



The Freedom to Display the American Flag Act: Construction and Constitutionality

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I. BACKGROUND AND LEGISLATIVE HISTORY OF THE FREEDOM TO DISPLAY THE AMERICAN FLAG ACT

*“One flag, one land, one heart, one hand,
One Nation, evermore!”*
– Oliver Wendell Holmes (1809-1894)¹

In the wake of condominium and homeowners’ association rules prohibiting and restricting the display of the flag of the United States of America and cases that affirmed these rules, Rep. Roscoe Bartlett (R-Maryland) introduced the Freedom to Display the American Flag Act of 2005 (“Act”) on January 4, 2005.² With legislators hesitant to look unpatriotic, the Act passed both houses of Congress by unanimous consent and was signed by President Bush on July 24, 2006.³

Prior to the enactment of the Freedom to Display the American Flag Act, courts generally upheld the validity of restrictive covenants that limit and restrict the display of the American flag. In *Stone Hill Community Association v. Norple*,⁴ homeowners argued that they had a constitutionally protected right to display the American flag. The Iowa Supreme Court affirmed the lower court decision holding that the owners, by purchasing a residence subject to restrictive covenants, agreed to abide by covenants and waived their right to erect a 35-foot pole attached to the exterior of the

roof to display the American flag.⁵ The court reasoned that the issue was not the display of the flag, but the erection of the flag pole on the residence roof in violation of subdivision regulations.⁶

In *Gerber v. Longboat Harbour North Condominium, Inc.*,⁷ a condominium unit owner brought an action under 42 U.S.C. section 1983 challenging a condominium association regulation that prohibited him from displaying the American flag except on designated holidays.⁸ The District Court for the Middle District of Florida held that material issues of fact existed precluding summary judgment on the issue of whether the actions of the condominium association regulating displays of the American flags regulated the exclusive use of the common elements of the condominium in violation of the unit owners' free speech rights.⁹ In dicta, the court stated that "judicial enforcement of private agreements contained in a declaration of condominium constitutes state action and brings the heretofore private conduct within the scope of the Fourteenth Amendment, through which the First Amendment guarantee of free speech is made applicable to the states."¹⁰

Facing a need to shield homeowners from restrictive covenants to prohibit the display of the American flag, Rep. Bartlett, in testimony before the House, expressed his purpose for introducing the legislation:

I have a constituent and a friend, Hugh Warner, who runs American Flag Service. He sells a lot of flags, one of the biggest flag salespersons in the country; and Hugh several years ago pointed out to me a problem that some of his buyers had. These were purchasers who were members of a homeowner's association or a condominium association who, when they flew their flag, were admonished by the association that they could not fly a flag on their condo or on their townhouse or home. So, as a result of those problems that Mr. Warner found several of his people had, as a result of some research that we did, we filed H.R. 42.

This is a very simple bill. We believe that it is a reasonable compromise between the rights of an association, homeowner's

association, condominium association, to maintain the value of their properties and the rights of the individual to fly his country's flag. We are not alone in being advised of this problem, because I have here in my hand newspaper reports from a number of newspapers that are reporting actions, there must be six or eight here, by States that were addressing this same problem; and they each one have passed bills that says that the homeowner's association may place reasonable limits on flying the flag, but they cannot prohibit the flying of the flag. . . It is a very simple bill. It simply says that a homeowner or condominium owner cannot be prohibited from flying the flag of his country. It also says that the association may place reasonable limits on the time and the manner of displaying the flag. We think that this is a commonsense accommodation of the rights of the associations to maintain the value of their properties and the rights of Americans to fly the flag. Mr. Speaker, it is hard for me to understand how a flag outside my condo could depreciate the value of my condo. I would just think that Americans flying flags should increase the value of whatever it flies on.¹¹

President Bush's statement upon signing the bill also provides some guidance on the legislative intent of the Act. In his presidential signing statement, President Bush affirmed:

Today, I was pleased to sign into law the 'Freedom to Display the American Flag Act of 2005.' Americans have long flown our flag at their homes as an expression of their appreciation for our freedoms and their pride in our Nation. As our brave men and women continue to fight to protect our country overseas, Congress has passed an important measure to protect our citizens' right to express their patriotism here at home without burdensome restrictions.¹²

Bartlett shed further light on the legislative intent in a press release issued in the aftermath of the presidential signing ceremony. Bartlett declared:

It's very exciting to know that Americans are now free to fly the flag at their homes . . . I was alarmed when I learned that some homeowners associations and condos all over the country prevent Americans from flying the American flag. It's hard to see how flying an American flag could depreciate the value of a condo. That's why I introduced this bill. H.R. 42 provides reasonable guidelines to guarantee Americans the freedom to display the American flag at their homes.¹³

The text of the Act also provides helpful insight on the legislative history: "An Act to ensure that the right of an individual to display the flag of the United States on residential property not be abridged".¹⁴

