# TREATY POWER JUSTIFICATIONS FOR EARLY FEDERAL TRADEMARK LAWS

### Zvi S. Rosen\*

In 1920, in one of his best-known opinions, Justice Oliver Wendell Holmes, Jr. declared that "[i]f [a] treaty is valid there can be no dispute about the validity of the statute under Article 1, § 8, as a necessary and proper means to execute the powers of the Government." This opinion made clear that Congress posesses an independent "treaty power" pursuant to the power to make treaties and the Necessary and Proper Clause of the Constitution to enact legislation executing such treaties even if it would otherwise lack authority under its powers enumerated in Article 1, Section 8 of the Constitution. "Missouri v. Holland has remained definitive on the subject, even if the controversy surrounding this holding has never entirely subsided. In the past decade, controversy over this holding has resurfaced with a vengeance, spurred on by the work of Nicholas Rosenkranz. In the coming Term, the Supreme Court will be called upon to reexamine the Missouri v. Holland decision in Bond v. United States.

Examples of exercises of the treaty power before *Missouri v. Holland* are rare, but both John Cross and I have discussed the use of the treaty power to pass the 1881 Trademark Act in the wake of the judicial invalidation of the first federal trademark law. Although these

<sup>\*</sup> Zvi S. Rosen is an Adjunct Assistant Professor at the New York Law School, and a member of the bars of New York and New Jersey. He would like to thank everyone who provided advice and comments on this piece.

<sup>1</sup> Missouri v. Holland, 252 U.S. 416, 432 (1920).

As used in this article, the "Treaty-Making Power" refers to the power of the government to make treaties with foreign nations, while "Treaty Power" refers to the congressional power to make laws based upon the Necessary and Proper Clause of the Constitution, calling into effect treaties made pursuant to the Treaty-Making Power.

<sup>3</sup> Charles A. Lofgren, Missouri v. Holland in Historical Perspective, 1975 Sup. Ct. Rev. 77 (1975).

<sup>4</sup> Nicholas Quinn Rosenkranz, Executing the Treaty Power, 118 HARV. L. REV. 1867 (2005).

Brief for Petitioner, Bond v. United States, No. 12-158, cert granted, 133 S. Ct. 978 (Jan. 18, 2013). This marks the second time the Supreme Court will hear Carol Ann Bond's case, the first time resulting in a 9-0 decision that an individual does have standing to raise the Tenth Amendment to the Constitution as a defense. Bond v. United States, 131 S. Ct. 2355 (2011).

<sup>6</sup> Act of March 3, 1881 To Authorize the Registration of Trade-Marks and Protect the Same, 21 Stat. 502 (1881) (the "1881 Trademark Act"); John T. Cross, The Lingering Legacy

pieces thoroughly explore the factual background of this episode in American history, they do not explore how this usage of the treaty power conforms—or fails to conform—to the treaty power as contemplated by *Missouri v. Holland* and beyond.

Analysis of the litigation and legislative process which lead to the 1881 Trademark Act shows a number of things about the state of the treaty power as of 1881. The first is simply that the treaty power was poorly understood and largely unprecedented during this period, with no citations to a prior use of the power. While modern commentators have found a number of prior instances where the treaty power had been exercised, these were not raised contemporaneously to either the Supreme Court or to Congress.<sup>7</sup> The second point is that while a power to make laws to effectuate treaties was obscure, it was also relatively uncontroversial, and the Forty-Sixth Congress embraced the treaty power and explicitly used it as a constitutional justification for the 1881 Trademark Act. The final point is that while the Forty-Sixth Congress did recognize the treaty power, it also believed that the scope of the treaty power was sharply limited and was only applicable to international activity. Likewise, a close reading of the Supreme Court's decision in the Trade-Mark Cases also suggests a limitation on the treaty power to international activity. In this era, Congress and the courts believed that the treaty power was limited by the Tenth Amendment to the point where it only permitted legislation by Congress dealing with matters beyond the reach of state power, such as foreign commerce.

