Washington International Law Journal

Volume 14 | Number 1

1-1-2005

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Recommended Citation

Nami Kim, Comment, *Letting Bayous Be Bygones: Should Louisiana Be Allowed to Mandate Use of the Pre-Socialist Vietnam Flag?*, 14 Pac. Rim L & Pol'y J. 129 (2005).
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LETTING BAYOUS BE BYGONES: SHOULD LOUISIANA BE ALLOWED TO MANDATE USE OF THE PRE-SOCIALIST VIETNAM FLAG?

Nami Kim†

Abstract: The State of Louisiana recently enacted S.B. 839, a state law that mandates the use of the flag of the former Democratic Republic of Vietnam at all state-sponsored public functions and public schools where Vietnam is to be represented. S.B. 839 has added further tension to the relationship between Vietnam and the United States, which is already strained by the unresolved issue of American prisoners of war ("POWs"), those missing in action ("MIA") in Vietnam, and the recent opening of Vietnam's economy to the rest of the world. Although fifty-nine cities and three other states in the United States have passed resolutions similar to the law in Louisiana, S.B. 839 remains the only state legislation that retains vigorous anti-Communist language and forbids the flying of the actual Socialist flag.

S.B. 839 is a form of unprotected government speech that intrudes on the federal government's exclusive power to handle foreign affairs in violation of the Dormant Foreign Affairs Power ("DFAP") doctrine. Established by the Supreme Court in *Zschernig v. Miller*, this doctrine has never been overruled.

The Supreme Court has never directly spoken to the specific issue of flags as implements of foreign policy. Lower courts have limited their use of the DFAP doctrine to arguably more material issues, such as selective taxation or the denial of higher education to certain foreign students. Yet S.B. 839 touches upon the main concerns behind the DFAP doctrine: unwanted disturbance of the relationship between the United States and a foreign country, and encouragement of similar action by other states and cities. Because S.B. 839 poses a challenge to the traditional isolation of states from foreign affairs, the Vietnamese-American community should propose a version of S.B. 839 in the United States Congress if they wish to address their underlying concerns.

I. INTRODUCTION

On July 12, 2003, the Louisiana State Legislature enacted S.B. 839,[1] a resolution authored by State Senators Jon Johnson, Robert J. Barham, and J. Chris Ullo on behalf of their numerous Vietnamese constituents. The text of the enactment states:

> The legislature does hereby recognize that the people of the former Republic of Vietnam, also known as South Vietnam, were valiant in their resistance to the aggression of the communist North Vietnam. The legislature further finds that

† The author would like to thank John Pierce of Stoel Rives, LLC; Professor Veronica Taylor; Amalia R. Walton; Elizabeth A. Tutmarc; and Hannah Saona for their editing assistance and guidance.

[1] Codified as LA. REV. STAT. ANN. § 49:153.3 (2004) [hereinafter S.B. 839]. For purposes of this Comment, I will refer to the resolution by its bill number to accommodate the majority of sources that continue to refer to it as such.

> refugees from the former Republic of Vietnam who emigrated to the United States of America and settled in the state of Louisiana should be honored and remembered for their sacrifices. Therefore, the only flag depicting the country of Vietnam that may be displayed in any state-sponsored public function or any public institution of learning shall be the flag of the former Republic of Vietnam.[2]

The passage of S.B. 839 marks the latest in a series of challenges to the federal government's exclusive control of foreign relations, also known as the Dormant Foreign Affairs Power ("DFAP"). At present, it is the twelfth of sixty-three such pronouncements denouncing the flag of Communist Vietnam, and the first successful state bill.[3] S.B. 839 is also the only state bill that retains such vigorous anti-Communist language and forbids the use of the actual Socialist flag. At first blush, S.B. 839 may present an obvious legal question as to whether states can intrude on the federal foreign relations power. However, because the Supreme Court has never directly addressed the concept of symbols as actual implements of foreign policy, the question becomes more of a political issue rather than a legal or constitutional query.[4] The Louisiana resolution represents a