A number of groups and associations supported the Act, including the Jewish War Veterans of the USA, American Veterans (AMVETS), Military Officers Association of America (MOAA), Gold Star Wives of America, Inc., Veterans of Foreign Wars (VFW), The Retired Enlisted Association (TREA), the American Legion, the National Independent Flag Dealer's Association, and the Community Associations Institute (CAI).¹⁵

Former U.S. House Majority Leader John Boehner (R-Ohio), in a statement released after President Bush signed the Act into law, declared that "[e]very American should be able to display the American flag on their own residential property. . . homeowners associations and condominiums should not be able to restrict the rights of those wanting to display the flag at their homes. Displaying the American flag should be the right of each and every citizen."¹⁶

The Freedom to Display the American Flag Act embodies the intent by Congress that Americans should possess the freedom to proudly display the flag of the United States without facing unreasonable restrictions imposed by condominium and homeowners' associations.

II. CONSTRUCTION OF THE FREEDOM TO DISPLAY THE AMERICAN FLAG ACT OF 2005

The Freedom to Display the American Flag Act prohibits associations from adopting and enforcing unreasonable restrictions from displaying the flag of the United States.

The substantive part of the Act states:

A condominium association, cooperative association, or residential real estate management association may not adopt or enforce any policy, or enter into any agreement, that would restrict or prevent a member of the association from displaying the flag of the United States on residential property within the association with respect to which such member has a separate ownership interest or a right to exclusive possession or use. . . Nothing in this Act shall be considered to permit any display or use that is inconsistent with . . . any reasonable restriction pertaining to the time, place, or manner of displaying the flag of the United States necessary to protect a substantial interest of the condominium association, cooperative association, or residential real estate management association.¹⁷

A. Definition of “Flag”

As in the review of any statute, the definitions are critical. In the Act, the term “flag of the United States” means:

any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which

the average person seeing the same without deliberation may believe the same to represent the flag, colors, standard, or ensign of the United States of America.¹⁸

Other legislation also provides for the flag of the United States. Under Title 4, the flag of the United States “shall be thirteen horizontal stripes, alternate red and white; and the union of the flag shall be forty-eight stars, white in a blue field . . . On the admission of a new State into the Union one star shall be added to the union of the flag.”¹⁹ Black’s Law Dictionary also provides helpful commentary. Black’s defines a “Flag” as “usually [a] rectangular piece of cloth, bunting, or other material decorated with a distinctive design and used as a symbol or signal.”²⁰

1. Flags Protected Under the Act

The Act’s definition for “flag of the United States” fails to place specific limits on the size of the flag. Congress also failed to expressly include language concerning flag poles or the size of flag poles. According to *Guinness Book® of World Records*, the world’s largest flag is the Superflag, a United States flag owned by the Thomas L. Demski Trust.²¹ The Superflag measures 255 x 505 (ft), weighs 3,000 pounds, and requires at least 600 volunteers to unfurl.²² The Superflag has appeared in special events such as the Super Bowl.²³

Although the possibility of a homeowner wanting to display a flag as large as the Superflag on their property remains unlikely, Congress now protects homeowners from flying a flag of any dimensions and size within the reasonable restrictions pertaining to the time, place, or manner of displaying the flag of the United States.²⁴ The statutory definition incorporated by reference in the Act defines a flag of the United States as a flag of “any size.”²⁵ Meanwhile, the Act also includes a limitation section that states:

[n]othing in this Act shall be considered to permit any display or use that is inconsistent with . . . any reasonable restriction pertain-

ing to the time, place, or manner of displaying the flag of the United States necessary to protect a substantial interest of the condominium association, cooperative association, or residential real estate management association.

The Act adopted the “reasonable time, place, and manner” language used in First Amendment speech cases. In *Heffron v. International Society for Krishna Consciousness, Inc.*, the Supreme Court held that for a time, place, and manner restriction to be constitutional, it must be “justified without reference to the content of the regulated speech, [must serve] a significant governmental interest, and that in doing so [it must leave] open ample alternative channels for communication of the information.”²⁶

These provisions in the Act allowing for a flag of “any size” and for “reasonable time, place, or manner” restrictions could be considered inapposite if an association limits the size of a flag. If an association prohibits a homeowner from flying a flag that obstructs the view of another homeowner, a court would likely find this as a reasonable place and manner restriction. Whether a particular size restriction is considered a reasonable time, place, or manner restriction will vary according to the facts.