This piece will (very) briefly explore the background of the treaty power and the 1881 Trademark Act. The litigation that necessitated the 1881 Trademark Act and the debates over it will then be examined in regard to both the existence of a treaty power and its content. Next, the competing constitutional powers at issue in crafting the 1881 Trademark Act will be examined through the perspective of those drafting the act, and the resolution they achieved will be explained. Finally, I will explore whether the treaty power as of 1881 is

of Trade-Mark Cases, 2008 MICH. ST. L. REV. 367 (2008); Zvi S. Rosen, In Search of the Trade-Mark Cases: The Nascent Treaty Power and the Turbulent Origins of Federal Trademark Law, 83 ST. JOHN'S L. REV. 827 (2009). Although I will refer mostly to my own piece, I would urge those interested in this topic to consult Professor Cross's piece as well.

Jean Galbraith identifies an earlier instance of laws carrying into effect extradition treaties passed prior to this period as being justified on the basis of the treaty power, after they were passed, by an Attorney General opinion. Jean Galbraith, Congress's Treaty-Implementing Power in Historical Practice (June 6, 2013) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2275355. It does not seem that anyone was aware of this example at any point during the litigation or debates over the 1881 Trademark Act.

consonant or dissonant with the treaty power of *Missouri v. Holland* four decades later.

It is also worth noting that this short piece is not meant to be an argument for where the treaty power does or should stand today. That has been done both by the various litigants in *Bond v. United States* and in the scholarly literature. It is simply an exploration of one of the earliest clearly documented applications of the treaty power by any branch of government.

#### I. THE 1870 TRADEMARK ACT

During the first half of the nineteenth century, trademark was strictly a creature of state law. No federal trademark law would even be proposed until 1860, when a measure was proposed and quickly sunk by concerns as to whether the federal government had the constitutional authority to regulate trademarks. However, after the Civil War, American diplomats began concluding treaties for reciprocal protection of trademarks with foreign nations. As these treaties were not self-executing, Congress felt a need to pass enabling legislation creating federal registration for trademarks, and these legislative proposals would be folded into the 1870 omnibus revision of the nation's intellectual property laws. Although there had been doubts about the constitutionality of such an act in 1860, no such doubts were raised in 1870.

The best explanation for why no constitutional objections were raised to the trademark provisions of the 1870 Act has to do with the international focus of the 1870 Act, compared to the domestic focus of the bill a decade earlier. After all, it had generally been understood that foreign affairs are the primary—if not exclusive—province of the federal government. The Constitution excludes by its terms the states from treaty-making and, more generally, foreign relations have been recognized as one of the core functions of the federal government.

<sup>8</sup> Rosen, supra note 6, at 831.

<sup>9</sup> *Id.* at 832–34.

<sup>10</sup> Id. at 834-38.

<sup>11</sup> Id. at 839–42. Criminal penalties were added by an 1876 act. Id. at 842–46.

<sup>12</sup> Id. at 841-42.

<sup>13</sup> Indeed, a decade later, it was noted on the floor of the House of Representatives that "It is plain from the debates that [the 1870 Trademark Act] never could have passed had it not been thought important in aid of those treaties." 10 CONG. REC. 2704 (1880).

<sup>&</sup>quot;No State shall enter into any Treaty, Alliance, or Confederation . . . ." U.S. CONST. art. 1, § 10.

LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 228 (1975); Holmes v. Jennison, 39 U.S. 540, 575 (1840) (Taney, C.J., plurality opinion) ("[e]very part of [the Constitution])

Constitutional objections were quickly raised to domestically focused proposals for federal trademark law in the 1860s and led to the quick demise of these proposals. By contrast, proposals for a federal law implementing registration of foreign trademarks met no constitutional resistance through the entire legislative process, suggesting that something was different for Constitutional purposes if the trademarks to be registered were foreign. However, the broadly drafted 1870 statute did not actually limit itself to foreign marks, and this would soon prove its undoing.<sup>16</sup>

# II. THE TRADE-MARK CASES

In early 1878, in what was apparently a case of first impression, the Southern District of Ohio held that the 1870 Trademark Act was constitutional as an exercise of the intellectual property clause of the Constitution. A number of articles in the legal journals criticized this decision as incorrect, and later that year the Circuit Court for the Eastern District of Wisconsin issued an opinion to the contrary, holding the 1870 Trademark Act unconstitutional.

