Formation*, 47 INT’L STUD. Q. 123, 134 (2003). Though these efforts are described as a failure by some, later rounds of the UNFF have at least shown increased attention to the issue of a binding treaty. One scholar noted that “[t]he negotiations for [a non-legally binding instrument] that took place at UNFF-7 followed on from a . . . decision negotiated at UNFF-5 and UNFF-6 and represent[s] a compromise between pro-convention and anti-convention forces.” Deborah S. Davenport, *UNFF-7: the way forward*, 37 COMMONWEALTH FORESTRY ASS’N NEWSL. 6-7 (2007).

<sup>23</sup> Hudson, *supra* note 11, at 353-354 (stating that “[a]t UNCED conflicts erupted over trade issues between developed and developing countries, stifling agreement on a ‘new legal instrument on forests.’ Both at UNCED and subsequent forest conferences, progress has been stymied by developing countries concerned that a binding treaty would negatively affect developing economies by regulating tropical forests more stringently than the temperate and boreal forests of the developed world. As the use of market-based mechanisms to address global forest issues has become more popular, this concern has morphed into a fear of ‘forest colonialism’, whereby the

impediments to treaty formation has been the inability of the U.S. to consistently support a legally binding international forest management agreement.<sup>24</sup>

The primary forum facilitating debate on global governance of forests is the UNFF. The UNFF seeks to promote sustainable forestry, address climate change, and preserve the varied ecosystem services provided by forests.<sup>25</sup> As noted, however, international negotiations leading up to the current UNFF talks have failed to achieve binding global forest governance. Additionally, the United Nations Framework Convention on Climate Change (UNFCCC) is increasingly considering forest management in the context of climate change, with current emphasis on the development of REDD programs that have the potential to improve carbon credit and offset markets globally.<sup>26</sup> UNFCCC negotiations, however, have failed to establish, in a binding instrument, a significant role for forests in mitigating atmospheric carbon.<sup>27</sup>

With regard to climate negotiations, the international community has increasingly recognized that a concerted global effort is necessary to capitalize on the huge potential of forests to combat climate change.<sup>28</sup> The current leading

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developed world would pay for the right to continue emitting carbon into the atmosphere while at the same time limiting development of forested lands in the developing world.”). *See also* Dimitrov, *supra* note 22, at 135; Tom Griffiths, *Seeing ‘RED’? ‘Avoided deforestation’ and the rights of Indigenous Peoples and local communities*, Report for the Forest Peoples Programme (2007), available at [http://www.forestpeoples.org/documents/ifi\\_igo/avoided\\_deforestation\\_red\\_jun07\\_eng.pdf](http://www.forestpeoples.org/documents/ifi_igo/avoided_deforestation_red_jun07_eng.pdf) (last visited Mar. 12, 2010).

<sup>24</sup> Deborah S. Davenport, *An alternative Explanation for the Failure of the UNCED Forest Negotiations*, 5(1) GLOBAL ENVTL. POL. 105 (2005); *See also*, Radoslav Dimitrov, *Hostage to Norms: States, Institutions and Global Forest Politics*, 5(4) GLOBAL ENVTL. POL. 1 (2005).

<sup>25</sup> Such ecosystem services include enhancing managed forests’ role in watershed protection and flood control, protecting habitat, biodiversity and genetic resources and the preserving cultural and recreational values. *See* Bastiaan Louman, Andreas Fischlin, Peter Glück, John Innes, Alan Lucier, John Parrotta, Heru Santoso, Ian Thompson, and Anita Wreford, *Adaptation of Forests and People to Climate Change – a Global Assessment Report, Chapter 1, Forest Ecosystem Services: A Cornerstone for Human Well-Being*, International Union of Forest Research Organizations (2009), available at <http://www.iufro.org/science/gfep/embargoed-release/download-by-chapter/> (last visited Mar. 12, 2010).

<sup>26</sup> *See infra* notes 135 and 137.

<sup>27</sup> For discussion of Kyoto’s failure to adequately incorporate forest management, *see* Levin et al., *supra* note 10 and Ben Cashore, C. McDermott & K. Levin, *The shaping and reshaping of British Columbia forest policy in the global era: A review of governmental and non-governmental strategic initiatives* (2006), prepared in preparation for keynote address to Association of BC Forest Professionals Annual General Meeting, Victoria, BC, Canada, February 22–24, 2006, available at <http://www.yale.edu/forestcertification/pdfs/ABCFFP.pdf> (last visited Mar. 12, 2010).

<sup>28</sup> Karsenty et al., *supra* note 10; Johns et al., *supra* note 10; Angelsen, *supra* note 10, Levin et al., *supra* note 10. In 2005 global forests covered 30 percent of the total land area worldwide. Food and Agriculture Organization of the United Nations (FAO), *Global Forest Resources Assessment 2005: Progress towards sustainable forest management* xii (2006), available at <ftp://ftp.fao.org/docrep/fao/008/a0400e/a0400e00.pdf> (last visited Mar. 12, 2010). The Intergovernmental Panel on Climate Change (IPCC) concluded that deforestation and forest

international treaty on climate change, the Kyoto Protocol (adopted in 1997 and entering into force in 2005), is a multilateral environmental agreement assigning binding carbon reduction targets and timetables to “Annex I,” or industrialized, nations, as well as general commitments for all member countries. The protocol, however, has largely ignored forest management as a means of achieving carbon sequestration goals, as emissions from deforestation and forest degradation have not been integrated into Kyoto targets.<sup>29</sup> Rather, the protocol’s effectiveness has been measured primarily with reference to its direct regulation of industry emitters for the purpose of reducing greenhouse gases.<sup>30</sup>

Cashore et al.<sup>31</sup> find that while private entities, environmental groups and government agencies have increasingly been included in talks to address climate change, forest managers have often been left out of climate change discussions. Twenty to twenty-five percent of annual global carbon emissions result from forest and land use activities, and a vast majority of these emissions are attributable to forest destruction and degradation.<sup>32</sup> Forest managers, however, “have not been required to act strategically in mitigating emissions or adapting to climate change impacts” and “[e]nvironmental groups . . . have yet to target their campaigns upon unsustainable forest management [and] the lack of adaptation strategies among forest managers.”<sup>33</sup>

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degradation account for most of the approximately 20-25% of human caused carbon emissions attributable to land use changes. IPCC, *supra* note 20. The UNFF has noted that “mismanagement [of forests] would have a significant impact on the course of global warming in the twenty-first century,” but that “[s]ustainable forest management can contribute toward emissions reductions and to carbon sequestration.” United Nations Forum on Forests, *Recent Developments in Existing Forest-Related Instruments, Agreements, and Processes* 12 (2004), working draft for Ad hoc expert group on Consideration with a View to Recommending the Parameters of a Mandate for Developing a Legal Framework on All Types of Forests, *available at* <http://www.un.org/esa/forests/pdf/aheg/param/background-2.pdf> (last visited March 12, 2010). Scholars have asserted that forest management activities can be augmented to achieve carbon sequestration goals through a variety of strategies, including the increase of forested land through reforestation projects, the increase in carbon density of existing forests at both stand and landscape scales, the expanded use of forest products that sustainably replace fossil-fuel CO<sub>2</sub> emissions and the implementation of REDD programs. Josep G. Canadell and Michael R. Raupach, *Managing Forests for Climate Change Mitigation*, 320 *SCIENCE* 1456 (2008). Though there is uncertainty regarding whether such augmented management approaches can actually achieve an accurately determined reduction of atmospheric carbon, mechanisms aimed at driving these activities, such as REDD, are increasingly utilized.

<sup>29</sup> Levin et al., *supra* note 10.

<sup>30</sup> Though the Kyoto Protocol introduced the Clean Development Mechanism (CDM) for forest carbon offset projects in developing countries, the CDM has proved inadequate, as only three forest CDMs exist (*see* <http://www.carbonpositive.net/viewarticle.aspx?articleID=1463>, last visited Mar. 12, 2010).

<sup>31</sup> Cashore et al., *supra* note 27.

<sup>32</sup> Myers, *supra* note 20, at 4; IPCC, *supra* note 20. A small fraction of this amount is attributed to other land use changes.

<sup>33</sup> Cashore et al., *supra* note 27, at 48.

Despite previous failures to comprehensively integrate forest carbon sequestration into the climate framework, the burgeoning currency of carbon that has exploded onto the market has changed the analysis regarding the viability of including global forest management programs within climate negotiations. The Energy Information Administration (EIA) projected that the proposed Lieberman-Warner Climate Security Act of 2007 would have resulted in U.S. carbon credit prices of between \$10-\$50 per metric ton of carbon by 2012, between \$18-\$80 per ton by 2020 and between approximately \$22-\$160 per ton by 2030.<sup>34</sup> If such projections come to fruition under a post-Kyoto framework, which has yet to result after COP-15 took place in Copenhagen in December 2009, global trade for carbon provides a significant incentive for governments to include forest management, at least as it relates to carbon sequestration values, within a binding international climate treaty.<sup>35</sup> Such inclusion would capitalize on the aforementioned inertia towards including managed forest carbon within the post-Kyoto framework and would compensate for Kyoto's failure to adequately utilize the world's forests to fight climate change.

The Kyoto climate discussions were only the latest international negotiations to fail to include global forest management activities within a binding treaty, as stand-alone treaty discussions have also faced persistent setbacks. The Rio rounds of forest talks in 1992 only produced a non-binding statement of principles.<sup>36</sup> A binding forest treaty was never even placed on the negotiation agenda because the G-77 group of developing countries largely viewed a treaty as a means for the developed world to raise trade barriers.<sup>37</sup> Furthermore, the G-77 believed developed countries were pressuring them to take economically detrimental action to protect tropical forests, while at the same time

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<sup>34</sup> U.S. Energy Information Administration (EIA), Energy Market and Economic Impacts of S. 2191, the Lieberman-Warner Climate Security Act of 2007 (2008), *available at* <http://www.eia.doe.gov/oiaf/servicerpt/s2191/fig5.html> (last visited Mar. 12, 2010 from <http://www.eia.doe.gov/oiaf/servicerpt/s2191/fig5.html>).

<sup>35</sup> Twenty years ago, before the U.S. wholly shifted its position on a global forest treaty, the U.S. itself recognized the economic incentives provided by forest carbon. *See* Davenport, *supra* note 24, at 123-124. As noted below, the U.S. is one of the world's largest energy users and emitter of carbon emissions, and potential costs to the U.S. of carbon regulation are great. Thus, the U.S. might come to the table more readily during climate change negotiations if it can mitigate economic impacts by the incorporation of market-based, international forest management programs into those negotiations. Most iterations of proposed domestic carbon cap and trade legislation in the U.S. have allowed for industry carbon offsets by investment in, or credit purchases from, approved carbon sequestration projects – in forests or otherwise. Opening up the forest markets by increasing, and uniformly formalizing, the number and types of market-based programs would only increase the attractiveness of a global climate treaty for the U.S. It would also make more viable U.S. interest in binding harmonization of forest management practices worldwide.

<sup>36</sup> Dimitrov, *supra* note 21.

<sup>37</sup> *Id.*



refusing to enforce the same regulations on temperate and boreal forests.<sup>38</sup> Subsequent IPF, IFF and UNFF discussions stagnated over similar issues. As noted, a key reason for the failure to achieve a stand-alone treaty is the U.S.'s reversal of its previous position generally supporting a legally binding international agreement on forest management.<sup>39</sup> The U.S. has been cited by numerous scholars as the most influential country in the international governance system, and the U.S. was actually the first country to propose a stand-alone, binding forest convention.<sup>40</sup> Although the U.S. was unable to push through a binding agreement in the early 1990s, its official reversal of support for binding international forest management in 1997 has made it more difficult for the international community to revisit the issue.<sup>41</sup> The U.S.'s reversal represented a domestic political shift whereby it embraced the argument put forth by developing countries opposed to a binding treaty – that national sovereignty in the forest sector was more valuable than benefits derived from an international forest treaty.<sup>42</sup>

Despite U.S. recalcitrance in past stand-alone forest negotiations, the 2007 UNFF talks did show signs of progress, resulting in a “Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation, and Sustainable Development of All Types of Forests.”<sup>43</sup> This instrument was meant to promote sustainable forest management worldwide by encouraging national action and international cooperation.<sup>44</sup> Though a positive step forward, some scholars claim that the instrument “looks unlikely to achieve any real consolidation of global forest governance,”<sup>45</sup> while others note that the failure to achieve a legally binding instrument “remains a setback.”<sup>46</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> Dimitrov, *supra* note 24.

<sup>40</sup> Davenport, *supra* note 24.

<sup>41</sup> *Id.*

<sup>42</sup> Imme Scholz, *A Forest Convention – Yes or No?*, Position Paper for the Federal Ministry for Economic Cooperation and Development (BMZ) (2004), available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0C54E3B3-1E9C-BE1E-2C24-A6A8C7060233&lng=en&id=27768> (last visited Mar. 12, 2010).

<sup>43</sup> United Nations General Assembly, Sixty-second session, Agenda item 54 (2008), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/469/65/PDF/N0746965.pdf?OpenElement>.

<sup>44</sup> UNFF (United Nations Forum on Forests), Report of the seventh session (2006-2007), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/349/31/PDF/N0734931.pdf?OpenElement> (last visited March 22, 2010).

<sup>45</sup> Gueneau, *supra* note 21, at 551.

<sup>46</sup> Katharina Kunzmann, *The Non-legally Binding Instrument on Sustainable Management of All Types of Forests - Towards a Legal Regime for Sustainable Forest Management?* 9(8) GERMAN L.J. 981, 1005 (2008), available at [http://www.germanlawjournal.com/pdfs/Vol09No08/PDF\\_Vol\\_09\\_No\\_08\\_981-1006\\_Articles\\_Kunzmann.pdf](http://www.germanlawjournal.com/pdfs/Vol09No08/PDF_Vol_09_No_08_981-1006_Articles_Kunzmann.pdf) (last visited Mar. 12, 2010) (stating in full that the value of the



Ultimately, though the inclusion of forest management activities within a binding global treaty remains under debate within both the UNFCCC and UNFF, a global treaty including forest management has yet to be achieved. The next section explicates how U.S. federalism may disrupt international negotiations on binding forest management if the mechanisms for achieving forest management – i.e. prescriptive regulation vs. market-based, non-prescriptive governance – are not considered.