The Act also protects flags of any number of stars or stripes. While the Act clearly protects the current U.S. flag with 50 stars and 13 stripes, any vexillologist and student of American history knows the flag of the United States has undergone many transformations. Although the Act does not expressly protect certain historical American flags by name, such as the Grand Union and the Betsy Ross flags, these flags would fall under the Act. Although the Grand Union flag does not contain any stars, this historical flag displays 13 stripes representing the original 13 colonies and Union Jack (the English flag) located in the top left. Since the statutory definition for “Flag” under the Act allows for a flag of any number of stars and stripes, the Grand Union flag would likely fall under the Act’s statutory definition of a flag. Similarly, a person could also display the famous Betsy Ross Flag on their property and receive protection under the Act. The “Betsy Ross” Flag, used from 1777–1795, like the Grand Union flag,

also had the 13 stripes representing the original 13 colonies, but the “Betsy Ross” Flag replaced Union Jack with the 13 stars in a circle in the upper left. From 1795 to 1960 the American flag increased from 13 to 50 stars. Any of these flags with varying number of stars, such as the 48-star flag or the Union Civil War flag, would also fall under the statutory definition for flag of the United States.

Some individuals and groups might question whether an American flag with gold or yellow fringe falls under the Act. According to some “fringe” groups, the presence of a yellow fringe on a flag denotes a shift in governmental authority and a court displaying a flag with yellow fringe is considered under martial law and does not sit under the standard law and Constitution.²⁷ Courts have rejected this argument as nonsensical, frivolous, or “gibberish”.²⁸ One federal court held that yellow fringe on an American flag has no legal significance.²⁹ Therefore, homeowners can display an American flag with or without yellow fringe and receive protection under the Freedom to Display the American Flag Act.

The Freedom to Display the American Flag Act’s definition for “Flag” includes not just the current American flag with 50 stars and 13 stripes, but the legislation also includes historical American flags of any reasonable size with varying number of stars both with and without gold fringe.

2. Flags Not Protected Under the Act

Although any flag of the United States falls within the statutory definition, Congress failed to provide language for other flags that homeowners might want to display. Most notably, the Act fails to include the National League of Families POW/MIA flag. On August 10, 1990, Congress recognized the League’s POW/MIA flag and designated it “as the symbol of our Nation’s concern and commitment to resolving as fully as possible the fates of Americans still prisoner, missing and unaccounted for in South-east Asia, thus ending the uncertainty for their families and the Nation.”³⁰ The POW/MIA flag which flies over many government buildings, however, does not receive the same protection under the Act as the American

flag. Supporters of the POW/MIA flag should petition Congress to expand the applicability of the Display the American Flag Act to include the POW/MIA flag.

The Freedom to Display the American Flag Act also fails to provide for protection for homeowners who want to display military flags. Flags of the U.S. Marine Corps, U.S. Army, U.S. Navy, U.S. Air Force, and U.S. Coast Guard are not generally considered “flags of the United States” depicting the traditional stars and stripes. As such, military flags do not receive statutory protection under the Freedom to Display the American Flag Act. Imagine a situation where a veteran who served in the navy who wants to display the U.S. Navy flag during the week of the annual Army-Navy football game. This veteran’s condominium association might prohibit or restrict the display of flags, including the U.S. Navy flag. Under the current Act, the veteran has no statutory protection to fly the U.S. Navy flag.

Meanwhile, some state statutes invalidate condominium and property association rules that restrict the display of military flags and the POW/MIA flag. In the Illinois Condominium Property Act,³¹ homeowners receive statutory protection to fly both the American flag and military flags.³² The Illinois statute provides: “a board may not prohibit the display of the American flag or a military flag, or both, on or within the limited common areas and facilities of a unit owner or on the immediately adjacent exterior of the building in which the unit of a unit owner is located.”³³ Although the Illinois Legislature did not expressly define the term “military flag,” flags of the U.S. Marine Corps, U.S. Army, U.S. Navy, U.S. Air Force, and U.S. Coast Guard would likely receive protection under the Illinois Condominium Act. Arizona also provides protection for condominium owners to display the POW/MIA flag, military flags of the United States Army, Navy, Air Force, Marine Corps or Coast Guard, the Arizona state flag, and an Arizona Indian nations flag.³⁴

Like military flags, Congress also failed to include state flags among those flags receiving protection under the Freedom to Display the American Flag Act. While some state flags receive protection from homeowners’

associations under state statutes,³⁵ the Freedom to Display the American Flag Act only includes the flag of the United States. Many state flags, such as the Texas Lone Star flag, serve as important historical symbols.³⁶ Of course, states legislators are free to introduce legislation that would protect homeowners and renters from associations and landlords that seek to impose restrictions on displaying state flags.