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[2] *Id.*

[3] FREE VIETNAM ALLIANCE, VIETNAMESE AMERICAN FREEDOM AND HERITAGE FLAG, *at* http://www.fva.org/vnflag/ (last visited Jan. 23, 2005) [hereinafter Roster]. The following represents the most up-to-date list of cities/states that have adopted flag legislation. The list is in reverse chronological order and includes the name of the city/state and the date of the legislation's passage: Missouri, TX (Sep. 7, 2004); Sugar Land, TX (Aug. 24, 2004); Portland, OR (June 28, 2004); Carollton, TX (June 15, 2004); Coral Springs, FL (June 15, 2004); Vancouver, WA (June 7, 2004); Seaside, CA (June 3, 2004); Lakewood, CO (May 24, 2004); Tampa Bay, FL (May 13, 2004); Bonney Lake City, UT (May 4, 2004); State of Colorado (Apr. 30, 2004); Saint Louis, MO (Apr. 30, 2004); Tacoma, WA (Apr. 20, 2004); Kent, WA (Apr. 20, 2004); Minneapolis, MN (Apr. 16, 2004); Commonwealth, VA (Apr. 15, 2004); Syracuse, NY (Apr. 12, 2004); State of Georgia (Apr. 1, 04); Honolulu, HI (Mar. 24, 2004); Centralia, WA (Mar. 24, 2004); Orlando, Florida (Mar. 22, 2004); Biloxi, MS (Mar. 16, 2004); Stockton, CA (Feb. 17, 2004); South El Monte, CA (Feb. 10, 2004); Grand Prairie, TX (Feb. 2, 2004); Philadelphia, PA (Jan. 29, 2004); Pierce County, WA (Jan. 26, 2004); San Diego, CA (Jan. 13, 2004); Wichita, KS (Jan. 13, 2004); Du Pont, WA (Jan. 13, 2004); Wichita, KS (Jan. 13, 2004); Lincoln, NE (Jan. 10, 2004); Worcester, WA (Dec. 16, 2003); Lakewood, WA (Dec. 8, 2003); Puyallup, WA (Dec. 1, 2003); Olympia, WA (Nov. 22, 2003); Marina City, CA (Nov. 18, 2003); Arlington, TX (Nov. 11, 2003); Clarkston, GA (Nov. 3 2003); Norcross, GA (Nov. 3, 2003); Doraville, GA (Oct. 20, 2003); Quincy, MA (Oct. 7, 2003); Grand Rapids, MI (Sept. 30, 2003); Garland, TX (Sept. 16, 2003); Tumwater, WA (Sept. 16, 2003); El Monte, CA (Sept. 16, 2003); Malden, MA (Sept. 16, 2003); Springfield, MA (Sept. 8, 2003); Sacramento, CA (Aug. 27, 2003); Rowley, MA (Sept. 15, 2003); Boston, MA (July 30, 2003); Fairfax County, VA (July 7, 2003); Pomona, CA (July 7, 2003); Houston, TX (June 18, 2003); Holland, MI (June 4, 2003); Santa Clara County, CA (June 3, 2003); Saint Paul, MN (May 28, 2003); Milpitas, CA (May 6, 2003); San Jose, CA (Apr. 15, 2003); Falls Church, VA (Apr. 14, 2003); Garden Grove, CA (March 11, 2003); Westminster, CA (Feb. 12, 2003).

[4] *See, e.g.*, Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1143 (2000) (describing the theory of state preclusion from foreign affairs post-*Zschernig* as "notoriously unclear").

narrowly focused wave of anti-Communist sentiment sweeping through city councils and state legislatures.[5] The true indictment against S.B. 839, therefore, is its inherent political purpose.

