

Congress Rewrites the American Constitution

Every school child knows that Congress cannot rewrite the American Constitution. There is a deliberative process for amending the Constitution, which has been done relatively infrequently in our history. Nevertheless, utilizing a doctrine called "preemption," Congress rewrites the Constitution all the time.

The 7th Amendment to the United States Constitution clearly and unequivocally preserves the right to trial by jury. Nevertheless, the United States Supreme Court routinely usurps this constitutional principle utilizing the pernicious doctrine of preemption.

In *Marmet Health Care Center, Inc. vs. Brown*, 132 S.Ct. 1201 (2012), the Supreme Court of Appeals of West Virginia held unenforceable all predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes. The Supreme Court of West Virginia was concerned about the fact that those most at risk would be forced to sign arbitration clauses, giving up their right to sue, when they had been injured by bad health care in nursing homes. Nursing home abuse is a major problem in this country. The response of the medical health care industry has been to force people to sign clauses giving up their 7th Amendment right to trial by jury and forcing them into an arbitration system which is typically controlled by the nursing home industry, but certainly not by a jury of the resident's peers.

The Federal Arbitration Act is treated virtually as a replacement for the 7th Amendment to the United States Constitution. In *Marmet*, the entire United States Supreme Court, *per curiam*, held that the Federal Arbitration Act provides that a written provision in the contract evidencing a transaction involving commerce "to settle by arbitration of controversy thereafter arising out of such contract or transaction" is valid, irrevocable and enforceable. The federal statute is said to preempt and replace both state law in violation of the 10th Amendment and the 7th Amendment right to trial by jury. Interestingly, the Supreme Court, in erecting and utilizing the preemption doctrine, never addresses the constitutional limitations at issue.

The Court recited that the Federal Arbitration Act "reflects an emphatic federal policy in favor of arbitral dispute resolution." The cases on the subject are legion. Any "conflicting rule" is displaced by the FAA. This breathtaking usurpation of state rights and the American Constitution is virtually taken for granted.

It is important to understand what arbitration really is. Arbitration is not a right to a trial by jury by the grievant's peers. Arbitration is extremely expensive, has limited rights of discovery, may create barriers to recovery, and is frequently controlled by the

wrongdoer. The FAA is said to displace the right to trial by jury in securities disputes and a host of other boilerplate agreements that consumers sign on a daily basis.

West Virginia's categorical rule against forcing people to sign arbitration agreements before a dispute even arises was found to violate the will of Congress to control both state and federal disputes. The United States Supreme Court sent the case back to the West Virginia court to consider whether the arbitration clauses are unenforceable "under state common law principles that are not specific to arbitration and pre-empted by the FAA." The Court did not explain itself at all but clearly it will be extremely difficult for those who have been harmed by nursing home abuse to overcome the overarching power of Congress in enacting the Federal Arbitration Act.

Interestingly, those who support so many other constitutional rights, pay little or no attention to the 7th Amendment. The public dispute has continued red hot and unabated concerning the right to bear arms. Is there an individual right to own weapons as opposed to permitting weapons to be utilized by a state militia? Does Congress have a right to pass legislation requiring people to obtain health care? Can the federal government issue a rule requiring large health care organizations and insurance companies to cover women for expenses related to birth control? Everyone will agree that there is no explicit language in the Constitution addressing any of these issues. The question is how the Constitution is to be interpreted. There are those who say that if the Constitution does not explicitly offer an answer to a question, the federal government may not intrude. Others say that the 250-year-old document cannot be enforced at all without some degree of interpretation. May a person shout "fire" in a crowded theater and claim a First Amendment protection to freedom of speech? The United States Supreme Court has answered unequivocally "no" to that question.

However, whatever debate may surround the Constitution on these various difficult social questions, there is no question that the 7th Amendment grants a right to trial by jury in cases involving more than \$20.00. The common law principles encapsulated within the 7th Amendment are routinely violated with nary a whimper from those who pretend to love our American Constitution.

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