In the shadow of this activity, three prosecutions for criminal trademark infringement were wending their way through the federal courts. In New York City, two merchants were accused of printing counterfeit labels for French champagne, which were meant for application to American bubbly, while in Cincinnati a dispute over ownership of a trademark for "O.K." whiskey led to criminal charges. The lower federal courts in these cases were divided as to the constitutionality of the federal trademark laws (the two New York cases were consolidated), and the issue went to the U.S. Supreme Court. <sup>21</sup>

tion] shows that our whole foreign-intercourse was intended to be committed to the hands of the general government").

In 1876, Congress amended the trademark laws to add criminal sanctions. Rosen, supra note 6, at 842–46. In the interest of brevity and avoiding unnecessary repetition of my previous article, it is simply worth noting that by 1878, the federal trademark laws included criminal penalties and that they were not included in the 1870 Trademark Act. Id.

<sup>17</sup> See Duwell v. Bohmer, 8 F. Cas. 181 (S.D. Ohio 1878) (No. 4,213) (finding federal question jurisdiction under trademark law); Rosen, supra note 6, at 847–48. The Intellectual Property Clause of the Constitution appears in Article 1, Section 8. U.S. CONST. art. 1, § 8.

<sup>18</sup> Rosen, supra note 6, at 854–57 (discussing various articles arguing that the Intellectual Property Clause does not support the Trademark Act).

<sup>19</sup> See Leidersdorf v. Flint, 15 F. Cas. 260 (C.C.E.D. Wis. 1878) (No. 8,219) (holding that a trademark is not subject to the Intellectual Property Clause); see also Rosen, supra note 6, at 849–53.

<sup>20</sup> Rosen, *supra* note 6, at 857–60.

<sup>21</sup> Id.

The general consensus was that the Intellectual Property Clause of the Constitution was an inappropriate basis for federal trademark legislation, limited as it is to authors and inventors. Debate over the law thus was focused on the Commerce Clause, and an ill-defined treaty power. In the brief of G.H. Mumm & Co., arising out of one of the New York prosecutions, counsel essentially admitted the lack of previous authority for a treaty power, asserting, "I do not attempt to locate the [treaty] power. If the United States are a nation, it exists."

The brief of Kunkelmann & Co. in the other New York prosecution makes a similar argument as that advanced by the Mumm brief.<sup>24</sup> However, it goes further, citing Holmes v. Jennison for the proposition that "'[t]he power to make treaties is given by the Constitution in general terms. . . and consequently [sic] it was designed to include all those subjects which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty...." While this vague statement is interesting, far more interesting is a paragraph struck out from the brief, which asserts that "[f]rom the authorities thus cited in support of the expansive meaning of the word 'commerce,' it seems quite clear that a power to regulate commerce comprehends a power to provide legislative means for enforcing the provisions of a treaty framed 'to secure a guarantee of property in trade marks...." No authority is given for this retracted proposition, and the phrasing of it, placing the treaty power within the Commerce Clause as opposed to the Necessary and Proper Clause, makes clear how poorly understood the treaty power was at the time.

<sup>22</sup> Id. at 857.

<sup>23</sup> Argument on Behalf of the United States at 13 ("Mumm Brief"), Trade-Mark Cases, 100 U.S. 82 (1879). The brief continues:

These treaties are the supreme law of the land, and have, in so far as they are operative, the same force and effect as statutes. It is obvious, therefore, that any legislative enactment passed in aid of them must be constitutional.

It may be urged that a treaty cannot stand if it has the effect of overriding the provisions of the organic law.

It is sufficient, in the present instance, that the treaties in question do not invade any of the clearly defined rights of the States. They have relation exclusively to commerce with foreign natious.

Id.

<sup>24</sup> Brief on the Part of Kunkelmann & Co., of Rheims, France ("Kunkelmann Brief") at 24, Trade-Mark Cases, 100 U.S. 82 (No. 711); see also Rosen, supra note 6, at 862.

<sup>25</sup> Kunkelmann Brief, supra, note 24, at 24 (quoting Holmes v. Jennison, 39 U.S. 540, 569 (1840). The brief omits a comma, present in the reported case, after the word "consequently."

<sup>26</sup> Id. at 25–26 (struck through). The brief appears to be quoting from an 1869 treaty with the French. Trade-Mark Convention, U.S.-Fr., proclaimed July 6, 1869, as appears in 1 WILLIAM M. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS 534 (1910).