### III. U.S. FEDERALISM AS A VETO POWER OVER GLOBAL FOREST MANAGEMENT

#### A. *The Political Science of Forests, Federalism and Treaties*

Recently, Professor Erika Weinthal<sup>47</sup> and I undertook a political science analysis of U.S. federalism's potential effects on global forest treaty negotiations in the event that either a legally binding stand-alone forest treaty or a post-Kyoto climate treaty incorporating forest management emerged from future UNFF or climate negotiations.<sup>48</sup> Particularly important to our analysis were the questions of what mechanisms any treaty aimed at forest management might employ, and what requirements the treaty would impose upon participating countries.<sup>49</sup> Weinthal and I argued that these questions are particularly important to the U.S., viewed as crucial to the success of both climate and international forest negotiations,<sup>50</sup> because,

the U.S.'s own domestic governance structure complicates its role in the creation of any legally binding treaty that involves the potential direct regulation of land use by the federal government. The U.S.'s governmental system of federalism, engrained in the U.S. Constitution and receiving protection by the U.S. judiciary, causes domestic implementation of certain international forest governance scenarios to be more viable than others.<sup>51</sup>

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instrument “lies in the advantage that it ties together the most important rules and standards of forest policy in one document and that it aims to realise sustainable forest management instead of limiting itself to a mere repetition of the global objectives of forests. The Instrument, however, does not succeed in creating one comprehensive set of all rules applicable and desirable for the forest sector, nor does it in fact reflect each state's responsibility to ensure the sustainable management of its forests. Furthermore, the fact that no consent could be reached on a legally binding instrument remains a setback.” *Id.*

<sup>47</sup> Nicholas School of the Environment, Duke University, Durham, North Carolina.

<sup>48</sup> Hudson, *supra* note 11.

<sup>49</sup> *Id.* at 354.

<sup>50</sup> Davenport, *supra* note 24.

<sup>51</sup> Hudson, *supra* note 11, at 354. For a general discussion of domestic constraints in international bargaining, see Peter B. Evans, *Building an Integrative Approach to International and Domestic Politics*, in *DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND*

Weinthal and I noted that scholars have focused on “decentralized mechanisms” for international forest governance, but have largely ignored the effects of domestic institutional structures like federalism on international forest management treaty formation.<sup>52</sup> This absence is notable since some scholars argue that any global forest management scheme should provide the greatest amount of flexibility in managing forests in order to achieve optimal results at the local level – or, a ‘bottom-up’ approach.<sup>53</sup> These scholars contend that forest governance should retreat from prescriptive approaches – i.e. “traditional governance” – because “traditional governance, focusing on a hierarchical, top-down style of policy formulation and implementation of the nation state and the use of regulatory policy instruments, will be incompatible with this demand for flexibility.”<sup>54</sup>

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DOMESTIC POLITICS 397-430 (Peter B. Evans, Harold K. Jacobson and Robert D. Putnam eds., University of California Press 1993). For a general comparative study of the role of federalism in environmental regulations in the United States and Europe see Daniel Kelemen, *Environmental Federalism in the U.S. and the EU*, in GREEN GIANTS? ENVIRONMENTAL POLICIES OF THE UNITED STATES AND THE EUROPEAN UNION 113-134 (Norman Vig and Michael Faure eds., MIT Press 2004). Scholars have described the U.S. Constitution as embodying “a very limited concentration of powers in the nation’s central institutions . . . the original allocation of jurisdiction to the national government was . . . modest with the unspecified, but apparently broad, residue being left with the states.” Ronald Watts, *The American Constitution in Comparative Perspective: A Comparison of Federalism in the United States and Canada*, 74(3) J. AM. HIST. 769 (1987). Though the balance of power between the state and federal governments shifts periodically in U.S. constitutional jurisprudence – thus leading to court “protection” of states’ rights to a greater or lesser degree than federal power – the principle that is U.S. federalism is resolutely protected by the judicial system. As Watts noted, “[i]n the United States there have been fluctuations in the relative strengths of the national and state governments.” *Id.* at 773. It remains, however, that “the courts and particularly the Supreme Court have come to play a prominent role through their exercise of judicial review to ensure the constitutionality of legislation and executive and administrative action relating to . . . the distribution of jurisdiction between the national and state governments” *Id.* at 789.

<sup>52</sup> Hudson, *supra* note 11, at 354. Krasner defines regimes as “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.” Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36(2) INT’L ORG. 185, 186 (1982). This article means to refer only to “explicit” regimes, or, in other words, those for which formalization is attempted or achieved by international legal treaty. Though it is arguable that some types of informal international regimes have already formed regarding global forestry, as noted above efforts to create a legally binding international treaty for forest management have failed for a myriad of reasons. Dimitrov, *supra* note 21.

<sup>53</sup> See Peter Glück, Jeremy Rayner, Outi Berghall, Susan Braatz, Carmenza Robledo and Anita Wreford, *Adaptation of Forests and People to Climate Change – a Global Assessment Report, Chapter 7, Governance and Policies for Adaptation*, International Union of Forest Research Organizations (2009), available at <http://www.iufro.org/science/gfep/embargoed-release/download-by-chapter/> (last visited Mar. 12, 2010).

<sup>54</sup> *Id.* at 190. See generally Peter Glück, Jeremy Raynor and Ben Cashore, *Forests in the Balance – Changing Paradigms, Chapter 4, Changes in the Governance of Forest Resources*,

Importantly, international negotiations on forests have limited the role of traditional governance for forests by jettisoning the use of prescriptive regulation. The success of international forest negotiations no longer depends upon top-down, regulatory mandates alone. Rather, negotiations depend upon the participation of numerous private and public entities, the promotion of flexibility to allow local governing bodies to participate in the efficient management of resources, and the provision of economic incentives as a driver of behavioral change – or, as noted, a bottom-up approach. Accordingly, traditional regulation prescribed in an insular and rigid fashion by individual nation states is no longer seen as the most effective means of achieving global governance.<sup>55</sup>

Weinthal and I characterized the impacts of international negotiations on internal domestic regulatory forest policy as an “outside-in” limitation on traditional governance,<sup>56</sup> but argued that domestic governance structures like U.S. federalism constitute an ‘inside-out’ limitation on traditional forest governance at both the national and international levels.<sup>57</sup> A thorough analysis of often overlooked “inside-out” limitations like federalism is crucial given that participation of the U.S. is a crucial component for any effective international treaty on forests, and that the U.S. is governed by a “constitutionally entrenched federal system.”<sup>58</sup> We suggested that because the U.S. federal system places primary private land use regulatory authority within the hands of state governments, in order to ensure the success of any international treaty aimed at forests, and avoid any questions as to whether federalism limits the treaty power in the area of global forest management, voluntary, market-based mechanisms,

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International Union of Forest Research Organizations (2005), available at <http://www.iufro.org/science/special/wfse/forests-global-balance/> (last visited Mar. 12, 2010).

<sup>55</sup> See generally Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988) (negotiator uses the threat of a domestic veto in the ratification process as means to tie her hands in the negotiations). Other scholars have noted the trend towards a bottom-up approach for forests; see Arun Agrawal, Ashwini Chhatre and Rebecca Hardin, *Changing Governance of the World’s Forests*, 320 SCIENCE 1460 (2008) and Glück, *supra* note 54.

<sup>56</sup> Hudson, *supra* note 11, at 355. An example of “outside-in” constraints on the U.S. legal system is the “Tuna-Dolphin” controversy. Due to the vast numbers of dolphins killed by the tuna industry off the western coast of Mexico, in the 1980’s Congress amended the Marine Mammal Protection Act to ban the import of tuna unless it could be shown that the tuna was caught using “dolphin-friendly” nets. Mexico challenged the trade restriction before the General Agreement on Tariffs and Trade (GATT). The GATT panel ruled in favor of Mexico, stating that the U.S. could not base trade restrictions on “process and productions methods” in violation of Articles I and III of GATT. Instead, according to GATT trade restrictions needed to be *product-specific*. Thus, if “tuna caught by dolphin-friendly gear was indistinguishable from tuna caught by gear with high dolphin mortality, then trade restrictions were impermissible.” JAMES RASBAND, JAMES SALZMAN, AND MARK SQUILLACE, *NATURAL RESOURCES LAW AND POLICY* 346 (Foundation Press 2004). Thus an “outside” international agreement on trade placed limitations on the implementation of a domestic law in the U.S.

<sup>57</sup> Hudson, *supra* note 11, at 355.

<sup>58</sup> *Id.*

like REDD, forest certification, and ecosystem service transaction programs must be implemented to ensure U.S. participation in any legally binding treaty aimed at global forest management.<sup>59</sup>

The use of voluntary, market-based mechanisms would be consistent with the trend in global forest governance demonstrating a *general* “downward shift from national to sub-national levels,” or, decentralization,<sup>60</sup> facilitating the use of such non-prescriptive mechanisms. These mechanisms also represent the increasingly utilized “neo-liberal” approach to environmental governance, which argues that environmental goals can be best achieved not through the state prescribing targets and enforcing compliance, but rather through implementing voluntary measures and market-based policies.<sup>61</sup> Maintaining consistency with the general global trend of decentralization is important for the U.S. since U.S. federalism “represents a *specific* legal constitutional requirement for decentralization, whereby a national government is judicially required to divulge regulatory authority to sub-national units (the states) in the area of direct forest management.”<sup>62</sup> Otherwise, U.S. federalism may inhibit the U.S.’s willingness to enter into, and ability to successfully implement, a treaty related to forests.

It appears U.S. federalism concerns have not entered the calculus in past forest treaty negotiations. As noted, the hesitancy of U.S. negotiators in the past to address forests with a binding treaty appears to have had more to do with defending sovereignty over U.S. resources than with anticipating judicial challenges to domestic treaty implementation.<sup>63</sup> Going forward, however, the U.S. would be more likely to lead regarding binding global forest governance if it does not anticipate federalism-based limitations on its ability to implement a treaty aimed at forests.<sup>64</sup> As demonstrated in the next section, removal of such domestic legal limitations for the U.S. will be crucial to the formation and success of any global treaty aimed at forests.

### *B. Importance of U.S. Participation in Treaty Formation*

Participation of the U.S. is crucial to the success of any global treaty on forest management. The U.S. is a party to only one-third of existing international environmental agreements, and has failed to sign or ratify many significant international environmental treaties – including most recently the Kyoto

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<sup>59</sup> *Id.*

<sup>60</sup> Glück et al., *supra* note 54, at 55.

<sup>61</sup> David Humphreys, *The Politics of ‘Avoided Deforestation’: Historical Context and Contemporary Issues*, 10(3) THE INT’L FORESTRY REV. 433 (2008).

<sup>62</sup> Hudson, *supra* note 11, at 355.

<sup>63</sup> Scholz, *supra* note 42.

<sup>64</sup> Hudson, *supra* note 11, at 355.

Protocol.<sup>65</sup> Without uncompromised U.S. participation, however, a future treaty aimed at forest management will not materialize in a way that comprehensively and effectively addresses either the sustainable forestry or the carbon sequestration values of forests.<sup>66</sup>

The U.S. is one of the greatest emitters of industrial carbon emissions in the world, with the highest per capita emissions, and is already considering regulation of industrial carbon domestically. As a result, including forests in a post-Kyoto climate treaty would bolster carbon markets and potentially encourage the U.S. to join the next climate treaty. In past climate negotiations the U.S. sought carbon offsets, such as those potentially provided by forests, to reduce the economic burdens of potential international carbon emissions regulation.<sup>67</sup> In fact, the U.S. has included carbon offset mechanisms in various congressional domestic legislative carbon proposals.<sup>68</sup> Forests provide significant carbon offset potential that may be crucial to achieving U.S. cooperation on climate negotiations in the international arena.<sup>69</sup>

The U.S.'s participation and support is also recognized as a necessary part any future stand-alone forest treaty.<sup>70</sup> Scholars have focused on:

U.S. leadership in the international environmental policy arena, not only because of the U.S.'s economic size and influence but also because the U.S. has some of the most stringent environmental regulations in the world . . . [T]he U.S. is critical to an effective outcome in global environmental issue areas . . . [A] focus on the U.S. as a necessary member of the pro-[forest agreement] coalition is justified by the fact that the U.S. is likely to bear a far greater proportion - in absolute terms - of the cost of any measures required for manipulating effective agreement than any other single state.<sup>71</sup>

Even so, the U.S. has forged a "powerful veto coalition in opposition to any further internationally binding instrument" on forest management.<sup>72</sup> As previously noted, past U.S. opposition to a forest treaty had more to do with

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<sup>65</sup> Kuh, *supra* note 14, at 199. Though the U.S. signed the Kyoto Protocol, it never ratified it domestically.

<sup>66</sup> Hudson, *supra* note 11, at 356.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* See David M. Reiner, *Climate Impasse: How The Hague Negotiation Failed*, 43(2) ENVIRONMENT 36, 38 (2001).

<sup>69</sup> For discussion of the economic incentives provided by forests, see Davenport, *supra* note 24, at 123-124.

<sup>70</sup> Hudson, *supra* note 11, at 356.

<sup>71</sup> Davenport, *supra* note 24, at 110.

<sup>72</sup> Scholz, *supra* note 42, at 9.

domestic politics and national sovereignty<sup>73</sup> than with concerns over federalism, and the U.S. has yet to raise federalism as a potential restraint on its treaty power as justification for its failure to support a global treaty.<sup>74</sup>

This would not be the first time the U.S. has allowed domestic politics to inhibit it from taking a leadership role on a subject of international environmental concern, as past climate negotiations have been similarly affected. For example, during the Kyoto negotiations the U.S. insisted that participating countries be able to meet emissions reductions through flexible methods, such as the use of carbon sinks, in order to offset emissions. The EU coalition and other countries, however, supported “strict rules” to significantly reduce emissions.<sup>75</sup> Also, the U.S. demanded that developing countries be subject to emissions reduction requirements, as evidenced by the Senate’s passage of the Byrd-Hagel resolution, which demanded that developing countries be bound to the same degree as the developed world by any international climate agreement.<sup>76</sup>

The U.S.’s acute focus on flexibility has been criticized for contributing to Kyoto’s failure – though Kyoto did assign numbers for overall emissions reductions, it failed to specify the means by which reductions would be achieved, simply asserting that flexibility mechanisms would be “supplemental to domestic actions.”<sup>77</sup> Furthermore, the U.S.’s political stance that developing countries should have been subject to Kyoto ultimately led to the failure of the U.S. to ratify and implement the protocol domestically. Ultimately, despite international recognition that U.S. participation is crucial for the success of international environmental agreements, the U.S. has continued to allow domestic politics to impact its willingness to enter into agreements on both forests and climate.

### *C. Potential Effects of Federalism on U.S. Treaty Participation and Implementation*

Importantly, there is a key difference between the domestic *political* issues that hamstrung U.S. negotiators in both previous forest management and climate talks, which were largely ideological, and domestic issues that could potentially derail a future treaty including forest management – which have a *legal* basis. Future international efforts to secure and implement a global treaty aimed at forest management may fail because the U.S.’s very constitutional structure may hinder it from taking a leadership role. The U.S. faces an important domestic legal obstacle, largely ignored by scholarship on forest negotiations, that may impede its willingness and ability to participate in a global treaty on forest management. As further discussed in Section IV., there is great uncertainty regarding whether

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<sup>73</sup> *Id.*

<sup>74</sup> No such instances were found in the review of the literature.

