

The right of the confederated government to enter into these treaties was apparently never questioned until after the adoption of the Constitution of the United States, when the provisions of such treaties guaranteeing the rights of foreign citizens were sustained under Article VI, Clause 2 of the Constitution making treaties then existing, or which might thereafter be made, the supreme law of the land. These subjects were not matters over which the Congress ordinarily had jurisdiction, but were matters which came within the jurisdiction of the states both under the confederation and under the Constitution; yet they were matters clearly within the treaty-making power. Can it be possible that, at the very threshold of this fabric of federal government, the men who had established it, who were familiar with its powers and with the power of governments generally to make treaties, made these treaties with the full knowledge that the Congress had no power to make a treaty over any matter which in ordinary domestic affairs was within the regulative power of the state? If it be true that the federal government may not make a treaty upon any matter which is ordinarily reserved for the governmental control of the state, a principal part of the treaty-making power, as it has been exercised for more than one hundred and twenty-five years, is swept away, for the central government has exercised this power, and it is absolutely necessary that it should do so in order to protect foreign citizens in their rights and to demand and receive for our citizens the same rights in foreign countries. We cannot expect that American citizens will be respected and receive the protection to which they are entitled under the principles of international law and the custom of nations, if we declare that our government is so impotent that it cannot give to foreign citizens within the states the same protection.

But let us consider this subject from the position of authority. When the convention which was to frame the constitution met in 1787, it was confronted with one of the most difficult tasks which has ever fallen to the lot of a deliberative body. The confederation, like all confederations which have come and gone, was inadequate for national purposes. It could not raise money,