A number of other flags are excluded from the Act that homeowners might also want to display as symbols of their patriotism and beliefs. For example, the United Nations flag and flags of foreign countries receive no protection under the Act. Meanwhile, the Act also does not include the rainbow flag, a multi-colored flag consisting of stripes in the colors of the rainbow, commonly used as a symbol of gay and lesbian pride.³⁷ A homeowner who wants to display the rainbow flag in front of their townhouse as part of a gay pride celebration, would not receive statutory protection under the Act. The Act also excludes any mention of the Confederate flag, often considered one of the most controversial symbols in American history.³⁸ The Act also excludes other flags of important historical significance such as the Bunker Hill flag, Bonnie Blue flag, the Gadsden (“Don’t Tread on Me”) flag, and the first Navy Jack flag.³⁹ Whether a condominium or homeowner association could prohibit an owner from displaying more controversial flags such as flags of the Confederacy remains an open question but since courts prior to the enactment of the Freedom to Display the American Flag Act generally upheld restrictive covenants that limit the display of the American flag,⁴⁰ courts would likely also enforce restrictive covenants that limit the display of other flags such as the rainbow flag.

While the Freedom to Display the American Flag Act includes the flag of the United States, the Act excludes other flags that carry important national significance to many Americans such as military flags and the POW/MIA flag.

B. Definition of Association

The Act applies to any “condominium association, cooperative association, or residential real estate management association”⁴¹ but does not apply to other entities such as landlords and municipalities, that might restrict the display of the American flag. Congress defines a “condominium association” as an “organization, whose membership consists exclusively of all the unit owners in the condominium project, which is, or will be responsible for the operation, administration, and management of the condominium project.”⁴² Meanwhile a “cooperative association” under the Act means “An organization that owns the record interest in the residential cooperative property; or a leasehold of the residential property of a cooperative project and that is responsible for the operation of the cooperative project.”⁴³ The term “residential real estate management association” means any “organization meeting the requirements of [I.R.C. 528(c)(1)(A)] with respect to a subdivision, development, or similar area substantially all the lots or buildings of which may only be used by individuals for residences.”⁴⁴ The definitions for condominium association, cooperative association, or residential real estate management association under the Act do not deviate from the definition of these terms found elsewhere in the United States Code.⁴⁵

While the Act applies to any “condominium association, cooperative association, or residential real estate management association”, Congress failed to include other locations where many Americans reside such as rental properties, timeshares, hotels, motels, and mobile home parks. Specifically, the Act fails to provide protection for tenants from restrictions imposed by landlords on displaying the American flag. As of the 2000 Census, sixty-six percent of Americans were homeowners⁴⁶ and presumably the bulk of the remaining thirty-four percent of Americans not classified as homeowners were renters. Although there are no known reported judicial opinions involving landlords that restrict renters from displaying the flag, articles and letters to the editor appearing in newspapers provide accounts where landlords restrict the display of the American flag.⁴⁷ For example, some landlords restrict flying the American flag to just on certain holidays and do not permit year-round display of the flag.⁴⁸ In response to

these unpatriotic landlords, some states have enacted legislation to protect tenants from flying the American flag without the fear of harassment, scrutiny, and possibly eviction from their landlords. Colorado, Delaware, Florida, Kentucky, Maryland, Minnesota, Nevada, and South Carolina provide statutory protection for tenants who want to display the American flag.⁴⁹ The Florida statute was introduced in part from a lawsuit involving residents of an apartment complex in Boynton Beach who were told to remove a flag in their window or keep it behind blinds.⁵⁰ The millions of Americans who live in rental properties should receive the same protection as homeowners in associations to proudly fly the American flag.

The Freedom to Display the American Flag Act also fails to address zoning restrictions imposed by cities and counties in flying the American flag. The Act applies to any “condominium association, cooperative association, or residential real estate management association” but does not include cities or counties. In 2001, the U.S. Court of Appeals for the Fourth Circuit rejected a claim by a veterans organization that a city flag ordinance limiting the permitted size of flags to 60 square feet in area violated the First Amendment as applied to a display of American flags.⁵¹ More recently, in February 2007, Donald Trump filed an action against the City of Palm Beach after being cited for flying a 15-by-25-foot American flag atop an 80-foot flagpole over his Mar-a-Lago Club.⁵² Trump’s lawyers allege in part that Palm Beach ordinances prohibiting the club’s flag display violate the Florida Constitution, and that the club should receive damages as a result.⁵³ Congress should amend the Act using the powers created by the Supremacy Clause to preempt city and county ordinances that restrict the display of the American flag.⁵⁴

The Freedom to Display the American Flag Act applies only to condominium association, cooperative association, or residential real estate management association and does not apply to restrictions imposed by landlords or municipalities. While the Act protects homeowners from associations, Congress failed to provide specific protection for all Americans to patriotically display the stars and stripes. Congress should amend the Act to protect all Americans from onerous restrictions imposed by landlords and municipalities in flying the flag.

III. CONSTITUTIONALITY OF THE FREEDOM TO DISPLAY THE AMERICAN FLAG ACT

Condominium and homeowners' associations seeking to enforce restrictive covenants that curtail the display of the American flag might challenge the validity of the Freedom to Display the American Flag Act arguing that the legislation violates the U.S. Constitution. Specifically, associations could argue that Congress lacked a legitimate source of federal power under the Constitution to adopt the Act. Associations might also advocate a position that the Act violates the Contracts Clause, Due Process Clause, or the Equal Protection Clause.