<sup>75</sup> Reiner, *supra* note 68, at 38.

<sup>76</sup> S. Res. 98, 105th Cong. (1997) (S. Rep. No. 105-54).

<sup>77</sup> Reiner, *supra* note 68, at 39.



U.S. federalism impedes Congress's ability to implement binding, prescriptive land use regulations even if mandated by international treaty.<sup>78</sup> Indeed, the potential for management conflicts in the area of natural resources law arises directly out of a constitutional structure that is said to have "split the atom of sovereignty,"<sup>79</sup> and thus to have ignited a seemingly unending controversy over the proper division of regulatory authority between the state and federal governments – especially with regards to the scope of the treaty power.

How might this conflict potentially play out in the area of forest management? Suppose the U.S. enters into an international treaty that included prescriptive directives requiring Congress to pass implementing legislation that establishes nation-wide forest management mandates on public *and privately owned* lands – such as the establishment nationwide buffer zones in forested watersheds. The nature of the implementing legislation could effectively prohibit U.S. participation in the treaty because U.S. federalism divides land use regulatory authority between the federal and state governments.<sup>80</sup> This division of authority presents a unique problem in the U.S. because even though central governments own roughly 86% of the world's forests and wooded areas worldwide,<sup>81</sup> U.S. state and federal governments only own 40% of U.S. forestland. The remaining 60% of U.S. forestland is in private ownership. This public/private divide in the U.S. is a remarkable break from the global pattern of forest ownership. Furthermore, almost 89% of the timber harvested in the U.S. comes from private lands.<sup>82</sup>

In turn, private land use regulation is the primary purview of state governments, to exercise as a "police power" for protection of the "general welfare."<sup>83</sup> Certain police powers available to the states are not available to the federal government under the Constitution – the Tenth Amendment of the Constitution reserves for the states all powers not so delegated, and may act as a limit on Congress's regulatory authority, "particularly in traditional areas of state and local authority, such as land use."<sup>84</sup> Scholars have noted that "[t]he weight of

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<sup>78</sup> Hudson, *supra* note 11, at 356.

<sup>79</sup> U.S. Term Limits v. Thornton, 514 U.S. 779 (1995).

<sup>80</sup> In fact, though related more to political sovereignty than to concerns about federalism, the U.S.'s opposition to a forest convention in 1997 is partially explained by its concern that environmentalists would have too great an influence over the treaty and its "fears about environmental *requirements* finding their way into the agreement." GARETH PORTER, JANET W. BROWN, AND PAMELA S. CHASEK, *GLOBAL ENVIRONMENTAL POLITICS* 209 (Westview Press 2000) (emphasis added).

<sup>81</sup> Agrawal, *supra* note 55, at 1460.

<sup>82</sup> Yale School of Forestry and Environmental Studies Global Institute of Sustainable Forestry, Program on Private Forests, <http://research.yale.edu/gisf/ppf/index.html> (last visited, Mar. 13, 2010).

<sup>83</sup> See generally *Mugler v. Kansas*, 123 U.S. 623 (1887).

<sup>84</sup> James May, *Constitutional Law and the Future of Natural Resource Protection*, in *THE EVOLUTION OF NATURAL RESOURCE LAW AND POLICY* 124-161 (Lawrence J. MacDonnell and

legal and political opinion holds that this allocation of power in [the U.S.] leaves the states in charge of regulating how private land is used,”<sup>85</sup> and that “[l]and use law has always been a creature of state and local law.”<sup>86</sup> The landmark land use regulatory case of *Euclid v. Ambler Realty* has been described as a “sweeping paean to the supremacy of state regulation over private property.”<sup>87</sup> Most importantly, the U.S. Supreme Court has recognized “the States’ traditional and primary power over land . . . use,”<sup>88</sup> and that “regulation of land use . . . is a *quintessential* state and local power.”<sup>89</sup>

To be clear, private land use activities are *affected by* federal regulations passed by Congress under other sources of authority under the Constitution, such as the Commerce Clause or treaty-making power. A number of federal regulations have an *effect* on private landowner activities without violating the Tenth Amendment. Both the Endangered Species Act (ESA) and Clean Water Act (CWA), each passed pursuant to Congress’s Commerce Clause power, limit private property owners’ land use rights to a degree. Specifically with regard to forests, the ESA prevents certain landowner logging activities that might endanger or threaten species, and the CWA regulates “nonpoint” sources of water pollution arising out of logging activities.<sup>90</sup> Indeed, courts have rejected state Tenth Amendment challenges to Congressional authority to protect endangered species under the ESA,<sup>91</sup> fish under the Magnuson-Stevens Fishery Conservation and Management Act,<sup>92</sup> and air quality under the Clean Air Act.<sup>93</sup>

The effects of these federal acts on land use, however, are *tangential* to the primary purposes of the regulations, which are to protect endangered species, water and air quality, and other resources – not to directly govern how private lands containing forest resources are to be generally managed. Rather, states arguably maintain direct regulatory authority over private forest management activities, and are currently the regulatory bodies responsible for establishing

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Sarah F. Bates eds., Section of Environment, Energy, and Resources, American Bar Association 2009).

<sup>85</sup> JOHN R. NOLAN, PATRICIA E. SALKIN, AND MORTON GITELMAN, *LAND USE AND COMMUNITY DEVELOPMENT* 17 (Thomson/West 2008).

<sup>86</sup> Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 335 (2003).

<sup>87</sup> PAUL GOLDSTEIN AND BARTON THOMPSON, JR., *PROPERTY LAW: OWNERSHIP, USE AND CONSERVATION* 967 (Foundation Press 2006).

<sup>88</sup> *Solid Waste Agency of N. Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (citing *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1944), that “regulation of land use [is] a function traditionally performed by local governments.”).

<sup>89</sup> *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (emphasis added) (citing *FERC v. Mississippi*, 456 U.S. 742, 767, n.30 (1982), that “regulation of land use is perhaps *the quintessential* state activity.”)

<sup>90</sup> RASBAND ET AL., *supra* note 56, at 1308.

<sup>91</sup> *Wyoming v. U.S. Dep’t of the Interior*, 360 F. Supp. 2d 1214 (D. Wyo. 2005).

<sup>92</sup> *Connecticut v. United States*, 369 F. Supp. 2d 237, 241-42 (D. Conn. 2005).

<sup>93</sup> *Alaska Dep’t of Env’tl. Conservation v. U.S. Env’tl. Prot. Agency*, 540 U.S. 461 (2004).

stand density, reforestation and riparian buffer zone requirements, governing clear-cutting practices, and implementing a wide variety of other best management practices.<sup>94</sup> In fact, Congress itself has recognized the tangential effects on land use related to its regulation of other resources. For example, the CWA *explicitly* recognizes federalist limitations on its ability to regulate land use, as it states that “[i]t is the policy of Congress to recognize, preserve, and protect *the primary responsibilities and rights of States* to . . . plan the development and use (including restoration, preservation, and enhancement) of *land* and water resources.”<sup>95</sup>

Additionally, federal statutes may *influence* state regulation of forest management, as states may pass or modify state laws<sup>96</sup> for the purpose of meeting federal clean water and endangered species requirements. Even so, a review of U.S. judicial precedent and traditional accepted forest management practices may distinguish the *permissible*, tangential influencing effects of federal statutes on state regulations from potentially *impermissible* federal interference with primary state authority over forest management. Courts have recognized both the CWA and ESA as valid under the Commerce Clause, despite the limitations they impose on private land use.<sup>97</sup> The validity of private forest management at the federal level, however, has never been judicially tested, as the federal government has never attempted to directly regulate private forest management activities.<sup>98</sup> As noted above, courts have consistently recognized the “quintessential” authority of states to regulate land use, and just as with zoning authority established in *Euclid*,<sup>99</sup> forest management falls squarely within the realm of traditional land use activities regulated by the state. Due to lack of federal intent to regulate in the area of private forest management, courts have yet to extend application of the Commerce Clause to private forests. As such, it appears that the accepted practice of direct state regulation of private forest activities remains intact.<sup>100</sup>

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<sup>94</sup> See JAN G. LAITOS, SANDRA B. ZELLMER, MARY C. WOOD, AND DANIEL H. COLE, NATURAL RESOURCES LAW 849 (Thomson/West 2006). It should be noted that logging is only one activity potentially engaged in by forest owners. Non-industrial uses of private forests are even more clearly in the zone of power reserved to the states, as they are subject to state and local zoning and development laws. It seems clear that the federal government cannot establish zoning schemes for states or municipalities. Some municipalities even use zoning as a means of regulating land use related to forestry. For example, a Pennsylvania municipality’s zoning ordinance prohibits clearcutting of forests on tracts which are larger than two acres and on slopes greater than 15% (*Id.* at 871, citing Williams Township Zoning Ordinance § 1402.A.19).

<sup>95</sup> 33 U.S.C. § 1251(b) (emphasis added).

<sup>96</sup> For example, states may adjust riparian buffer zone regulations.

<sup>97</sup> See generally, GOLDSTEIN, *supra* note 87, at 1086-1102 (ESA) and RASBAND ET AL., *supra* note 56, at 826-827 and 853-865 (CWA).

<sup>98</sup> Hudson, *supra* note 11, at 357.

<sup>99</sup> Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

<sup>100</sup> Beyond the scope of this article is exploration of whether federal regulation of private forests could withstand judicial scrutiny under an expanded understanding of Commerce Clause

Also potentially affecting private land use activities are international treaties entered into by the federal government for the protection of certain natural resources – as demonstrated in the 1920 U.S. Supreme Court case of *Missouri v. Holland*,<sup>101</sup> discussed below. As noted below, however, *Holland* may be distinguishable on its facts, as the treaty at issue in that case, like the ESA and CWA, regulates resources tangentially related to the direct land use activities of private property owners. In addition, the federal government has never asserted, by treaty, authority over private forest management practices traditionally regulated by states.<sup>102</sup> In short, even though federal statutes and treaties may affect land use activities of private landowners, the federal government has never before attempted to directly regulate private forest management, and thus courts have never considered the validity of any federal attempts to do so.

Ultimately, because of U.S. federalism, the types of forest management directives that might arise out of either a post-Kyoto climate framework or a stand-alone forest treaty will impact the viability of the treaty within the U.S. and, equally as important, affect treaty formation in the first instance since participation of the U.S. in treaty negotiations is essential.<sup>103</sup> This is especially so since the U.S. has previously invoked federalism as a reason to avoid treaty formation in several other contexts. As noted by Professor Bradley, “in a number of instances in the late nineteenth and early twentieth centuries, U.S. officials declined to enter into negotiations concerning private international law treaties because of a concern that the treaties would infringe on the reserved powers of the states.”<sup>104</sup> In addition, even up until the time of *Missouri v. Holland* “U.S. representatives insisted that they could not agree to a treaty regulating certain labor conditions because those matters were within the reserved powers of the states. These states’ rights concerns continued to inhibit U.S. participation in private international law, labor, and other treaty regimes even after *Holland*.”<sup>105</sup>

Other scholars have noted that much more recently perceived federalism limitations have reduced U.S. bargaining power at the negotiating table by encouraging the U.S. to act in outright opposition to treaty formation, to seek exemptions in treaties that modify the obligations of states, or to provide concessions to the states in domestic implementation.<sup>106</sup> Ultimately, nations with

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jurisprudence – i.e. if forest products might be considered articles of “commerce . . . among the several states.” U.S. CONST. art. I, § 8, cl. 3.

<sup>101</sup> 252 U.S. 416 (1920).

<sup>102</sup> Hudson, *supra* note 11, at 357-358.

<sup>103</sup> *Id.* at 358.

<sup>104</sup> Bradley, *supra* note 14, at 131-132.

<sup>105</sup> *Id.* at 132.

<sup>106</sup> Swaine, *supra* note 1, at 410. Professor Swaine noted that based upon perceived federalism limits the U.S. flatly opposed the Convention on the Rights of the Child, sought treaty exemptions for the states with a variety of human rights treaties and the Agreement on Government Procurement, and provided concessions to the states in domestic implementation of trade matters like the Uruguay Round Agreements Act. *Id.* Professor Swaine noted that “recent

federal systems, like the U.S., “may decline altogether to enter into a treaty that poses a serious risk of conflict with their constitutions. At the domestic level, well-grounded constitutional principles may be insurmountable, as may more pedestrian limits imposed by legislation particular to the treaty.”<sup>107</sup> Thus, U.S. federalism is predisposed to conflict with principles of international law, not only in the negotiation of treaties, but perhaps more importantly in the implementation of treaties governing areas considered the subject of traditional state authority, like forest management. Because the U.S. has allowed federalism to limit its ability and willingness to participate in international treaties in the past, it is necessary to gain a complete understanding of the relationship between international law and federalism, and how to avoid conflicts between the two that may arise.

*D. International Law on Federalism – a Restraint on Treaty Participation?*

Federal government claims of domestic political restraints on treaty implementation are not limited to the U.S., but such claims gain particular traction when based upon entrenched constitutional grounds, as with the U.S. As Professor Swaine has noted, “[f]ederal states not infrequently seek broader concessions based on the political feasibility of national implementation, but the arguments that have had purchase are based on more genuine constitutional limits. Much the same may be said with respect to...outright refusals to participate based on federalism grounds.”<sup>108</sup> With the U.S.’s federalism principles embedded in the Constitution, and a long history of jurisprudence developing federalism’s scope, scholars have rightly questioned what would happen to U.S. treaty obligations if the U.S. Constitution indeed establishes federalism limitations on the treaty power.<sup>109</sup>

International law and U.S. constitutional law have been said to “exhibit a kind of passive hostility toward one another.”<sup>110</sup> From the perspective of international law, international law prevails over domestic legislation and constitutions. From the perspective of the U.S. legal system, however, international law cannot affect the operation of the Constitution, which “operates

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U.S. practices may persuade [the Supreme Court] to look more skeptically at the equivalence of a treaty and its legislative implementation...Congress did take specific steps to implement the Uruguay Round Agreements and NAFTA, but in each case pointedly impaired the effectiveness of the agreement for the states’ sake; in other matters, like the Agreement on Government Procurement, the United States more forthrightly negotiated internationally and domestically for purely voluntary subscription by American states.” *Id.* at 421.

<sup>107</sup> *Id.* at 462.

<sup>108</sup> *Id.* at 445-446.

<sup>109</sup> *Id.* at 449.