There was not significant discussion in print about the treaty power and the trademark law around this time, with an unsigned editorial from the New York Tribune being one of the exceptions. <sup>27</sup> It noted that "[f]riends of the law contend that . . . Congress may pass a general trade-mark law as incidental to enforcement of treaties."

At oral argument, the Attorney General gestured towards the treaty power, but did not indicate that such a power was absolute, noting that "[t]he purpose and the natural and reasonable effect of the acts are to... carry out in good faith and enforce our treaty stipulations on the subject. The act is a regulation of foreign commerce." Whether this argument was meant to couch the treaty power within the Commerce Clause, or to refer to regulation of foreign commerce as a legitimate end of the treaty power is unclear, and references to foreign commerce in the context of the treaty power would continue through the 1881 Trademark Act.

Despite these arguments, the Cincinnati prosecution, which raised no issues of international—or even interstate—activity, <sup>30</sup> became the more prominent action since it raised the clearer constitutional question. In what the case reporter later termed the "Trade-Mark Cases," on November 17, 1879, the Supreme Court held the federal trademark laws unconstitutional, holding that the Intellectual Property Clause of the Constitution would not support a trademark law, and that the Commerce Clause was inapplicable since the trademark laws were not limited to interstate and foreign commerce by their terms.<sup>31</sup> In dicta, the Court also indicated that even if the Commerce Clause had been properly invoked, the trademark laws might still be unconstitutional—a relic of a different era of Commerce Clause jurisprudence that interpreted "commerce" narrowly.<sup>32</sup>

Finally reaching the treaty power, the Court noted that "[i]n what we have here said we wish to be understood as leaving untouched the whole question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect." As discussed below, despite this disclaimer, the Court none-theless tells us a good deal about the scope of the treaty power by fail-

<sup>27</sup> Trade-Mark Quandary, N.Y. TRIB., Dec. 8, 1878, at 4.

<sup>28</sup> *Id.* No riposte to this argument is given.

<sup>29</sup> Trade-Mark Cases, 100 U.S. 82, 88 (1879).

<sup>30</sup> Indeed, in the Cincinnati prosecution, the record did not show any activity outside the city of Cincinnati.

<sup>31</sup> *Id.* at 93–97; see also Rosen, *supra* note 6 at 868–72.

<sup>32</sup> Trade-Mark Cases, 100 U.S. at 95 ("Every species of property which is the subject of commerce, or which is used or even essential in commerce, is not brought by this clause within the control of Congress.").

<sup>33</sup> Id. at 99.

ing to save the trademark law on treaty power grounds. After all, had the trademark laws been constitutional under the treaty power, the Court would have been duty-bound to save them on that ground.

#### III. THE 1881 ACT

The reaction of trademark holders to the Supreme Court's decision was surprisingly equanimous, their major concern being the foreign protection their trademarks received only through the reciprocal protection of foreign trademarks in America.<sup>34</sup> The reaction of foreign merchants was more pronounced, and the French ambassador was asked to push for a new trademark law.<sup>35</sup> It was clear that America needed to honor its treaty obligations, but it was not clear how it could if both the Commerce Clause and the Intellectual Property Clause were out of bounds.

The first approach, at once simple and slightly ridiculous, akin to bringing a howitzer to level an ant colony, was an amendment to the Constitution. One was proposed only two weeks after the decision in the *Trade-Mark Cases* was announced. Although this would have unquestionably solved the problem, it was understandably seen as an overreaction and was adversely reported by the House Judiciary Committee. Understandable of the House Judiciary Committee.

The second approach was to attempt to argue against the Supreme Court's dicta that trademarks were not commerce for purposes of the Commerce Clause. This approach was taken in a bill proposed a few weeks later, which, after amendments, would substantially reenact the trademark law as it had stood two months earlier, only limited to interstate and foreign commerce. However, the flaw of this approach is obvious—it is generally a bad idea to argue constitutional law with the United States Supreme Court—especially since Congress was eager to avoid the disruption and uncertainty that the Supreme Court's decision had caused for international commerce.

Without the Intellectual Property Clause or Commerce Clause, and with a constitutional amendment seen as overkill, only one option was left—the idea that the treaty could provide its own constitutional justification under the power to make treaties and the Necessary and Proper Clause.