A. Source of Federal Power

Associations seeking to enforce restrictive covenants that limit the display of the flag might contend that Congress lacks a legitimate federal power under the U.S. Constitution to adopt the Freedom to Display the American Flag Act. In order to determine whether any action of the federal government complies with the U.S. Constitution, the court determines whether the enactment is made pursuant to one of the powers granted the federal government under the Constitution.⁵⁵

Although not specified by legislators, presumably the source of federal power for the Act derives from the Commerce Clause.⁵⁶ In 2005, the U.S. Supreme Court summarized the three permissible exercises of congressional authority over commerce: "First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce."⁵⁷ The third category or power, regulating activities that substantially affect interstate commerce, is most likely at issue under the Freedom to Display the American Flag Act.

Associations that seek to enforce restrictive covenants limiting the display of the flag might argue that the Commerce Clause does not give Congress the power to enact the Freedom to Display the American Flag Act and the restrictions on displaying the flag are purely intrastate. Proponents of the Freedom to Display the American Flag Act will argue that the Act is national in scope and has a substantial effect on interstate commerce. Congress failed to include a jurisdictional hook in the Act limiting the definition of “flag of the United States” to “any flag sold or offered for sale, in interstate or foreign commerce”. The effect of a jurisdictional hook is to make a facial constitutional challenge unlikely or impossible, and to direct litigation toward the statutory question of whether, in the particular case, the regulated conduct possesses the requisite connection to interstate commerce.⁵⁸

One federal court upheld the constitutionality of the Condominium and Cooperative Abuse Relief Act of 1980,⁵⁹ which regulated contracts entered into by condominium associations, under a Commerce Clause challenge.⁶⁰ The Court held Congress did not exceed its power under the Commerce Clause in passing the Condominium and Cooperative Abuse Relief Act of 1980, as there was a rational basis for finding by Congress that long-term leasing arrangements for recreation and other condominium or cooperative-related facilities affect interstate commerce, as to both new and converted condominium units.

Congress did not make any legislative findings in adopting the Freedom to Display the American Flag Act that condominium association, cooperative association, or residential real estate management association rules governing the display of the American flag affect interstate commerce.⁶¹ The congressional findings under the Condominium and Cooperative Abuse Relief Act of 1980, however, include the following language that cooperatives and condominiums affect interstate commerce:

[T]here is a Federal involvement with the cooperative and condominium housing markets through the operation of Federal tax, housing, and community development laws, through the operation of federally chartered and insured financial institutions, and

through other Federal activities ... the creation of many condominiums and cooperatives is undertaken by entities operating on an interstate basis.⁶²

While Congress failed to make specific findings in adopting the Freedom to Display the American Flag Act, a Court will likely look at the legislative findings under the Condominium and Cooperative Abuse Relief Act of 1980 that cooperative and condominium housing markets affect interstate commerce.

Moreover, unless the flags affected by the Act are entirely manufactured, distributed, and sold intrastate, some nexus to interstate commerce exists. The purchase and possession of American flags arise out of or are connected with a commercial transaction, which viewed in the aggregate substantially affect interstate commerce. Many American flags are imported from China much to the chagrin of American workers and the Flag Manufacturers Association of America.⁶³ According to the U.S. Census, \$5.5 million worth of American flags were imported in 2005, of which \$5 million worth were made in China.⁶⁴ Membership in the Flag Manufacturers Association of America, a non-profit trade association, established in 2003, representing the leading United States flag manufacturers and suppliers dedicated to educating and promoting the quality, variety and proper use of flags manufactured in the United States, includes four manufacturers: Annin & Company based in New Jersey; C.F. Flag based in Alabama; J.C. Schultz Enterprises, Inc. based in Florida; and Valley Forge Flag based in Pennsylvania.⁶⁵ If a customer purchases a flag from one of these four manufacturers that is not their home state, some interstate commerce is involved.

Since Congress make specific findings under the Condominium and Cooperative Abuse Relief Act of 1980 that cooperative and condominium housing markets affect interstate commerce and the manufacture, distribution, and sale of American flags connected with the Freedom to Display the American Flag Act affect interstate commerce, Congress acted within its Commerce Clause powers by adopting the Freedom to Display the American Flag Act.

While the Commerce Clause is the likely source of Congressional power for the Freedom to Display the American Flag Act, Congress could not claim power under the First Amendment. The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”⁶⁶ A disability specific to Congress, the First Amendment cannot confer power to Congress.⁶⁷ Since the First Amendment restricts the power of Congress to regulate expressive conduct and speech, the First Amendment cannot serve as a source of federal power for the Freedom to Display the American Flag Act. Thus, sufficient authority exists under the Commerce Clause for Congress to pass the Freedom to Display the American Flag Act but not under the First Amendment.