<sup>110</sup> *Id.*

as an absolute constraint on how U.S. obligations may be observed.”<sup>111</sup> The rules governing legal agreements among nations, addressing the “formation, application, interpretation, modification, termination, and validity of treaties,” are codified in the 1969 Vienna Convention on the Law of Treaties (Vienna Convention).<sup>112</sup> The Vienna Convention has been described as the “treaty on treaties.”<sup>113</sup> Article 27 of the Vienna Convention provides that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty,”<sup>114</sup> and this provision has been described as codification of a “preexisting principle of customary international law that makes no exception for federal states.”<sup>115</sup> In addition, Article 26 of the Vienna Convention states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>116</sup>

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<sup>111</sup> *Id.* Professor Hollis has described “the treaty” as “liv[ing] a double life. By day, it is a creature of international law, which sets forth extensive substantive and procedural rules by which the treaty must operate...By night, however, the treaty leads a more domestic life. In its domestic incarnation, the treaty is a creature of national law, deriving its force from the constitutional order of the nation state that concluded it. Within the United States, therefore, the Constitution governs. Just as we look to international law to discern treaty rules on the international plane, so too must we look to the Constitution for substantive or procedural rules by which the treaty functions within the U.S. legal system.” Hollis, *supra* note 14, at 1327-1328.

<sup>112</sup> DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* 156 (Harvard University Press 2010).

<sup>113</sup> *Id.*

<sup>114</sup> Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331, 339.

<sup>115</sup> Swaine, *supra* note 1, at 450.

<sup>116</sup> *See* Vienna Convention, *supra* note 114, at art. 26; *Id.* at art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”); Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, Annex, at 124, U.N. Doc. A/8082 (1970), reprinted in 9 I.L.M. 1292, 1297 (1970) (“Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.”). Professor Swaine has further elaborated that “[i]nternational lawyers and diplomats do not turn a blind eye toward the difficulties that federal governments may face, nor do they naively satisfy themselves with the prospect of remedies. Instead, international law addresses federalism indirectly through the meta-obligation of *pacta sunt servanda* – the fundamental principle that treaties are to be obeyed – and its corollary duty of good faith (to which I will refer, in the aggregate, as a duty of good faith)... This principle does a yeoman’s work in reconciling treaties with the realities of federalism. It supports, of course, the notion that a state’s international responsibilities prevail over any inconsistent domestic law. More particularly, it imposes an affirmative duty to bring internal legislation, at whatever level of government, into line with treaty obligations. Nations are unambiguously responsible for enacting domestic legislation necessary to implement their treaty obligations, and likewise cannot enforce laws that conflict with their international duties (or, of course, adopt any new laws of that character); if additional legislation is required because of some peculiarity of the nation’s domestic legal order, so be it. It follows that federal states are obliged to take legal action to preempt or otherwise disable inconsistent subnational law.” Swaine, *supra* note 1, at 453.



Ultimately, international law is supposedly “indifferent” toward federalism.<sup>117</sup> Arguments that a federal domestic governance structure provides an excuse for treaty noncompliance have been described as “heretical,”<sup>118</sup> because “a particular country’s constitutional difficulties are its own, and a choice in all events that is not to be visited upon the rest of the world.”<sup>119</sup> Despite international law’s seemingly stern outside-in perspective on federalism, however, the U.S.’s *inside-out* perspective is quite different – especially considering the rise of the new federalism. Scholars have argued that,

suggestions that international law might actually insinuate itself into the U.S. Constitution, particularly those provisions governing relations among domestic institutions, would surely be resisted....U.S. courts (usually) try to interpret statutes in conformity with treaty and other international obligations. But constitutional law, in the American system, is a different kettle of fish, and in U.S. courts even run-of-the-mill federal statutes – including those protecting state interests – may erase any undesired implications from international law. While Supreme Court justices occasionally preach the need to pay attention to the legal world outside U.S. borders, the Court’s case law seemingly limits international law’s potential relevance to the new federalism.<sup>120</sup>

The U.S.’s reluctance to allow international obligations to impact domestic governance actually merges fairly consistently with the true state of affairs in international law. In reality, though the position of international law relative to domestic constitutional federalism is stated in fairly stark terms, international law has in fact treated domestic constitutional law with greater deference.<sup>121</sup> As noted, accommodation is frequently made during negotiations for federal states that claim constitutional hurdles to treaty requirements, an occurrence that “reflect[s] a more general understanding that a party’s constitutional constraints are less tractable.”<sup>122</sup> Even *after* a treaty is formed, international law may concede to the federalist position. For example, as noted by Professor Swaine, the 1999 proceedings regarding two German nationals convicted of murder in Arizona, Karl and Walter LaGrand, were concluded by provisional order that sought to limit the U.S. and the state of Arizona’s death

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<sup>117</sup> *Id.* at 450.

<sup>118</sup> *Id.* at 452. Professor Swaine stated, however, that it “remains manifestly harder for federal governments to ensure compliance, and the abstract availability of remedies for noncompliance hardly makes up the difference.” *Id.*

<sup>119</sup> *Id.* at 451.

<sup>120</sup> *Id.* at 468-470.

<sup>121</sup> *Id.* at 456.

<sup>122</sup> *Id.* at 457.

penalty procedures as a violation of the Vienna Convention.<sup>123</sup> The U.S. argued that it could not intervene because its federal system imposed limits that designated such procedures the sole purview of the states, and thus not subject to the treaty.<sup>124</sup> The International Court of Justice (ICJ) ultimately issued an order finding that international law “did not require the United States to exercise powers it did not have, but rather established an obligation to take all measures at its disposal to prevent the German national’s execution prior to the Court’s final decision.”<sup>125</sup> Clearly, the powers that the U.S. was claiming it did not have in the LaGrand proceedings were powers that were instead reserved for the states under the Tenth Amendment (development of death penalty procedures), and protected by federalism principles.

The ICJ’s decision in the LaGrand proceedings actually follows quite naturally from the language of Article 26 of the Vienna Convention, providing that though international treaties are binding, they must be implemented by countries in “good faith.” This good faith provision, and the recognition by the IJC that nation states need not exercise powers they do not have within their domestic regulatory tool belt, is arguably an implicit recognition of the international community that treaties may be constrained by federalism. Furthermore, a “good faith,” rather than absolute, performance requirement is recognition of the difficulties in overcoming domestic constraints on treaties when there is no enforcement mechanism or when the compliance system of a treaty is non-binding (as is the case with the Kyoto Protocol).<sup>126</sup>

Ultimately, international law sends mixed messages regarding the legitimacy of claimed federalism constraints on domestic implementation of treaties. Though the Vienna Convention asserts that countries may not invoke provisions of internal law as justification for failure to perform treaty obligations, the Convention also requires only that binding treaties be carried out in “good faith,” which the ICJ has interpreted as an obligation to take only such measures as are “at the disposal” of the treaty-making branch of the nation’s government. Just as with the death penalty procedures at issue in the LaGrand proceedings, direct regulation of private land-use activities such as forest management is not a regulatory measure traditionally at the disposal of the U.S. federal government.

In the end, U.S. federalism may act as an “inside-out” domestic constraint on prescriptive “traditional governance” at both the national and international levels, just as do “outside-in” international negotiations noted by scholars.<sup>127</sup> Due to the U.S.’s past tendency of allowing federalism restraints inhibit it from

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<sup>123</sup> *Id.*

<sup>124</sup> [LaGrand Case \(F.R.G. v. U.S.\), 40 I.L.M. 1069, 1091 P95 \(June 27, 2001\)](#) (noting that U.S. pleadings were cited as a “constraining factor... the character of the United States of America as a federal republic of divided powers”).

<sup>125</sup> Swaine, *supra* note 1, at 457 (quoting LaGrand, *supra* note 124, at 1097).

<sup>126</sup> BODANSKY, *supra* note 112, at 86.

<sup>127</sup> See Hudson, *supra* note 11; Glück et al., *supra* note 53.

participating in international treaties, in order for international forest negotiations to result in a legitimate and effective treaty addressing forest management in the future – and one that can be constitutionally implemented in the U.S. – measures other than prescriptive, traditional governance regulatory methods will need to be explored.

*E. Avoiding Federalism Limits on U.S. Treaty Participation and Implementation*

Scholars have noted that a global treaty aimed at forest management activities would necessarily “mandate some degree of harmonization of forestry practices.”<sup>128</sup> If such a binding treaty provided prescriptive forest management directives at the national level, however, it would necessarily involve potentially unconstitutional regulation of private lands in the U.S., due to the large private ownership of forests.<sup>129</sup> The Intergovernmental Panel on Climate Change (IPCC) has highlighted several forest management goals that could be achieved through a prescriptive, “traditional governance” framework,<sup>130</sup> including “maintaining or increasing the forest area” and “maintaining or increasing stand-level carbon density.”<sup>131</sup> Though these goals can be accomplished by voluntary, market-based programs, the IPCC leaves unanswered the mechanism of implementation. Thus, it is feasible that an international treaty could require signatory nations to “increase and maintain forest area” by prescribing, for example, mandatory maintenance of partial forest cover on all forested lands, implementation of soil erosion reduction programs, or limitation of fertilizer use.<sup>132</sup> A likely response to

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<sup>128</sup> Ronnie D. Lipschutz, *Why is There No International Forestry Law?: An Examination of International Forestry Regulation, Both Public and Private*, 19 UCLA J. ENVTL. L. & POL’Y 153, 159 (2001).

<sup>129</sup> By way of hypothetical, a global governance scenario that required that “within x number of years, treaty participants must increase and maintain forest area by 25% and implement active carbon sequestration projects on 50% of their forested lands” may not be viable under the U.S. federal system, because the U.S. government would arguably not be able to ensure compliance with the mandate on even a majority of forested lands within its borders – as, again, federal ownership of forests in the U.S. is only 40%. State governments would claim sole authority to pass laws prescribing increased forest density on the remaining 60% of forests that are on private lands.

<sup>130</sup> Though climate negotiations are primarily concerned with forest carbon only, the IPCC’s findings are relevant to future UNFF negotiations, as the UNFF has also recognized the role of forest carbon in addressing climate change.

<sup>131</sup> Gert J. Nabuurs and Omar Masera, *Climate Change 2007: Mitigation, Chapter 9, Forestry 549, Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4-wg3-chapter9.pdf> (last visited Mar. 12, 2010).

<sup>132</sup> Hudson, *supra* note 11, at 358. As an example of how these results might be achieved, the IPCC has stated that “[f]orest management activities to increase stand-level forest carbon stocks

such a treaty would be constitutional challenges in the U.S., with both private forest owners and states challenging direct federal regulation of private and state-owned forestlands.<sup>133</sup> The federal government would then be unable to effectively implement the treaty throughout most of the U.S., since 60% of forests are owned by private landowners, constraining the U.S.'s ability to meet its treaty obligations.

If, however, as Professor Weinthal and I previously suggested, treaty negotiations aimed at forest management incorporate voluntary, market-based mechanisms, then these domestic treaty implementation complications disappear. Provision of voluntary programs would free the federal government from forcing private landowners to manage forests in a prescribed manner, which would in turn free the U.S. from potential federalism complications as it implements the treaty. For example, under a climate treaty the mandatory regulatory requirements required by an act of Congress implementing the treaty (i.e. carbon emissions reductions) would fall on industry emitters, not private landowners. Furthermore, both climate and stand-alone forest treaties would provide market incentives to private forest managers, as would any state regulation of forest management driven by the market. Forest certification,<sup>134</sup> REDD,<sup>135</sup> ecosystem service<sup>136</sup> and

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include harvest systems that maintain partial forest cover, minimize losses of dead organic matter (including slash) or soil carbon by reducing soil erosion, and by avoiding slash burning and other high-emission activities. Planting after harvest or natural disturbances accelerates tree growth and reduces carbon losses relative to natural regeneration. Economic considerations are typically the main constraint, because retaining additional carbon on site delays revenues from harvest. The potential benefits of carbon sequestration can be diminished where increased use of fertilizer causes greater N<sub>2</sub>O emissions." Nabuurs, *supra* note 131, at 551.

<sup>133</sup> Claims might also be brought under the Takings Clause of the Fifth Amendment, which grants protection for private property owners by establishing that property may not be taken by the government without "just compensation," though exploration of the potential success of such claims is beyond the scope of this article.

<sup>134</sup> As forest certification markets expand demand should increase for certified forest products originating from sustainably managed forests. Forest certification markets are especially important as other private forest markets are shrinking. For example, the U.S. pulp and paper industry has largely retreated overseas, and large paper companies are increasingly offloading landholdings in the U.S. As foresters seek to transition timber sales from the pulp and paper industry into sawmill markets, they should benefit from increasing demand for certified sawmill and lumber products.

<sup>135</sup> The inclusion of REDD programs into a future forest or climate treaty would be wise not only because such programs are voluntary for the participants, thus avoiding federalism concerns, but also because REDD programs are already under consideration for inclusion in a global treaty. In fact, the Rights and Resources Initiative has noted that "REDD emerged as one of the rare points of consensus from the confusion in Copenhagen." Rights and Resources Initiative Announcement on Fourth RRI Dialogue on Forests, Governance and Climate Change, April 6, 2010. Furthermore, REDD programs perhaps provide the most effective method – both practical and economic – of using forests to fight climate change. Scholars have noted that carbon sequestration potential of REDD projects is multiple times the potential of afforestation and reforestation projects. Myers, *supra* note 20, at 2. In addition, the IPCC found that "[r]educed deforestation and degradation is the forest mitigation option with the

largest and most immediate carbon stock impact in the short term . . . because large carbon stocks . . . are not emitted when deforestation is prevented.” Nabuurs, *supra* note 131, at 550. Due to the sheer magnitude of carbon that can be sequestered under REDD programs, and the corresponding increase in carbon credit investments made available by such programs, REDD programs provide significant economic incentives for private foresters to voluntarily participate. In fact, the UK government’s Stern Review on the economics of climate change recommended a greater focus on “non-energy emissions, such as avoiding deforestation.” NICHOLAS H. STERN, *THE ECONOMICS OF CLIMATE CHANGE* xii (Cambridge University Press 2006). The Kyoto Protocol’s Clean Development Mechanism allows for the generation of emissions credits for afforestation and reforestation projects, but not for programs aimed at reducing deforestation and degradation. Lars H. Gulbrandsen, *Overlapping Public and Private Governance: Can Forest Certification Fill the Gaps in the Global Forest Regime?*, 4(2) *GLOBAL ENVTL. POL.* 75 (2004). A shift is occurring, however, as current proposals suggest including REDD in a post-Kyoto agreement. Brian Murray and Lydia Olander, *A Core Participation Requirement for Creation of a REDD Market*, short policy brief from the Nicholas Institute for Environmental Policy Solutions (2008), available at <http://nicholas.duke.edu/institute/pb-redd.pdf> (last visited Mar. 13, 2010). At a REDD workshop in Cairns, Australia in 2007, numerous countries proposed mechanisms for incorporating REDD into future climate talks. Myers, *supra* note 20, at 18. Similarly, in 2005 Costa Rica and Papua New Guinea submitted a proposal on behalf of the Coalition for Rainforest Nations to give developing countries access to the carbon market through credits generated from REDD programs. *Id.* at 17-18. Also, at the Bali round of the UNFCCC in December 2007, delegates agreed to the “Bali Action Plan,” which was a decision on “[r]educing emissions from deforestation in developing countries” that “invited parties to reduce carbon emissions from forest degradation ‘on a voluntary basis’ in order to enhance forest carbon stocks in developing countries.” Humphreys, *supra* note 61, at 434. REDD programs would also compliment the US’s ever-developing movement toward a carbon cap-and-trade program, and, if it eventually occurs, could dovetail nicely into a climate change agreement facilitating voluntary landowner participation in forest management programs. The U.S. Congress has already considered integrating REDD into any potential national carbon market. As scholars have noted, “the international forest carbon provisions in the Lieberman-Warner America Climate Security Act (S.2191), [previously] under debate in the US Senate, . . . allocate[d] funds from allowance revenues to implement and develop REDD activities.” Murry, *supra*. The incentives for U.S. incorporation of REDD programs into a national climate policy are clear, as costs of climate change regulation could be greatly reduced by REDD. One study found that forest carbon, sequestered primarily through REDD activities, could “cut the cost of climate change policies in half and reduce the price of carbon by 40%.” Myers, *supra* note 20, at 25. In short, considering the potential value of REDD in reducing the cost of climate regulation, the inertia toward including REDD into any global treaty aimed at forest management and U.S. federalism’s effect on U.S. treaty participation and implementation, inclusion of REDD programs is clearly warranted.