Rosen, supra note 6 at 874.

<sup>35</sup> Ic

<sup>&</sup>lt;sup>36</sup> *Id.* at 875; H. Res. 125, 46<sup>th</sup> Congress (2<sup>nd</sup> Sess. 1879).

<sup>37</sup> Rosen, *supra note* 6 at 875–87.

<sup>38</sup> Id. at 876–78.

On December 8, 1879, the New York Tribune again published an unsigned editorial regarding the treaty power. This time, the editorial responded to the argument, asserting that "it will be a new discovery in constitutional law that the President and Senate can, by making a treaty, enlarge the power of Congress to legislate affecting internal affairs. The editorial continued in this vein, noting sarcastically that thorny problems such as slavery could have been solved without the need for a Constitutional amendment, if only the U.S. had entered into an international treaty banning slavery. The piece concluded that the Treaty Power, if it exists, must be drawn extremely narrowly.

In the House Judiciary Committee, the decision was made to forswear the Commerce Clause and rely on the treaty power. The House Judiciary Committee reported a replacement bill that was largely the same as the bill that had been committed to them but was limited to trademarks used in international commerce. The report that accompanied this replacement bill explained that "trade-marks, in commerce with foreign nations and with the Indian tribes can be protected under the treaty power." The report invoked the Necessary and Proper clause to extend the treaty power to Congress's desired objects. 44

When the replacement bill reached the floor of the House of Representatives, its author, Rep. Hammond, gave a lengthy speech explaining the approach that he and the Judiciary Committee had taken. He explained that "Congress, though powerless in this regard, under the commerce clause, may so legislate in aid of the treaty-making power." He did "not enter into the extent of the treaty-making power," but rather asserted that "all that is desirable in this regard may be done by the treaty-making power alone, or by it and Congress together." Rep. Hammond then moved to strike out the criminal provisions from the bill, noting that "[n]o treaty obligation demanded" criminal penalties for trademark infringement. Although there was debate over the necessity of the bill, it did not focus on the treaty power aspect, which indeed was never discussed.

```
39 Trade-Mark Treaties, New York Tribune, Dec. 8, 1879.
```

<sup>40</sup> Id.

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

<sup>42</sup> Id.

<sup>43</sup> H.R. REP. No. 46-561, at 6 (2d Sess. 1880).

<sup>44</sup> Id.

<sup>45 10</sup> CONG. REC. 2703 (1880).

<sup>46</sup> Ia

<sup>47</sup> Id. at 2704.

This bill was passed and entered the law in early 1881, and federal trademark protection was limited to those trademarks used in foreign commerce. This remained the law until 1905, when it was superseded by a trademark law based on the Commerce Clause. In its years of operation, the constitutionality of the 1881 Trademark Act was generally accepted. However, the treaty-power basis for the act was forgotten quickly, and within four years a congressional report asked why interstate commerce was not included in a trademark act that they believed was premised on the Commerce Clause. <sup>50</sup>

### IV. WHAT DOES THIS ALL MEAN?

This is an abbreviated version of the use of the treaty power in the *Trade-Mark Cases* and the 1881 Trademark Act; those seeking a lengthier version of this history should review my piece, *In Search of the* Trade-Mark Cases. Rather, I present this historical record to demonstrate three basic points: that the existence of a treaty power as an independent basis for congressional action was essentially unknown prior to 1879, with no direct precedents available to the attorneys and legislators dealing with the issue, that Congress did in fact decide that a treaty power existed, and that the treaty power of this era was limited narrowly to foreign activities.

# A. The Obscure Treaty Power

It is a maxim of legal practice that when an argument is made and presented as "so obvious to require no support," it is often entirely lacking in support. This does not make it incorrect, it simply means that the argument is premised on little more than rhetoric. So it was with the *Trade-Mark Cases*; advocates of the constitutionality of the existing trademark laws asserted that the power to make legislation calling treaties into effect must exist—even if no previous example of the

<sup>48</sup> Act of Feb. 20, 1905, ch. 592, § 1, 33 Stat. 724.