B. Contracts Clause

Condominium and homeowners’ associations seeking to enforce restrictive covenants that limit the display of the American flag might challenge the validity of the Freedom to Display the American Flag Act under the Contracts Clause. The association might argue that the Act impairs the private contractual obligations of the restrictive covenant limiting the display of the American flag. Restrictive covenants are contracts and the rules of contract construction govern the interpretation of restrictive covenants.⁶⁸

The Contracts Clause provides: “No State shall pass any . . . Law impairing the Obligation of Contracts.”⁶⁹ The Contracts Clause, embodied in Art. I, section 10, clause 1 of the U.S. Constitution, prohibits states from passing laws that would impair private contractual obligations.⁷⁰ The Contracts Clause is also called the Contract Clause or the Obligation of Contracts Clause.⁷¹

The Contracts Clause only applies to state laws and claims that federal legislation unlawfully impairs existing contracts fall under the Fifth Amendment Due Process Clause.⁷² The Contracts Clause does not apply to the federal government.⁷³ When there is a substantial

impairment of contract by federal legislation, courts review the law under the Fifth Amendment due process clause rather than the contracts clause which applies to state legislation.⁷⁴ Since the Contracts Clause applies only to state laws, a court would not find that the Freedom to Display the American Flag Act, a federal law, violates the Contracts Clause.

C. Due Process Clause

Condominium and homeowner associations seeking to enforce restrictive covenants that curtail the display of the American flag might also contend that the Freedom to Display the American Flag Act retroactively affects existing contracts in violation of the Due Process Clause found in the Fifth Amendment. To challenge a statute under due process, it is “familiar law that legislative acts adjusting the burdens and benefits of economic life carry with them a presumption of constitutionality and that the person complaining of a due process violation must establish that the legislature has acted in an arbitrary and irrational manner”.⁷⁵ Congress had a legitimate reason for restricting existing restrictive covenants contracts to support freedom of expression in displaying the flag of the United States. Therefore, a court will likely uphold the constitutionality of the Act under any due process challenge.

D. Equal Protection Clause

Condominium and homeowner associations seeking to enforce restrictive covenants that limit flying the American flag might also challenge the validity of the Freedom to Display the American Flag Act under the Equal Protection Clause. The Fourteenth Amendment’s Equal Protection Clause states that “[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws.”⁷⁶ The Equal Protection Clause is “essentially a direction that all persons similarly situated should be treated alike”.⁷⁷ If legislative classification or distinction neither burdens fundamental right nor targets suspect class,

the U.S. Supreme Court will uphold it against equal protection challenge so long as it bears rational relation to some legitimate end.⁷⁸ Fundamental rights include the right to vote and the right of interstate travel.⁷⁹

No court has previously recognized that the right to enforce a restrictive covenant which limits or prohibits a homeowner's right to display the American flag involves a fundamental right. Furthermore, the Act does not target any suspect class such as persons of a particular race, national origin, or sex. The Act applies to condominium associations, cooperative associations, or residential real estate management associations⁸⁰ and does not discriminate on the basis of sex or race. Therefore, strict scrutiny analysis will not apply and the court need only find that the federal legislation bears some rational relation to some legitimate purpose. Certainly the right to fly the American flag involves a legitimate purpose. The Act also bears a rational relationship to achieve the legitimate purpose allowing homeowners the right to display the American flag. The Act also includes a provision that "[n]othing in this Act shall be considered to permit any display or use that is inconsistent with . . . any reasonable restriction pertaining to the time, place, or manner of displaying the flag."⁸¹ Since the Freedom to Display the American Flag Act does not involve a fundamental right or suspect class and bears a rational basis to achieve a legitimate purpose, courts will not find that the Act violates the Equal Protection Clause.

IV. CONCLUSION

While the Freedom to Display the American Flag Act protects homeowners from association unreasonable time, place, and manner restrictions in displaying the American flag, the Act falls short in its scope and application. Congress should amend the Act to include protection for tenants from restrictions imposed by landlords and municipalities in flying the American flag. Moreover, Congress should amend the Act to include other flags of symbolic significance, including the

POW/MIA flag and military flags. Although associations might argue that the Freedom to Display the American Flag Act violates the Commerce Clause, Contracts Clause, Due Process Clause, and the Equal Protection Clause, courts will likely uphold the constitutionality of the Freedom to Display the American Flag Act.



Endnotes

I would like to thank Mike Johnson for his contribution to this article.