<sup>136</sup> Foresters might receive significant payments from ecosystem service programs. Scholars note that “forests provide important and valuable ecosystem services, offering shelter and habitat for a vast array of plant and animal species, purifying water, sequestering carbon, and slowing rainfall to prevent flooding. Most of these services are ‘free,’ in the sense that they are not captured in markets. As a result, with no obvious economic value they have often been ignored in management decisions.” RASBAND ET AL., *supra* note 56 at 1206. The American Forestry Association estimates that “the average economic contribution of a single tree is \$73 in energy conservation, \$75 for erosion control . . . and \$50 for air pollution benefits. Over its lifetime, an average tree provides more than \$57,000 in environmental and economic benefits.” Mike McAliney, *Arguments for Land Conservation: Documentation and Information Sources for Land Resources Protection*, The Trust for Public Land, 1993, *see*

similar programs<sup>137</sup> would encourage private foresters to manage forests sustainably, as the economic benefits from participating in those markets are realized.<sup>138</sup>

Ultimately, an improved carbon market providing greater participation of forest owners in carbon credit-generating REDD-type programs, forest ecosystem service markets capturing watershed, air quality, biodiversity and other values,

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[http://www.tpl.org/tier3\\_cd.cfm?content\\_item\\_id=1080&folder\\_id=726](http://www.tpl.org/tier3_cd.cfm?content_item_id=1080&folder_id=726). As an example, a soil stabilization and erosion control project undertaken in Tucson, Arizona planted 500,000 mesquite trees that reduced surface water runoff that would otherwise have required the construction of \$90,000 worth of detention ponds. Similarly, forest managers might receive payment for the provision of air quality services, as urban forest programs seek to remove particulate matter from the air through forestry. The same mesquite trees in Tucson, once they reach maturity, will remove 6,500 tons of particulate matter annually. Since Tucson spends \$1.5 million on an alternative dust control program, the air quality value of each tree is significant. RASBAND ET AL., *supra* note 56, at 1207-1208. As another example of the value of the forest in this regard, “45 percent of the total water runoff in California is estimated to originate on national forests . . . The value of water flowing from national forests, in both offstream and instream uses, is conservatively estimated to be at least \$3.7 billion per year.” United States Department of Agriculture, Forest Service, *2000 RPA Assessment of Forest and Range Lands* 63, available at <http://www.fs.fed.us/pl/rpa/rpaasses.pdf> (last visited Mar. 13, 2010). The South Coast Air Quality Management District asserts that a total of 300 trees “can counter balance the amount of pollution one person produces in a lifetime.” John McCaul, *Living in Los Angeles County - The Role of Recreational Opportunities in Assuring the ‘Quality of Life’ and Long-term Economic Health of the County, The Trust for Public Land*, 1990, see [http://www.tpl.org/tier3\\_cd.cfm?content\\_item\\_id=1080&folder\\_id=726](http://www.tpl.org/tier3_cd.cfm?content_item_id=1080&folder_id=726). One study found that 120 acres of canopy tree cover in an urban area can absorb up to 5.5 pounds of carbon monoxide, 127 pounds of sulfur dioxide, 24 pounds of nitrogen dioxide, and 170 pounds of particulates per day. Trees in a 525 acre area of the city of Chicago had an annual air pollution mitigation value equivalent to around \$25,000 as compared to other air pollution controls. McAliney, *supra*. In short, there is money to be saved, and made, by foresters participating in market based ecosystem service programs.

<sup>137</sup> Outside the scope of this article is a thorough description of the operation of these programs. For background on forest certification programs, see Gulbrandsen, *supra* note 135; Graeme Auld, Ben Cashore, and Deanna Newsom, *Perspectives on Forest Certification: A Survey Examining Differences Among the U.S. Forest Sectors’ Views of Their Forest Certification Alternatives*, in *FOREST POLICY FOR PRIVATE FORESTRY* (CAB International 2002); Andrew Long, *Auditing for Sustainable Forest Management: The Role of Science*, 31 COLUM. J. ENVTL. L. 1 (2006). For background on ecosystem service programs, see Sara J. Scherr and Alejandra Martin, *Developing Commercial Markets for Environmental Services of Forests*, Katoomba Workshop II Proceedings and Summary of Key Issues (2000) available at [http://www.katoombagroup.org/documents/events/event4/bc2000\\_proceedings2.pdf](http://www.katoombagroup.org/documents/events/event4/bc2000_proceedings2.pdf) (last visited Mar. 13, 2010); Alicia Robbins, *Ecosystem Services Markets*, discussion paper for “Saving Washington’s Working Forest Land Base” forum (2004), available at <https://digital.lib.washington.edu/dspace/bitstream/handle/1773/2244/tp12.pdf?sequence=1> (last visited Mar. 13, 2010). For background on REDD programs, see Myers, *supra* note 20. Though REDD programs have heretofore been aimed at the developing world, REDD provides a model of the type of market-based mechanisms that could be implemented in the U.S. in order to avoid federalism issues under a treaty that includes global forest management.

<sup>138</sup> Hudson, *supra* note 11, at 359.

and a more well-developed forest certification market could “fill an increasing void in the portfolios of private forest managers in the U.S. and at the same time induce behavioral change in forest management that will have a positive environmental impact.”<sup>139</sup> Because U.S. federalism “acts as a legal constitutional driver for decentralization and the use of bottom-up mechanisms,” market-based programs that “allow the participation of a wide range of public, private, international and local stakeholders” should be promoted and implemented.<sup>140</sup>

The utilization of forest management as a solution to climate change is crucial. In order to adequately address climate change, and to capture the multiple other ecosystem service values provided by sustainable forestry, the domestic legal structures of key participants in global environmental negotiations must be taken into account when crafting binding treaties aimed at forest management.<sup>141</sup> Because the U.S. has been targeted both as a key component of successful binding global forest governance and blamed for the recent failures of treaty formation, the federalism question will need to be considered. Failure to do so might lead to negotiations supporting top-down, prescriptive regulations, which would leave the U.S. unable to act. The next section considers U.S. federalism’s effect on the U.S. government’s treaty power in the context of forest management, and demonstrates that the highly contentious and unresolved nature of the debate lends further support for the conclusions proposed by this article.

#### IV. AN UNENDING CONTROVERSY – DOES FEDERALISM LIMIT THE TREATY MAKING POWER?

##### A. *Setting the Stage*

The previous sections have discussed how climate change offers a new opportunity to achieve binding global governance of forests as well as the role of the U.S. as a potential federalist veto player. Regarding the latter, the article analyzed the political science driving federalism’s effects on the formation of a treaty aimed at forests, the importance of the U.S. to treaty formation, the potential limiting effects of U.S. federalism on treaty creation and domestic implementation, how international law would view such effects, and how to avoid those effects during global forest treaty negotiation. During the foregoing analysis, however, the article necessarily presumed that federalism would in fact have a limiting effect on the treaty power. This section turns to the resolution of this question, or more accurately whether, based upon scholarly interpretations of constitutional law generally, and *Missouri vs. Holland* specifically, there is likely to be a resolution to this question in the foreseeable future.

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

During one of the most prominent scholarly skirmishes on the scope of the treaty power, which took place in the *Michigan Law Review* at the beginning of the decade, Professor Golove provided an accurate and useful summary of the nature of the debate:

Characteristic of the most enduring constitutional controversies is a clash between fundamental but ultimately irreconcilable principles. Unable to synthesize opposing precepts, we visit and revisit certain issues in an endless cycle. Each generation marches forward heedless, and sometimes only dimly aware, of how many times the battle has already been fought. Even the peace of exhaustion achieves only a temporary respite. The abiding controversy over the relationship between the treaty power of the national government and the legislative powers of the states is paradigmatic in this respect... [T]he issue has been among the most passionately disputed questions in our constitutional history. Although temporarily in hibernation, it threatens presently to break out again into full-blown conflict. Can the federal government enter into treaties on subjects that are otherwise beyond Congress's legislative powers?<sup>142</sup>

Golove's not so veiled exasperation with this question was a response to an article by Professor Bradley titled "The Treaty Power and American Federalism,"<sup>143</sup> in which Bradley argued that the treaty-power is not unlimited in scope, and could be restrained by federalism principles.<sup>144</sup> Bradley's article was an evaluation of the nationalist position on the treaty power, which, based largely on *Missouri v. Holland*, rejects both the idea that the Tenth Amendment placed any restrictions on the treaty power, as well as the notion that there were any subject matter limitations upon the treaty power.<sup>145</sup> Bradley "question[ed] the nationalist view," asserting that the treaty power "is a power to make supreme federal law. If such law can be made on any subject, without regard to the rights of the states, then the

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<sup>142</sup> Golove, *supra* note 15, at 1076.

<sup>143</sup> Bradley, *supra* note 14.

<sup>144</sup> See generally, *Id.*

<sup>145</sup> *Id.* at 393-394 (noting that "[t]he nationalist view has been endorsed by a number of prominent foreign affairs commentators, as well as by the influential Restatement (Third) of the Foreign Relations Law of the United States...the nationalist view of the treaty power has two components. First, largely on the basis of the Supreme Court's decision in *Missouri v. Holland*, it generally is understood today that 'the Tenth Amendment, reserving to the several States the powers not delegated to the United States, does not limit the power to make treaties or other agreements.' Second, while it 'was once widely accepted' that treaties could be made only with respect to matters of 'international concern,' most commentators today either disagree with such a limitation or assume that it is insignificant, given that most matters upon which treaties are likely to be concluded can plausibly be characterized as of international concern.").



treaty power gives the federal government essentially plenary power vis-à-vis the states. Such plenary power, however, is exactly what American federalism denies.”<sup>146</sup>

Bradley argued that if federalism means anything under past or current understandings of constitutional law – i.e. the new federalism – then the treaty power should not be given special immunity from federalism limitations.<sup>147</sup> Other scholars have made similar arguments.<sup>148</sup> Bradley ultimately argued that the treaty power should be subject to the same federalism limitations that apply to Congress’s legislative powers, with the result that “the federal government should not be able to use the treaty power...to create domestic law that could not be created by Congress.”<sup>149</sup> Professor Swaine agreed, stating that the Supreme Court may be able to “humble *Holland* without overturning it. It might adopt the presumption, for example, that neither treaties nor their domestic implementation were intended to exceed the federal government’s legislative authority...a presumption that treaties ought not be construed in excess of otherwise applicable limits on the national government’s power...has precedent.”<sup>150</sup> Given the new federalism, the interpretation that the federal government’s treaty power cannot exceed Congress’s authority to legislate pursuant to its other constitutional powers would put federal management of land use activities like forestry in serious doubt.

The new federalism that arose in the 1990’s included a number of cases where the Supreme Court, for the first time since 1937, limited the scope of Congress’s domestic powers, and correlatively protected states’ rights and the

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<sup>146</sup> *Id.* at 394. Bradley stated that “...we must decide whether federalism is worth preserving. If it is, the nationalist view of the treaty power should be reconsidered.” *Id.* at 461.

<sup>147</sup> *Id.* at 394. (stating that “[m]y argument is simply that if federalism is to be the subject of judicial protection – as the current Supreme Court appears to believe – there is no justification for giving the treaty power special immunity from such protection. My argument is one against treaty power exceptionalism, not necessarily one in favor of federalism.”).

<sup>148</sup> Swaine, *supra* note 1, at 474-475 (stating that federalism limits “might leave the United States with a gap between its international treaty obligations and its ability to implement them, and that gap may be relatively more difficult for the government to fill.... If the national government is indeed supposed to be a creature of limited authority, shouldn't the treaty power enjoy boundaries just like any other?”). See also Kuh, *supra* note 14; Rosenkranz, *supra* note 14; Hollis, *supra* note 14.

<sup>149</sup> Bradley, *supra* note 14, at 450. Bradley stated that the treaty power should be subject “to the same federalism restrictions that apply to Congress’s legislative powers. Under this approach, the treaty power would not confer any additional regulatory powers on the federal government, just the power to bind the United States on the international plane. Thus, for example, it could not be used to resurrect legislation determined by the Supreme Court to be beyond Congress’s legislative powers, such as the legislation at issue in the recent *New York*, *Lopez*, *Boerne*, and *Printz* decisions. As mentioned above, this approach was endorsed by George Nicholas during the Virginia Ratifying Convention, Thomas Jefferson in his *Manual on Parliamentary Practice*, and the Supreme Court in its 1836 decision, *New Orleans v. United States*. It also is essentially the law in Canada, where the treaty power has been construed not to give the national government legislative power over matters reserved to the provinces.” *Id.* at 456.

<sup>150</sup> Swaine, *supra* note 1, at 422.

traditional subjects of state regulatory authority under the Tenth Amendment.<sup>151</sup> The Supreme Court, in *New York v. United States*,<sup>152</sup> *U.S. v. Lopez*,<sup>153</sup> *City of Boerne v. Flores*,<sup>154</sup> *Printz v. U.S.*,<sup>155</sup> and *U.S. v. Morrison*<sup>156</sup> invoked federalism principles to strike down federal statutes. In *New York*, the Court found the statute invalid because it was “inconsistent with the federal structure of our Government established by the Constitution,”<sup>157</sup> while the Court in *Printz* found the statute invalid because it “compromised the structural framework of dual sovereignty.”<sup>158</sup> Furthermore, in the Court’s subsequent unanimous decision in

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<sup>151</sup> Rosenkranz, *supra* note 14, at 1936.