In 1901, the Supreme Court "refrained from any discussion" of the constitutionality of the 1881 Trademark Act, since "the question of the constitutionality of the act of Congress was not passed on by the court below." Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U.S. 665, 677–78 (1901). This was only technically accurate, since in fact the Court of Appeals said that "[t]here has been no ruling upon the constitutionality of this act, and it need only be said that its validity is fairly doubtful." Illinois Watch-Case Co. v. Elgin Nat. Watch Co., 94 F. 667, 669 (7th Cir. 1899). The decision of the Court of Appeals did not mention the treaty power, probably because the treaty power basis of the act had been forgotten. Otherwise, the 1881 Trademark Act seems to have escaped constitutional scrutiny.

VANOE, COMM. ON PATENTS, REGISTRATION OF TRADEMARKS, H.R. REP. No. 48-2376 (1885).

power being used could be found. Legislators raised the same arguments the next year in Congress—that a treaty power must exist, even if they could not locate particular examples of its prior uses.

There had been a number of times when Congress was called upon to execute a treaty that called for appropriations or regulation of commerce, and the question was whether execution of a treaty was required or discretionary. These examples were not unknown to those drafting the 1881 Trademark Act—in fact, a draft of a speech found in the papers of the Judiciary Committee from the 46<sup>th</sup> Congress enumerates many of the same examples, including the Jay Treaty and the 1815 Treaty with Great Britain, along with the then-recent treaty with Hawaii and the purchase of Alaska. However, these are not examples of situations where an independent treaty power was considered, since it was unnecessary; the constitutionality of the laws to be passed was clear, the question was whether the constitution required their passage.

A recent draft by Jean Galbraith cites a number of instances when an independent treaty power was asserted in legislative debates, in secondary sources, and in an opinion of the Attorney General, none of these instances was raised during the litigation which lead to the *Trade-Mark Cases* or in the debates over the 1881 Trademark Act.<sup>52</sup> Rather, the fact that contemporaneous debates raised none of the examples raised in Galbraith's article demonstrates that the treaty power was profoundly obscure and poorly understood. Further, while it can be pointed to in certain debates, and perhaps as an unexpressed basis for extradition laws, the treaty power had never been the explicit Constitutional basis for a law of Congress as of 1879.

# B. The Affirmed Treaty Power

While the treaty power may have been obscure and poorly understood, and while it also was limited in scope, as will be discussed *infra*, Congress did unquestionably decide in by 1881 that some limited form of the treaty power premised on the Necessary and Proper Clause and the power to make treaties did exist and confer powers beyond Congress's enumerated powers. What Congress did not assert—and indeed, their actions strongly suggest a contrary view—is that the treaty power allowed Congress to regulate in areas subject to state control under the Tenth Amendment.

<sup>51</sup> Copy on file with author, along with partial transcription.

<sup>52</sup> Galbraith, supra note 7.

## C. The Limited Treaty Power

The obscurity of the treaty power—and the relative lack of controversy surrounding its application—owes, first and foremost, to the sharply limited scope in which it existed in the nineteenth century. In many ways, then as now, asking whether a treaty power existed is asking the wrong question. The right question is what the scope of the treaty power was—and is. In the nineteenth century, the treaty power ended where state power began and was limited to the arena where the federal government had primacy—that of foreign affairs.

As Galbraith notes, an 1887 House Report on a treaty with the Hawaiian Islands made clear that the treaty-making power ends with the Tenth Amendment. This was the generally accepted view through the nineteenth century. Indeed, the standard view through the nineteenth and much of the twentieth century was that the treaty-making power carried with it substantial limitations in scope, limiting it to foreign affairs. The arguments made and actions taken in the courts and Congress regarding trademarks are entirely consonant with the view that the treaty power carries with it the same limitation. As an initial matter, the assertions of the treaty power before the Supreme Court were made not by domestic actors but by the attorneys for French vintners, who were requesting reciprocal protection under a French treaty with the United States.

Congress felt that in order to legislate under the treaty power, only trademarks used internationally could be subject to that legislation. The House Judiciary Committee had before it a bill based on the Commerce Clause, which included trademarks used in interstate commerce. In order to change the bill's constitutional rationale to the treaty power, it was necessary to excise trademarks which were only used domestically. That the Judiciary Committee felt that such a change was necessary—and that the bill became law with this limitation—demonstrates that a limitation of the treaty power to international affairs was understood by all at the time.