1. *Voyage of the Good Ship Union*, Stanza 12.
2. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00042:@@R> (last visited Mar. 22, 2007). Also available on Westlaw at 2005 FD H.R. 42 (NS). PL 109-243, 120 Stat 572 (HR 42).
3. *Ibid.*
4. 492 N.W.2d 409 (Iowa 1992).
5. *Ibid.*
6. *Ibid.*
7. 757 F. Supp. 1339 (M.D. Fla. 1991).
8. *Ibid.*
9. *Ibid.*
10. *Ibid.* at 1341. For further discussion of the right to display the American flag, see Elizabeth F. Grussenmeyer, *The Right To Display The American Flag In Common Interest Developments: Restrictions By Homeowners' Associations Not Tolerated*, 34 *McGeorge Law Review* 516, 2003.
11. Statement of Rep. Bartlett 152 Cong. Rec. H4574-02, 2006 WL 1749721, June 27, 2006.
12. Press Release, White House Press Office, President's Statement on Signing of the "Freedom to Display the American Flag Act of 2005" (Jul. 24, 2006), see <http://www.whitehouse.gov/news/releases/2006/07/20060724-6.html> (last visited Mar. 11, 2007). Also available on Westlaw at 2006 WL 2051750.
13. Press Release, Rep. Roscoe Bartlett, "Americans Now Free to Display the Their American Flags at Their Homes" (July 24, 2006), see <http://bartlett.house.gov/News/DocumentSingle.aspx?DocumentID=47621> (last visited Mar. 11, 2007).
14. PL 109-243, 120 Stat 572.
15. *Ibid.*
16. *Ibid.*
17. PL 109-243, 120 Stat. 572 (H.R. 42) Sec. 4; 4 U.S.C.A. § 5 NOTE.
18. 4 U.S.C.A. § 3.
19. 4 U.S.C.A. § 1- 2.
20. *Black's Law Dictionary* 669 (8th ed. 2004). The national flag of Nepal, with two red triangles, is the only non-rectangular national flag. See Kaushal Basnet, "Small Slice of Nepal Thriving in GTA", *Toronto Star*, May 11, 2006, at 6.

The state flag of Ohio, technically a burgee or pennant shape, is the only non-rectangular U.S. state flag. See Ron Rollins, “More Flag Facts to Know, Wave Proudly at Parties”, *Dayton Daily News*, June 14, 2006, at D11.

21. <http://www.superflag.com/doc/guinness.htm> (last visited Mar. 17, 2007).
22. *Ibid.*
23. *Ibid.*
24. For a popular culture reference to the display of a large American flag in a condominium unit, in the television show *Frasier*, Episode “Mother Load”, Part 2 (original air date January 15, 2002), a huge American flag covered Frasier Crane’s entire apartment window and Frasier, portrayed by actor Kelsey Grammer, took his grievance to the condominium board. <http://www.frasieronline.co.uk/episodeguide/season9/ep12.htm> (last visited Mar. 17, 2007).
25. 4 U.S.C.A. § 3.
26. 452 U.S. 640, 648 (1981).
27. Mark Edward DeForrest & James M. Vaché, “Truth or Consequences Part Two: More Jurisprudential Errors of the Militant Far-Right”, 35 *Gonzaga Law Review*, 319, 330 (1990-2000).
28. *Ibid.*
29. *McCann v. Greenway*, 952 F.Supp. 647, 651†(W.D.Mo. 1997).
30. PL 101-355, 104 Stat 416.
31. 765 ILCS 605/1, *et seq.*
32. 765 ILCS 605/18.6.
33. *Ibid.*
34. A.R.S. § 33-1261.
35. *Ibid.*
36. See Charles A. Spain, Jr., “The Flags and Seals of Texas”, 33 S. *Texas Law Review* 215 (1992).
37. In *Daubenmire v. City of Columbus*, 452 F.Supp.2d 794 (S.D.Ohio 2006), the court held that individuals who engaged in expressive burning of the rainbow flag and pled no-contest in state court and were found guilty of open burning charges were precluded from bringing a civil action under 42 U.S.C.A. § 1983.
38. Michael J. Henry, “Student Display of the Confederate Flag in Public Schools”, 33 *Journal of Law and Education*, 573, 2004.
39. On May 22, 2002, Gordon R. England, Secretary of the Navy, ordered the first Navy Jack be displayed on board all U.S. Navy ships in lieu of the Union Jack during the global war on terrorism. The “Navy Jack” is a flag consisting of a rattle-

snake superimposed across 13 horizontal alternating red and white stripes, with the motto, "Don't Tread on Me." See Jimmy Brown, "Mission Completed", *Sun Herald* (Biloxi, MS), Oct. 20, 2004, at J2.