<sup>152</sup> 505 U.S. 144 (1992) (invalidating a federal statute that effectively compelled state disposal of radioactive waste).

<sup>153</sup> 514 U.S. 549 (1995) (invalidating a federal statute criminalizing the possession of firearms near school zones).

<sup>154</sup> 117 S. Ct. 2157 (1997) (invalidating a federal statute for exceeding Congress’s powers under the 14<sup>th</sup> Amendment).

<sup>155</sup> 117 S. Ct. 2365 (1997) (invalidating a federal statute requiring state law enforcement officials to conduct background checks on handgun purchasers).

<sup>156</sup> 529 U.S. 598 (2000) (invalidating a federal statute providing a civil remedy to victims of gender-based violence, even when no criminal charges were filed).

<sup>157</sup> 505 U.S. at 177.

<sup>158</sup> 117 S. Ct. at 2383. Bradley noted that “[i]t was obvious by [*Printz*] that the Court was treating the Tenth Amendment (broadly defined) as a restraint on delegated powers. Indeed, two concurring justices, including the author of the earlier *New York* decision, stated this expressly.” Bradley, *supra* note 14, at 115. Another scholar has noted about *Printz*: “The Court[.]...asked whether the Act was consistent with the structure of the Constitution. In this section, the Court discussed the nature of federalism and emphasized the ‘residuary and inviolable sovereignty’ of the states. This sovereignty, the Court asserted, is implicit in numerous provisions of the Constitution and explicit in the Tenth Amendment. The Court did not focus on the scope of the Commerce Clause to determine where federal power began and state sovereignty ended. Instead, it inferred a zone of state sovereignty based on the constitutional provisions cited by Justice Scalia and on the Framers’ intent. ‘The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.’ The Court also rejected the federal government’s contention that Congress’s power to regulate handguns under the Commerce Clause, coupled with the Necessary and Proper Clause, established the Brady Act’s constitutionality. ‘When a ‘La[w] . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier . . . it is not a ‘La[w] . . . proper for carrying into Execution the Commerce Clause . . . .’ Here again, it is difficult to see how the Court’s conclusion would change if the Brady Act were based on a treaty. Unlike in *New York*, the Court did not base its conclusion on the boundaries of the Commerce Clause. So one cannot say that while the commerce power extends to point A, the treaty power might extend further to point B. Instead, the Court independently identifies point X – the line of state sovereignty – and declares that federal action past this point is impermissible. One might suggest that the Court would move point X for prudential reasons if the treaty power were invoked, but there is no indication of such flexibility in the Court’s opinion. Indeed, it declares that protecting state sovereignty is essential to preserving liberty. It would seem difficult for the Court to surrender that sovereignty simply because Congress was clever enough to package the Brady Act in a treaty.” Thomas Healy, Note, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726, 1739-1740 (1998).

*Reno v. Condon*, the Court stated that “[i]n *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.”<sup>159</sup>

Though this shift in the Supreme Court’s perspective on domestic federal authority might seem a victory for those supporting federalism principles, Bradley warned that the Supreme Court’s reassertion of federalism protections “is likely to increase the importance of the scope of the treaty power. If the treaty power is immune from federalism restrictions, as the nationalist view maintains, then it may be a vehicle for the enactment of legislative changes that fall outside of Congress’s domestic lawmaking powers.” Once again, Professor Swaine agreed, stating that “[t]he new federalism decisions also invite fresh scrutiny of the treaty power by encouraging its creative use to circumvent federalism restrictions.”<sup>160</sup> Swaine cited scholars arguing that the statutes struck down in *City of Boerne* and *Morrison* could (and should) be effectively re-enacted if legislated pursuant to an international treaty.<sup>161</sup> Both the Clean Water Act and the Endangered Species Act have received similar attention, as scholars have asserted that potential “as applied” constitutional challenges to these acts could be rendered moot if the resources in question were protected pursuant to an international treaty.<sup>162</sup> Nonetheless, “[b]ecause such arguments rely on an apparent inconsistency between *Holland* and the new federalism, they arguably increase its vulnerability to being reinterpreted, narrowed, or overruled.”<sup>163</sup>

Professor Kuh framed the balance between the new federalism and treaty power more directly, and assessed “how the treaty power will be recast in a manner consistent with the Supreme Court’s revitalized approach to

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<sup>159</sup> 528 U.S. 141, 149 (2000).

<sup>160</sup> Swaine, *supra* note 1, at 417.

<sup>161</sup> *Id.* at 417. See also Bradley, *supra* note 14, at 100 (noting that in *Morrison* “a group of international law scholars filed an amicus curiae brief arguing that, even if the statute exceeded Congress’s powers (as the Supreme Court ultimately concluded), it should be upheld as a valid implementation of a treaty.” See, Brief of Amici Curiae on Behalf of International Law Scholars and Human Rights Experts in Support of Petitioners at 28-30, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-0005, 99-0029)).

<sup>162</sup> Kuh, *supra* note 14, at 173-174 (noting that “[a]lthough the Supreme Court did not reach the issue, commentators on the SWANCC decision have suggested that the treaty power provides a ground independent of the Commerce Clause for upholding the constitutionality of the CWA’s reach to include isolated, intrastate water bodies. Gavin R. Villareal and Omar N. White have evaluated (in separate articles) the possibility of employing the treaty power to support the ESA,” and citing Stephen M. Johnson, *Federal Regulation of Isolated Wetlands After SWANCC*, 31 ENVTL. L. REP. (ENVTL. L. INST.) 10669 (June 2001); Gavin R. Villareal, *Note: One Leg to Stand On: The Treaty Power and Congressional Authority for the Endangered Species Act After United States v. Lopez*, 76 TEX. L. REV. 1125 (1998); Omar N. White, *The Endangered Species Act’s Precarious Perch: A Constitutional Analysis Under the Commerce Clause and the Treaty Power*, 27 ECOLOGY L.Q. 215 (2000).).

<sup>163</sup> Swaine, *supra* note 1, at 417.

federalism.”<sup>164</sup> Professor Kuh stated that the nationalist view of the treaty power as unlimited in scope “ignores both historical uncertainty about the bounds of the treaty power as well as new legal scholarship questioning the continued vitality of strong versions of the treaty power in light of the Supreme Court’s recent federalism jurisprudence.”<sup>165</sup> Professor Kuh argued that the holding in *Missouri v. Holland*, to the extent that it is interpreted by the nationalist camp as immunizing the treaty power from the constraints of the Tenth Amendment, may be called into question given the new federalism jurisprudence of the Court.<sup>166</sup> She ultimately concluded that “as scholars undertake critical examinations of the treaty power, they will generally agree that some type of limitation on the treaty power is imminent and/or warranted...[A]rticulation of a limitation on the nationalist view of the treaty power is both inevitable and advisable.”<sup>167</sup>

Professor Golove responded rather forcefully to what he viewed as misguided new federalism reinterpretations of the nationalist perspective on the treaty power.<sup>168</sup> In Golove’s view, the question was simply a matter of whether the treaty power was an independently granted “delegated” power to the national government, taking it outside any restrictions generated by the Tenth Amendment.<sup>169</sup> Golove answered in the affirmative. Furthermore, Golove took issue with Professor Bradley’s interpretation of constitutional history relied upon by the nationalist view, asserted that Bradley’s view was “entirely unwarranted,” and argued that it is actually “the states’ rights view that must stretch for historical validation.”<sup>170</sup> The tense disconnect between the two camps was apparent as Golove accused Bradley of deflecting and ignoring contrary precedents, and found Bradley’s approach “particularly inadequate” and “entirely without support

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<sup>164</sup> Kuh, *supra* note 14, at 175.

<sup>165</sup> *Id.* at 177.

<sup>166</sup> *Id.* at 180.

<sup>167</sup> *Id.* at 180-181.

<sup>168</sup> Golove stated that “[g]iven a seven-to-two decision rendered by a Court well known for its sensitivity to federalism concerns – a decision that has been on the books for eighty years, repeatedly reaffirmed and never questioned by the Court, and the object of a highly publicized but failed effort to amend the Constitution – it is difficult to see what justification there could be now for overruling such a venerable decision. Yet, that is precisely what Professor Curtis Bradley forcefully advocated in *Treaty Power and American Federalism*, recently published in this Review.” Golove, *supra* note 15, at 1079.

<sup>169</sup> *Id.* at 1087-1088. Golove expounded that, “[u]nder this view – the nationalist view – the treaty power is the same as any of the other enumerated powers, except that it is granted to the President and Senate in Article II, rather than to Congress in Article I. In contrast, the states’ rights view, at least in its most plausible formulation, denies that the treaty power is, in the relevant sense, ‘delegated.’ Rather, it is just another method for exercising the powers given to the national government in Article I.” *Id.* at 1088.

<sup>170</sup> *Id.* at 1278.

in the Constitution.”<sup>171</sup> Golove also found “unpersuasive” Bradley’s contention that the treaty power would be virtually unlimited without federalism restraints.<sup>172</sup>

Bradley counterpunched even more forcefully, describing portions of Golove’s analysis as “polemical and exaggerated in tone and substance.”<sup>173</sup> Bradley claimed that Golove inhibited debate on the scope of the treaty power by “largely fail[ing] to engage” his critique. Also, Bradley stated that Golove’s analysis “reflects a false assumption about the views of other foreign affairs scholars” and that it “more importantly, lacks any meaningful content.”<sup>174</sup> Bradley asserted that Golove, while purportedly accepting the new federalism, provided analysis that is “inconsistent” with the decisions upon which new federalism is based.<sup>175</sup> Finally, Bradley was particularly critical of Golove’s historical analysis, finding it to be “methodologically inconsistent and tendentious.”<sup>176</sup> Even more pointedly, Bradley asserted that “[a] central complaint about the use of history by legal academics (and judges) is that it is shaped and twisted in order to support a particular conclusion. It is in this sense that, notwithstanding its length, Golove’s historical discussion may be considered law office history.”<sup>177</sup>

Ultimately, this scholarly skirmish demonstrates – at the very least – that the issue of whether federalism places limits on the treaty power is highly contentious among prominent scholars, and is as of yet unresolved. As Professor Bradley stated,

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<sup>171</sup> *Id.* at 1278-1279.

<sup>172</sup> *Id.* at 1287.

<sup>173</sup> Bradley, *supra* note 14, at 98.

<sup>174</sup> *Id.* at 99.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* Bradley stated that “Golove’s article...is off-track right from the beginning...it is plagued by methodological inconsistencies, and the tendentious and exaggerated way in which it is presented undermines its reliability.” *Id.* at 132-133. Notably, Bradley argued that Golove “overstates the degree to which Supreme Court precedent resolved the treaty power issue prior to *Holland*. Most of the decisions Golove cites as ‘affirming the nationalist view’ simply held that valid treaties preempt inconsistent state law.” *Id.* at 130.

<sup>177</sup> *Id.* at 124. Bradley also expressed strong disagreement to Golove’s argumentation style, noting that “Golove frequently attaches his own pejorative labels to anyone who has argued for limits on the treaty power. For example, he states that the citizens of South Carolina were not engaging in ‘[r]ational discussion’ when they disagreed with the views of one Supreme Court Justice (William Johnson) concerning the scope of the treaty power; refers to arguments for restrictions on the treaty power as ‘states’ rights dogmas’; and says that efforts in the 1950s to limit the treaty power by constitutional amendment (efforts that received the support of the American Bar Association and many Senators) were ‘shameful’ and involved ‘virtual fanatics.’ Similarly, Golove often attempts a guilt-by-association strategy, suggesting linkages (often no more than temporal) between arguments for a limited treaty power and pernicious practices such as slavery and racial segregation.” *Id.* at 125.

The scope of the treaty power has been debated numerous times throughout this nation's history. The issue has resurfaced in recent years for a number of reasons, including the Supreme Court's revitalization of federalism restraints in the domestic arena and an expansion in the scope and range of U.S. treaty-making... Golove's article fails to appreciate the legitimate reasons why the treaty power question has been a persistent feature of American political and legal discourse, and why, in this age of globalization, the question once again merits our attention.<sup>178</sup>

This constitutional uncertainty alone is arguably enough to discourage the U.S. from supporting a forest management treaty that would raise such debatable federalism concerns. The next section, however, turns to *Missouri v. Holland*, assesses it in the context of the recent scholarly debates on the scope of the treaty power, and analyzes where land use activities, like forest management, fall along the spectrum of the treaty power's scope. The next section also analyzes an alternative treaty power limitation put forth by Professor Hollis, arising out of the executive branch, that could complicate forest treaty formation even if the judiciary ultimately refuses to revisit *Missouri v. Holland*.

*B. Missouri v. Holland – Death by Judicial Review or Executive Federalism?*

Scholars have described *Missouri v. Holland* as the “benchmark” for the Treaty Clause authority of the federal government to regulate certain natural resources,<sup>179</sup> and “perhaps the most famous and most discussed case in the constitutional law of foreign affairs.”<sup>180</sup> Importantly, scholars have observed that *Holland* “is in deep tension with the fundamental constitutional principle of enumerated legislative powers, and it is therefore of enormous theoretical importance.”<sup>181</sup> The following review of *Holland* is not meant to attempt a resolution of the constitutional questions presented, but rather to demonstrate that the debatable nature of the case's precedential value creates even more uncertainty regarding federalism's potential limits on the treaty power – thus advancing this article's argument that such federalism complications should be avoided.

The events giving rise to *Holland* arose out of a December 8, 1916 treaty between the United States and Great Britain recognizing that “many species of birds in their annual migrations traversed many parts of the United States and of

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<sup>178</sup> *Id.* at 132.

<sup>179</sup> LAITOS, *supra* note 94, at 1200-1201.

<sup>180</sup> LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 190 (Oxford University Press, 2d ed. 1996).

<sup>181</sup> Rosenkranz, *supra* note 14, at 1869.

Canada . . . were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection.”<sup>182</sup> The two countries agreed to pass domestic conservation legislation to implement the treaty. To that end, the U.S. passed the Migratory Bird Treaty Act (MBTA) to prohibit the killing, capturing or selling of any migratory birds covered by the treaty.<sup>183</sup> The state of Missouri challenged a U.S. game warden’s authority to enforce the MBTA, arguing the act was unconstitutional as an interference with the rights reserved to the states under the Tenth Amendment. Missouri also asserted the tradition of state control over wildlife to support its claim. In response, the federal government argued the statute was valid under the treaty-making power granted to it by the Constitution.<sup>184</sup>

The Supreme Court began its analysis<sup>185</sup> by noting that Article II of the Constitution expressly delegates authority to the federal government to create treaties. Furthermore, the Court noted that Article VI declares that treaties are made under the “authority of the United States,” and federal laws passed under the Constitution are the supreme law of the land. The Court found that “[i]f the treaty is valid there can be no dispute about the validity of the [MBTA] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.”<sup>186</sup> The Court found that the MBTA did not contravene any specific portion of the Constitution, and thus was valid - *unless* it was prohibited by the Tenth Amendment under the facts of the case. The Court stated that “[t]he language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed,”<sup>187</sup> and that “[n]o doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power . . . it only remains to consider the application of established rules to the present case.”<sup>188</sup>

Scholars have largely assumed that the Court’s analysis stopped at a review of the “treaty power.”<sup>189</sup> If so, this fact would argue in support of the U.S.