Further, although the Supreme Court expressly refused to rule on the Treaty Power question, it is not accurate to say that they took no position on the treaty power in the *Trade-Mark Cases*. It was already well-settled that a court should take any reasonable interpretation to

<sup>53</sup> H.R. REP. No. 49-4177 at 7 (1887); see Galbraith, *supra* note 7.

<sup>54</sup> Curtis A. Bradley, The Treaty Power and American Federalism, 97 MICH. L. REV. 390, 418–22 (1998).

<sup>55</sup> *Id.* 

find a law constitutional.<sup>56</sup> Had the trademark laws as of 1879—without the limitation of international or interstate activity—been constitutional under the treaty power, the Supreme Court would have been duty-bound to hold the trademark law constitutional.<sup>57</sup> The fact that the Supreme Court did not save the trademark laws with national scope under the treaty power leads to the direct inference that they could not be saved by the treaty power. In the *Trade-Mark Cases*, the Supreme Court effectively held that to be valid under the treaty power, any future trademark law would need a limitation of scope.

In this context, the 1879 editorial in the New York Tribune mocking the assertion of the treaty power makes complete sense. The Tribune's editorial commented that "it will be a new discovery in constitutional law that the President and Senate can, by making a treaty, enlarge the power of Congress to legislate *affecting internal afairs*." What is importantant is not just the questioning of the treaty power, but the questioning of the *scope* of the treaty power. After noting the absurdity of a truly unbound treaty power, the anonymous author concluded "[e]vidently, any legislation which rests on treaties must run within very narrow limits." <sup>59</sup>

The law crafted by Congress to fit the Treaty Power tells us a great deal about what these "narrow limits" are. Had the relevance of a particular area of law to a treaty been all that was needed, then a limitation to international commerce hardly seems necessary. Rather, Congress clearly felt that international activity was necessary to be within the scope of the treaty power and thus so crafted the 1881 Trademark Act.

# V. A NINETEENTH CENTURY TREATY POWER IN THE TWENTY-FIRST CENTURY

The treaty power is once again being debated, and *Bond v. United States* looms large on the Supreme Court's 2013–14 docket. And yet, the lessons of the episodes of 1879–81 involving trademark protection are still timely. The view at the time was that the treaty power

<sup>56 &</sup>quot;No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution." Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448–49 (1830).

<sup>57</sup> Indeed, this rule was repeated in opinions which Justice Miller (who wrote the opinion in the *Trade-Mark Cases*) joined. *See, e.g.* Presser v. Illinois, 116 U.S. 252, 269 (1886) ("[I]t is a rule of construction that a statute must be interpreted so as, if possible, to make it consistent with the constitution and the paramount law." (internal citation omitted)).

<sup>58</sup> Editorial, *A Democratic Brazen Serpent*, N.Y. TRIB., Dec. 8, 1879 (emphasis added) (on file with author).

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

was limited to international activity by the Tenth Amendment and the scope of the treaty power. These are the very arguments being put forth by petitioner.<sup>60</sup>

As noted, prior to *Missouri v. Holland*, it was widely agreed that the treaty power is limited in scope. This Article adds another piece to the puzzle, providing more evidence that the scope of the pre-1920 treaty power was limited. However, *Missouri v. Holland* is not so dissonant with the view of the treaty power that came before it. <sup>61</sup> The treaty at issue in *Missouri v. Holland* involved internationally migratory birds—an international activity. <sup>62</sup> Although *Missouri v. Holland* rejected the Tenth Amendment as a limitation on the treaty power, it did not address the scope of the treaty power otherwise. Such an inquiry was unnecesary since the law in question was a regulation of international activity and thus within the core of the treaty power. *Missouri v. Holland* is best understand not as a repudiation of the limitations to the treaty power located by Congress close to forty years earlier, but rather as a continuation of them.

<sup>60</sup> Brief for Petitioner, Bond, *supra* note 5.

This is not to say that it is entirely consonant either, especially in its dismissal of the Tenth Amendment, even though the general view up to that point was that the Tenth Amendment limited the treaty power. Bradley, *supra* note 54.

<sup>62</sup> Holland, 252 U.S. at 430–31.