40. *Supra*, EN 4 and 7.
41. PL 109-243, 120 Stat 572 (HR 42).
42. PL 109-243 incorporating by reference 15 U.S.C.A. § 3603.
43. *Ibid.*
44. PL 109-243 incorporating by reference I.R.C. 528.
45. *Ibid.*
46. U.S. Census Bureau, U.S. Department of Commerce, "Historical Census of Housing Tables: Homeownership" (2000), available at <http://www.census.gov/hhes/www/housing/census/historic/owner.html> (last visited Mar. 22, 2007).
47. Matt Woodmancy, "Has no Intention of Removing His U.S. Flag", *Pantagraph* (Bloomington Ill.), Jul. 1, 2006, at A6.
48. *Ibid.*
49. See Colo. Rev. Stat. § 27-2-108.5); 25 Del. Code Ann., § 316 (Supp. 2004); Fla. Stat. Ann. § 83.67 (West Supp. 2005); Ky. Rev. Stat. Ann. § 2.042; Md. Code Ann., Real Prop. § 14-128 (West Supp. 2005); Minn. Stat. Ann. § 500.215 (West 2005); Nev. Rev. Stat. Ann. 118A.325; S.C. Code Ann. § 27-1-60 (Supp. 2004).
50. "Tallahassee Ticker", *Miami Herald*, Mar. 10, 2004, at B5.
51. *American Legion Post 7 of Durham, N.C. v. City of Durham*, 239 F.3d 601, 103 A.L.R.5th 745 (4th Cir. 2001). For further discussion, see *Validity, Construction, and Application of Zoning Ordinances Regulating Display of Non-commercial Flags or Banners*, 103 A.L.R. 5th 445.
52. "Trump Seeks Jury Trial in Palm Beach Flag Flap", *Orlando Sentinel*, Feb. 18, 2007, at B6.
53. *Ibid.*
54. For example, in *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103 (3d Cir. 1985), cert. denied, 475 U.S. 1013 (1986), the Third Circuit Court of Appeals invalidated a township ordinance prohibiting importation of nuclear waste due to its preemption under the supremacy clause by the Federal Atomic Energy Act of 1954. *Id.* at 1109.
55. See Ronald D. Rotunda and John E. Nowak, 1 *Treatise on Constitutional Law Substance & Procedure* § 3.1 (3d ed. 1999 & Supp. 2007).
56. U.S. Const., Art. I, § 8, cl. 3.

57. *Gonzales v. Raich*, 545 U.S. 1, 17, 125 S.Ct. 2195, 2205, 162 L.Ed.2d 1 (2005).
58. See *U.S. v. Patton* 451 F.3d 615, 632 (10th Cir. 2006).
59. 15 U.S.C. §§ 3601-3616.
60. *Bay Colony Condominium Owners Ass'n v. Origer*, 586 F.Supp. 30 (N.D.Ill.1984).
61. See *Supra* I. Background and Legislative History of the Freedom to Display the American Flag Act.
62. 15 U.S.C. § 3601(a)(4).
63. The Flag Manufacturers Association of America (FMAA) sponsors the “Certified Made in the USA” certification program. “Certified Made in the USA” confirms that the flag has been made in the USA of materials that are domestic in origin and that all processes in every step of its manufacture were completed in USA facilities with USA labor. See <http://www.flagmanufacturersofamerica.com/> (last visited Mar. 22, 2007). U.S. law requires every flag be labeled with its “country of origin”. Only the FMAA “Certified Made in the USA” Certification label assures the standards and continued compliance as monitored by a professional association and its domestic members.
64. Damon Lawrence, “Not Made in the U.S.A.: Many Versions of Old Glory are Manufactured Outside the United States — But Does It Matter?”, *Columbus Ledger-Enquirer*, Jul. 3, 2006. 2006 WLNR 11458593.
65. See <http://www.flagmanufacturersofamerica.com/about/memberlist.php> (last visited Mar. 22, 2007).
66. U.S. Const. amend. I.
67. Jay S. Bybee, “Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act”, 48 *Vanderbilt Law Review* 1539, 1624-33 (1995).
68. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex.1998).
69. U.S. Const. art. I, § 10.
70. *Black's Law Dictionary* 351 (8th ed. 2004).
71. *Ibid.*
72. *National Wildlife Federation v. I.C.C.*, 850 F.2d 694 (D.C. Cir. 1988).
73. *Brown v. Retirement Committee of Briggs & Stratton Retirement Plan*, 797 F.2d 521, 528 (7th Cir. 1986).
74. See Ronald D. Rotunda and John E. Nowak, 2 *Treatise on Constitutional Law Substance & Procedure* § 15.9 (3d ed. 1999 & Supp. 2007).
75. *Textile Workers Pension v. Standard Dye & Finishing*, 725 F.2d 843, 849 (2nd Cir.), cert. denied, 467 U.S. 1259, 104 S.Ct. 3554, 82 L.Ed.2d 856 (1984).

76. U.S. Const. amend XIV, § 1.
77. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).
78. *Vacco v. Quill*, 521 U.S. 793, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997).
79. See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).
80. PL 109-243, 120 Stat 572, Sec. 2; 4 U.S.C.A. § 5 Note.
81. *Ibid.*

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