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<sup>182</sup> *Missouri*, 252 U.S. at 431.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 432.

<sup>185</sup> Justice Oliver Wendell Holmes, Jr. delivered the opinion.

<sup>186</sup> *Missouri*, 252 U.S. at 432.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 434-435.

<sup>189</sup> *See*, Rosenkranz, *supra* note 14, at 1886-1888 (stating “The treaty power is somewhat analogous, textually and structurally, to the legislative power vested in the Congress by Article I, Section 1. Textually, the phrase ‘legislative Powers’ in Article I may be paraphrased as the ‘power to make laws,’ which is parallel to the Article II ‘Power . . . to make Treaties.’ Structurally, both powers may be used to create ‘supreme Law of the Land.’ And if the legislative power is analogous to the treaty power, then a statute is analogous to a treaty. A statute, like a treaty, is not itself a ‘Power[] vested by th[e] Constitution’; rather, like a treaty, it is the fruit of the exercise of



federal government's authority to enter into an international agreement imposing domestic restrictions on forest management practices on private lands. However, the Court's subsequent Tenth Amendment analysis, *as applied to the specific facts of Holland*, makes this assertion less clear, especially when the resource in question is private forestlands.<sup>190</sup> For example, the Court noted that "wild birds are not the possession of anyone . . . [t]he whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away."<sup>191</sup> Thus, the *migratory nature* of the resource weakened the state's claim of sole regulatory authority over them. In other words, because the MBTA involved a resource that moved across international boundaries, Congress could enter into a treaty to regulate the resource without violating the "general terms of the Tenth Amendment."<sup>192</sup>

The Court also invoked the national interest at stake as support for finding no Tenth Amendment restraint on the federal government's legislative authority:

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one such power – in this case, the legislative power vested in the Congress by Article I, Section 1. Yet it has never been suggested that because Congress has power to make all laws which shall be necessary and proper for carrying into execution the 'legislative Powers' of Article I, Section 1, it thus has power to make laws necessary and proper for carrying into execution the fruits of the exercise of such powers, which is to say, other statutes.... Yet this is precisely analogous to the implicit logic of *Missouri v. Holland*. Justice Holmes and the few scholars to have considered the question have implicitly assumed that a law implementing a non-self-executing treaty that has already been made would somehow fit the bill as a 'Law[] which shall be necessary and proper for carrying into Execution . . . [the] Power . . . to make Treaties.' The error stems, perhaps, from a failure to quote the relevant clauses. Or perhaps it stems from the coincidental echo of the word 'execution' in the Necessary and Proper Clause and in the doctrine of non-self-executing treaties. At any rate, as noted at the outset of this Article, Justice Holmes contented himself with just a single conclusory sentence: 'If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government'." )

<sup>190</sup> Importantly, the Court stated: "We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . ." *Missouri*, 252 U.S. at 433. In addition, it is unclear that the Court today would even consider the facts of *Holland* under the treaty-making power, as "since 1937 the Supreme Court's broad reading of the Commerce Clause as a source of congressional power has led to more reliance upon it to uphold federal regulation of wildlife." GEORGE C. COGGINS, CHARLES F. WILKINSON, JOHN D. LESHY, AND ROBERT L. FISCHMAN, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 178 (Foundation Press 2007). In fact, the MBTA itself was subsequently justified independently under the Commerce Clause (e.g., *see Andrus v. Allard*, 444 U.S. 51 (1979)). Outside the scope of this article is an assessment of whether forests could be regulated by the federal government pursuant to Commerce Clause authority. Though *Gonzales v. Raich* potentially "suggests that *Lopez* and *Morrison* did not entirely supplant the Court's earlier view of a broad commerce power" (Hollis, *supra* note 14, at 1359), it does not prove that new federalism will be significantly eroded in the near future.

<sup>191</sup> *Missouri*, 252 U.S. at 434.

<sup>192</sup> Hudson, *supra* note 11, at 360.

[h]ere a national interest of very nearly first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is in vain, and were it otherwise, the question is whether the United States is forbidden to act.<sup>193</sup>

It is unclear whether it is “sufficient to rely upon the States” to properly regulate forest management.<sup>194</sup> On the other hand, it does seem clear that *climate change* is a “national interest of very nearly the first magnitude,” which can only be addressed “by national action in concert with that of another power.”<sup>195</sup> As noted, however, the Court in *Holland* relied primarily on the migratory nature of the birds and the lack of “possession” by any party. Furthermore, there is no question that the federal government has historically regulated wildlife, so that *general* invocation of the Tenth Amendment by states in *Holland* could not overcome the federal government’s treaty authority to regulate that particular resource.<sup>196</sup> This is a very different scenario from private forest management, which, as discussed above, has traditionally been considered a “land use” regulatory responsibility reserved to states. Forests are indeed “in possession” of specific public and private landowners and are obviously not migratory.

Additionally, the history of state control over private forest management (and land use generally) demonstrates that the federal government is not considered a *necessary* party to private forest management – and forests are not “protected *only* by national action in concert with that of another power” – even if the federal government is a necessary party to climate change negotiations. These facts, coupled with the reassertion of federalism protections by the Court, may

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<sup>193</sup> *Missouri*, 252 U.S. at 435.

<sup>194</sup> Indeed, state governments are likely to exercise less stringent environmental controls over forest management activities on state owned and private forests, than is the federal government over federal forests. Scholars have noted that “federal officials consistently exhibit greater levels of ecosystem-level management, rare species identification and protection, ecosystem research and monitoring, and soil and watershed improvement” than do state officials, and “agency officials at higher levels of government are likely to favor goals other than economic development more than are agency officials at lower levels of governance.” TOMAS M. KOONTZ, *FEDERALISM IN THE FOREST: NATIONAL VERSUS STATE NATURAL RESOURCE POLICY* 77-78 (Georgetown Univ. Press 2002).

<sup>195</sup> This statement arguably does not apply, however, regarding forest management in isolation from the climate issue. It seems clear that the U.S. could responsibly and sustainably manage its forests without reliance on the cooperation of any other nation.

<sup>196</sup> In *Palila v. Hawaii Dep’t of Land & Natural Resources*, the court characterized the holding in *Holland* as the authority of “the federal government to preempt state control over *wildlife* under federal legislation implementing a . . . [t]reaty” (*Palila v. Hawaii Dep’t of Land & Natural Resources*, 471 F. Supp. 985, 993 (D. Haw. 1979), *emphasis added*).

argue *against* the domestic validity of an international treaty regulating private forest management, and *for* the invocation of a Tenth Amendment power reserved to the states, and could prohibit a *Holland*-type ruling on challenges to an international forest management treaty.

In fact, Professor Swaine, noting Justice Holmes's reliance in *Holland* on the national interest at stake, the need for international cooperation and the inability of states to regulate the resource in their own right, asserted that "*Holland* ...instances an interpretative presumption for the treaty power – we should prefer interpretations permitting U.S. federalism to be reconciled with the national government's ability to negotiate and adhere to treaties – based on the insight that the state-based alternative to the treaty power is inadequate."<sup>197</sup> In the case of forest management, it is *politically* arguable, but *legally* unclear, that the state-based alternative is inadequate – especially considered in light of the new federalism.<sup>198</sup> The Court reasserted federalism protections in *Lopez* and *Morrison* in part because the Court "perceived that dual federalism required that some matters be left to the states – and, implicitly but unmistakably, that the states were capable of regulating the matters in question."<sup>199</sup> Thus the Court indicated that "traditional exercise of state authority...was worth respecting not only for tradition's sake, but also because it demonstrated that the states could take over precisely where the national government was forced to stop."<sup>200</sup>

Ultimately, a reading of *Holland* that comports to the nationalist view of the treaty power may, as noted by Professor Rosenkranz, "run[] counter to the textual and structural logic of the Constitution," and would result in Congress's legislative power being "expandable virtually without limit."<sup>201</sup> Rosenkranz finds such a scenario "in deep tension with the basic constitutional scheme of enumerated legislative powers," and that it "stands contradicted by countless canonical statements that the powers of Congress are fixed and defined."<sup>202</sup> Such an expansion of Congress's legislative power is not, Rosenkranz argues, "consistent with the text of the Constitution or with its underlying theory of separation of powers."<sup>203</sup> Rosenkranz is especially critical of the *Holland* Court's failure to cite a particularly germane 1836 Supreme Court decision – *New Orleans*

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<sup>197</sup> Swaine, *supra* note 1, at 479.

<sup>198</sup> See *supra* note 194.

<sup>199</sup> Swaine, *supra* note 1, at 479.

<sup>200</sup> *Id.*

<sup>201</sup> Rosenkranz, *supra* note 14, at 1893.

<sup>202</sup> *Id.* at 1894. Rosenkranz continued: "Just recently, Chief Justice Rehnquist wrote for the Court that 'Congress' regulatory authority is not without effective bounds.' But it was Chief Justice Marshall, almost two centuries before, who explained why in the clearest terms: 'enumeration presupposes something not enumerated,' or more emphatically, '[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'" (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)).

<sup>203</sup> *Id.* at 1899.

*v. United States* – recognizing the principle that “the government of the United States . . . is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power.”<sup>204</sup> As demonstrated in the next section, *New Orleans* is all the more relevant to an analysis of any treaty regulating land uses like forest management, as the treaty at issue in that case sought to impede traditional state control over property rights.

The *Holland* Court’s Tenth Amendment analysis may be limited to the specific fact pattern of *Holland*, resting upon the Court’s characterization of the birds as being wildlife of a transitory nature and the necessity of countries to collaborate for the management of transboundary resources. Scholars have asserted as much, Professor Bradley noting that “although *Holland* has been construed as giving the treaty power complete immunity from federalism limitations, the decision itself can be read much more narrowly,”<sup>205</sup> and Professor Swaine that “there is a substantial risk that subject-matter limitations...[may be] applied to the exercise of the treaty power. While *Missouri v. Holland* may survive for the foreseeable future, it will likely be read narrowly.”<sup>206</sup> Or, as summarized by Professor Kuh:

[T]he expansive, nationalist view of the treaty power is unlikely to survive sustained analysis intact and will likely be cabined by some type of limiting principle. When presented with arguments that the treaty power justifies congressional power to act in an area outside of the bounds of the Commerce Clause and other enumerated powers, the Supreme Court will be forced to reexamine in a serious way, for the first time in nearly eighty years, an ill-defined, poorly understood constitutional doctrine (the nationalist view), the wholesale adoption of which could easily be argued to undermine the concept of enumerated powers so recently embraced by the Court in its Commerce Clause, Eleventh Amendment, Tenth Amendment, and anti-commandeering decisions. It only seems prudent to anticipate that instead of feeling inexorably bound by relatively moribund precedent, the Court will instead endeavor to assimilate the treaty power into the revived federalism that it has put forward with such frequency.<sup>207</sup>

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<sup>204</sup> *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836).

<sup>205</sup> Bradley, *supra* note 14, at 459.

<sup>206</sup> Swaine, *supra* note 1, at 412.

<sup>207</sup> Kuh, *supra* note 14, at 186.

Professor Rosenkranz is even more direct, stating that “*Missouri v. Holland* may be canonical, but it does not present a strong case for the application of stare decisis. It is wrongly decided and should be overruled.”<sup>208</sup>

Not every scholar who asserts likely federalism limits on the treaty power believes such limits will arise out of the judiciary. Professor Hollis, for instance, does not believe that the Supreme Court will revisit *Missouri v. Holland* anytime soon. Although agreeing that federalism restraints will likely be placed on the treaty power, Hollis asserted these limitations will arise out of the executive branch, rather than the judiciary. Hollis claimed that both nationalists and new federalists are misguidedly fixated on *Missouri v. Holland* – nationalists believing *Holland* rightly held there were no federalism restraints on the treaty power, and new federalists seeking to justify overturning *Holland* or “dramatically restricting its scope.”<sup>209</sup> Hollis cited various rationales supporting his conclusion,<sup>210</sup> but his primary rationale was that the executive’s protection of federalism principles may prevent the Court from ever having a chance to revisit *Holland*. Hollis noted that:

[t]he executive, in exercising its Article II power, has consistently held the reins on accepting U.S. treaty obligations... it is ultimately the executive that negotiates and concludes U.S. treaties and determines the scope of the obligations it wishes to assume. Thus, it is the executive’s choice, first and foremost, whether to defer to federalism in treaty-making. Of late, it has done so with increasing frequency. As such, the Court may never have a chance to revisit *Missouri*. The treaties the president concludes today simply do not implicate the legal authority questions Holmes had to address.<sup>211</sup>

Hollis argued that the executive has adopted at least six distinct approaches to federalism during treaty-making: no accommodation at all (either when

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<sup>208</sup> Rosenkranz, *supra* note 14, at 1937.

<sup>209</sup> Hollis, *supra* note 17, at 1344-1345.

<sup>210</sup> Hollis’s first rationale was that a majority of the current Court actually supported *Holland*, as Justice’s Breyer, Ginsberg, Stevens, Thomas and Souter all accept *Holland* as good law. *Id.* at 1353-1354. Hollis’s second rationale is that the Court resists judicial review of the Treaty Power, since the Supreme Court has never struck down a treaty for exceeding the scope of the treaty power. Hollis noted that “it would require a dramatic change for the Court to suddenly begin policing limits on the treaty power.” *Id.* at 1355. If any subject were “dramatic” enough to prompt the Court to address the scope of the treaty power, however, it would be property rights. Given the fundamental and controversial nature of private property rights, federal regulation of private property via a forest treaty might give rise to 5<sup>th</sup> Amendment takings claims, which are considered relatively often by the Supreme Court. Hollis further cited renewed deference to foreign affairs power and broader conceptions of Congress’s legislative power as reasons the Court is unlikely to revisit *Holland*.

<sup>211</sup> *Id.* at 1360.

federalism is not an issue or on matters involving foreign persons or transnational conduct), rejecting the treaty,<sup>212</sup> modifying treaties to account for federalism,<sup>213</sup> modifying U.S. consent to the treaty, limiting federal implementation of the treaty and limiting federal enforcement of the treaty.<sup>214</sup>

Hollis observed that the executive has increasingly implemented federalism restraints during U.S. treaty-making, and has “limited treaties from expanding federal law-making beyond Congress’s legislative powers or interfering with activities traditionally regulated by the states.”<sup>215</sup> Hollis agreed with other scholars<sup>216</sup> that federalism’s potential restraining effect on the treaty power may limit the U.S.’s ability to successfully engage in treaty-making, noting that Executive Federalism “may prevent the United States from joining treaties it might otherwise have an interest in joining. It may restrain the United States from obtaining concessions from other nations with regard to their behavior because of the knowledge that the United States would not be able to reciprocate given states rights concerns.”<sup>217</sup> Importantly, Hollis concluded that “even if the Court somehow reengages the issue, Executive Federalism offers evidence of treaty power limits from the power-holder’s perspective – limits to which the Court is likely to defer.”<sup>218</sup>

Ultimately, regardless of whether the judiciary narrows or overrules *Holland*, or the executive places its own federalism restraints on the treaty power, the potential complications for a forest treaty that fails to take into account U.S. federalism are significant. The next section concludes review of federalism and the treaty power by demonstrating that even the nationalist view, as put forth by Professor Golove, may allow for federalism restraints on the treaty power in the area of land use activities and property rights, such as are at issue in forest management activities – creating yet more uncertainty and further supporting a

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<sup>212</sup> As in the case of the Convention on the Rights of the Child, *supra* note 106 (because of its focus on issues that were exclusively the purview of the state) and the International Covenant on Economic, Social and Cultural Rights. Hollis, *supra* note 14, at 1372-1373.

<sup>213</sup> For example, Hollis noted that the Tobacco Convention would have originally required the federal government to force states to promote measures to protect the public from the harms of tobacco smoke, but due to federalism concerns it ultimately only imposed those requirements on the federal government “in areas of existing national jurisdiction as determined by national law” while “actively promot[ing them] at other jurisdictional levels.” Hollis, *supra* note 14, at 1377. Similarly, the Council of European Corruption Convention implicated state criminal law, but the executive negotiated explanatory language providing that “it was the intention of the drafters of the Convention that [c]ontracting parties assume obligations under this Convention only to the extent consistent with their [c]onstitution and the fundamental principles of their legal system, including, where appropriate, the principles of federalism.” *Id.* at 1378.

<sup>214</sup> *Id.* at 1370-1371.

<sup>215</sup> *Id.* at 1363.

<sup>216</sup> See *supra* notes 104-107 and accompanying text.

<sup>217</sup> *Id.* at 1394-1395.

<sup>218</sup> *Id.* at 1386.

global treaty that incorporates voluntary mechanisms for forest management, rather than prescriptive mandates.

*C. The Treaty Power and Private Property Rights*

[N]either life nor property of any citizen, nor the particular right of any state, can be affected by a treaty – *Edmond Randolph*<sup>219</sup>

The treaty power's relationship with private property rights provides yet another example of the uncertainty surrounding the treaty power's scope and federalism's potential limits upon it. Even under the broad, nationalist, reading of *Holland*, direct regulation of private property rights and land use activities, like forest management, may be outside the scope of the treaty power. Both Professor Bradley and Golove, though on opposite ends of the debate, have indicated as much, and federalism-based protection of private property rights from an encroaching treaty power has deep historical roots. Professor Bradley cited an 1819 opinion of the Attorney General that suggests a limitation on the treaty power in the area of private property rights. The opinion stated that "the federal government could not alter by treaty state inheritance law concerning real property."<sup>220</sup> Similarly, in *New Orleans v. United States*, the issue was whether, pursuant to a treaty with France, the federal government had acquired trust rights over certain properties in the city of New Orleans, or whether those property rights remained in the local government. The Court ruled in favor of the city, finding, as noted above, that the federal government "is one of limited powers," and its power cannot be "enlarged under the treaty-making power," thus suggesting a federalism limitation on the treaty power in the area of property rights.<sup>221</sup>

Furthermore, it was not only the judicial branch of government that asserted federalism limitations on the treaty power in the area of property rights. Ralston Hayden, an early 20<sup>th</sup> Century scholar who wrote extensively on the treaty power and states' rights, noted that between 1830 and 1860 "the Senate and the executive entertained grave and increasing doubts concerning their authority to make treaties" in the area of real property rights and that "in every particular instance in which conflict arose the treaty in question was amended to bring it more nearly into accord with the states' rights theory."<sup>222</sup>

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<sup>219</sup> The Debates in The Convention of the Commonwealth of Virginia, reprinted in 3 Elliot's Debates (Jonathan Elliot ed., 2d ed. 1888), at 504.

<sup>220</sup> Bradley, *supra* note 14, at 416.

<sup>221</sup> *New Orleans*, 35 U.S. (10 Pet.) at 736.

<sup>222</sup> Ralston Hayden, *The States' Rights Doctrine and the Treaty-Making Power*, 22 AM. HIST. REV. 566, 585 (1917). In turn, Professor Bradley notes, Hayden "explains that, when President Fillmore submitted a proposed treaty between the United States and Switzerland to the Senate in



Though Professor Golove's analysis of property rights as a states' rights limit on the treaty power is rather disjointed, upon closer review it arguably supports federalism as a restraint on the treaty power in the area of property rights. Golove consistently cited treaties entered into by the U.S. that limited state authority over property rights as foolproof examples of how the treaty power can trump powers traditionally left to the states.<sup>223</sup> Yet Golove's examples may not prove as much as he would like. Every example Golove cited dealt with property owned by *foreign nationals*. For example, Golove asked "[c]an the federal government enter into treaties on subjects that are otherwise beyond Congress's legislative powers? Consider some typical examples from the nation's past: treaty stipulations overriding traditional state laws preventing aliens from owning real property..."<sup>224</sup> Golove cited another treaty that allowed citizens of the U.S. and France to "own real and personal property in the territory of the other and dispose of it by testament, donation, or otherwise to whomsoever they chose. This stipulation altered the traditional common law rule of the states, which denied aliens the right to own real property."<sup>225</sup> Noting the "close relationship between real property and state sovereignty," Golove asserted that "the provision was bound to raise questions about the scope of the treaty power" and that "this provision, found in the very first treaty of the new nation and repeated in countless treaties thereafter, raised the single issue over which the states' rights and nationalist views of the treaty power would most recurrently contend for the next century and a half"<sup>226</sup> – that is, the treaty power vs. state control over property rights of citizens of *other nations*.

Indeed, Golove spent a remarkable amount of time discussing various treaties that trumped state regulatory authority over property rights – but in each case, the treaty only trumped state property rights authority as it related to *aliens* owning property in the U.S. A treaty power scope that subsumes traditional state authority over property only in the narrow circumstances of foreign citizens' ownership rights is hardly surprising, as it is consistent with *Holland's* focus on treaty subject matters that necessarily implicate the involvement of the federal government – i.e. treaties that necessarily involve the participation of, or interaction with, a foreign power. Given one of the primary justifications for the treaty power – the need to speak with one voice in international affairs<sup>227</sup> – the federal government would necessarily engage with a foreign power over rights of foreign citizens living in the U.S., and would do so constitutionally.

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1850, he asked for and obtained amendments from the Senate to protect the reserved powers of the States." Bradley, *supra* note 14, at 421 (citing Hayden, at 575-576).

<sup>223</sup> See generally Golove, *supra* note 15; Hollis, *supra* note 14.

<sup>224</sup> Golove, *supra* note 15, at 1077.

<sup>225</sup> *Id.* at 1106-1107.

<sup>226</sup> *Id.* at 1107.

<sup>227</sup> *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003).

In fact, the Supreme Court holdings that Golove cited make clear that the Court only upholds treaty stipulations over traditional state authority under circumstances where the treaties are “for the protection of citizens of one country residing in the territory of another”<sup>228</sup> or are “agreement[s] with respect to the rights and privileges of citizens of the United States in foreign countries, and of the nationals of such countries within the United States.”<sup>229</sup> It may be a stretch to assert that Golove’s nationalist perspective on the treaty power would carry the day over traditional state authority in the area of private forest management, when no foreign power or its citizens were necessarily involved. Golove indicated as

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<sup>228</sup> *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924).

<sup>229</sup> *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931). Golove provided other examples of treaty power trumping traditional state authority, but in each instance, again, foreign nationals were involved: “The Court’s two most notable opinions in the decade following *Missouri* were *Asakura v. City of Seattle* and *Santovincenzo v. Egan*. At issue in *Asakura* was a Seattle municipal ordinance regulating pawnbrokers, which restricted applicants to citizens of the United States. It would be hard to imagine a subject more local in character, and the city urged the Court to revisit *Missouri*; the city argued that *Missouri* was inconsistent with the Tenth Amendment and rendered the treaty power ‘a convenient substitute for legislation in fields over which Congress has no jurisdiction. As this Court knows, a treaty is usually drafted secretly by the State Department or commissioners . . . in conference with some foreign representative.’ The Court refused the bait. Instead, Justice Butler, speaking for a unanimous Court, made clear that *Missouri* would be taken for all it was worth:

The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend ‘so far as to authorize what the Constitution forbids,’ it does extend to all proper subjects of negotiation between our government and other nations. . . . Treaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations....the only question was whether the treaty was of a common type and whether it strengthened ‘friendly relations’ and promoted ‘good understanding.’ If so, then no matter how local the subjects with which it dealt, it fell within the scope of the treaty power and superseded inconsistent state laws.’

*Santovincenzo* presented a similar case. The treaty at issue had a novel provision concerning intestate distribution of the estates of decedents of Italian nationality. Under New York law, in the absence of known heirs, the estate escheated to the state. Under the treaty, however, the Italian Consul was entitled to receive the assets for distribution in accordance with Italian law. Thus, rather than just removing the disability of alienage, the treaty substituted the law of a foreign nation regarding inheritance for the law of a state. The Court was once again unanimous in upholding the treaty, with Chief Justice Hughes delivering the opinion. Reminding his audience that treaties of this kind have reciprocal benefits, Hughes observed:

There can be no question as to the power of the Government of the United States to make the Treaty . . . . The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations, and agreement with respect to the rights and privileges of citizens of the United States in foreign countries, and of the nationals of such countries within the United States, and the disposition of property of aliens dying within the territory of the respective parties, is within the scope of that power, and any conflicting law of the State must yield.”

Golove, *supra* note 15, at 1270-1272.

much, ultimately asserting that “a treaty cannot...adopt domestic standards just because the President and Senate believe them to be laudable. A treaty is unconstitutional if it does not serve a foreign policy interest or if it is concluded not to affect the conduct of other nations but to regulate our own.”<sup>230</sup>

Perhaps most tellingly, though Golove is one of the most vocal proponents of the nationalist view, his ultimate analysis actually argued against the use of the treaty power to trump traditional state authority over property rights. Golove provided context by stating that:

[N]ationalist view proponents do not argue that the treaty power, because it is exclusively granted to the federal government, is therefore free from federalism limitations that would apply to concurrent powers...[A]s I have also previously pointed out, they do not contend that the treaty power is categorically exempt from either affirmative federalism limitations, such as...the general Tenth Amendment declaration that exercises of nondelegated authority are unconstitutional.<sup>231</sup>

Golove then made an analogy between separation of powers limitations on the treaty power and federalism limitations, noting that a treaty “purporting to authorize the President rather than Congress hereafter to make laws regulating interstate and foreign commerce would violate the separation of powers. Even though a treaty can regulate particular matters falling within those subjects, it may not change the internal distribution of power between Congress and the President.”<sup>232</sup> Strikingly, Golove argued that:

Likewise, a treaty purporting to grant Congress hereafter legislative authority over, say, *real property in the states*, would fall afoul of federalism. Although a treaty can regulate particular aspects of real property relations in the states, it cannot transfer legislative authority over those subjects from the states to Congress. Beyond these cases, treaties are as subject to federalism as they are to the separation of powers.<sup>233</sup>

Although this statement can be read to merely mean that Congress cannot aggregate unto itself a general authority to directly regulate private property, Golove failed to explain how such an aggregation would be fundamentally different than allowing individual treaties to “regulate particular aspects of real

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<sup>230</sup> *Id.* at 1287-1288.

<sup>231</sup> *Id.* at 1285.

<sup>232</sup> *Id.* at 1286.

<sup>233</sup> *Id.* (emphasis added).

property relations.” Apparently, based upon Golove’s own lengthy summary of examples, he would confine such regulation in the area of property rights to treaties affecting real property owned by foreign nationals.

Ultimately, regardless of the contentious outcome of the “new federalism” vs. “nationalist” debate on the scope of the treaty power – in the legislature, the courts, and the scholarly literature – it appears that at the *very least* it is uncertain whether private property rights, and land use activities like forest management, remain protected by federalism limits on the treaty power. Not only does *Missouri v. Holland* raise such doubts, but so does the scholarly writings of parties on *both sides* of the “new federalism”/“nationalist” debate. If federalism does so limit the treaty power, then the federal government would not be able to implement prescriptive, “traditional governance” forest management directives on private lands pursuant to an international treaty. Any attempt to do so would result in Tenth Amendment judicial challenges, likely brought by both private landowners and state governments.

## CONCLUSION

The international community is properly increasing its focus on global forest management in the battle against climate change, and is rightly taking an interest in forest management activities on a local scale. This focus is essential to capture the full carbon sequestration value of the world’s forests, as well as to preserve the numerous other ecosystem services provided by sustainable forestry. Achieving either a binding stand-alone forest treaty or a climate treaty incorporating forest management, however, will depend in large part on the willingness and ability of the U.S. to enter into and implement such a treaty. U.S. federalism, however, complicates the U.S.’s role in the formation of any treaty aimed at forests, since the federal government is granted authority under the Constitution to negotiate treaties, while state governments maintain primary regulatory authority over land use activities like forest management.

This U.S. has a history of invoking federalism to inhibit treaty formation and implementation, and constitutional law scholars continue to debate whether federalism may act as a limit on the treaty power. The uncertainty regarding federalism’s effect on the treaty power is increased upon closer review of *Missouri v. Holland*, as the precedential value it holds for potential challenges to a future treaty aimed at forest management is unclear. A review of the relationship between the treaty power and private property rights further demonstrates that the extent to which the federal government may invoke the treaty power to regulate in the area of traditionally state regulated land use activities is questionable, and the outer bounds of the federal government’s treaty power authority are ill-defined at best.

In contrast, there is greater certainty regarding which mechanisms might be best employed to coordinate international forest management activities, as the

increased global focus on bottom-up market-based mechanisms demonstrates. Combining the uncertain with the “more certain,” it is apparent that a global forest treaty based upon “traditional governance” and prescriptive mandates that may run afoul of federalism principles in the U.S. should be avoided. Market-based initiatives like REDD, forest certification, and ecosystem service transaction programs would provide the best opportunity to achieve global forest management goals, and do so with the uncompromised leadership and participation of the U.S. Cooperation of the U.S. is crucial if the international community is ever to convince the Alabama forester to leave those oaks, poplars, sycamores and pines on the creek bank and provide essential environmental benefits not only to rural Alabama, but to the world.