This Comment explores why the Louisiana flag conflict is properly understood as a violation of the DFAP doctrine. Part II lays the historical background on the tense U.S.-Vietnam relationship. Part III introduces the DFAP doctrine, setting up the doctrinal framework for examining the central issues of federalism and foreign policy presented by the Louisiana flag issue. Part IV discusses the status of S.B. 839 as both product and provocateur of the many other legislative pronouncements targeting the Communist Vietnamese flag. Part V delineates the major concerns implicated and possibly threatened by the flag resolutions: the still-unresolved POW/MIA issue;[6] the loss of leverage in the human rights campaign; [7] and the impact on trade relations,[8] particularly with respect to the Vietnamese catfish debacle.[9] Part VI examines the language and legislative history of S.B. 839 to demonstrate its intent to influence foreign relations. Part VII considers the relevance of symbolic actions within the framework of the DFAP doctrine. It concludes that flags, as communicative symbols, are forms of government speech that do not fall under the protection of the First Amendment and that S.B. 839 therefore violates the DFAP doctrine.

II. THE RELATIONSHIP BETWEEN VIETNAM AND THE UNITED STATES IS TOO FRAGILE TO WITHSTAND ADDITIONAL INFLAMMATION

The history of the relationship between the United States and Vietnam reveals a past fraught with mistrust and conflict. Although the federal government currently conducts diplomatic relations with Vietnam and has done so since 1995, the formal resumption of normalized relations came only after a twenty-year chill between the two countries.[10] This delicate relationship began only after arduous negotiations over Vietnam's human

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5 *See* Roster, *supra* note 3.

6 *See* Peter G. Furniss, *Recent Development: The United States-Vietnam Trade Relationship: Politics and Law in the Process of Normalization*, 35 HARVARD INT'L L.J. 238, 240 (1994); John A. Farrell & Michael Kranish, *Clinton Lifts Trade Barriers on Vietnam, Cites cooperation, POW-MIA Groups Decry Decision*, BOSTON GLOBE, Feb. 14, 1994, at 1.

7 *See* Furniss, *supra* note 6.

8 *See id.*

9 *See generally* Amalia R. Walton, Comment, *Catfish Wars: Vietnam's Fight for Free Trade in the U.S. Court of International Trade*, 13 PAC. RIM L. & POL'Y J. 471 (2004).

10 BUREAU OF EAST ASIAN AND PACIFIC AFFAIRS, U.S. DEPARTMENT OF STATE, BACKGROUND NOTE: VIETNAM, Sept. 2004, http://www.state.gov/r/pa/ei/bgn/4130.htm (last visited Jan. 23, 2005).

rights policies,[11] its return of American POW/MIA servicemen,[12] and its entry into the capitalist market.[13] As aptly stated by Vietnam's top Party leader, Le Kha Phieu, however, the war between the two countries sometimes appears to have simply switched to less bloody battlefields: "The U.S. continue[s] to seek ways to completely wipe out the remaining socialist countries . . . We should never relax our vigilance for a minute."[14] The forceful message of S.B. 839 could contribute to the destabilization of a historically volatile relationship between the Unites States and Vietnam, a consequence forbidden by the DFAP doctrine.[15]

A. *Tension Between the United States and Vietnam Has Remained High Since the Vietnam War*

The years following the 1973 Paris Accords[16] saw a complex interplay of trade policies, human rights issues, and POW/MIA negotiations that ultimately became the trademark of relations between Vietnam and the United States. Vietnam was left in stark isolation after the United States severed trade relations in 1975.[17] Many countries and world financial organizations followed America's lead, fearing similar treatment by the United States.[18] In 1976, President Ford first refused Vietnam's demands for humanitarian aid in direct violation of the Paris Accords[19] until Vietnam fulfilled its own pledge to return the remains of American POWs and MIAs.[20] In 1978, Vietnam invaded neighboring Cambodia.[21] The Carter

[11] Ky Tran-Trong, Note, *A Would-Be Tiger: Assessing Vietnam's Prospects For Gaining Most Favored Nation Status From The United States*, 38 WM. & MARY L. REV. 1583, 1591-93 (1997).

[12] *See id.*

[13] *See id.*

[14] Lan Cao, *Eighteenth Annual International Law Symposium: Doing Business in Vietnam: Reflections on Market Reform in Post-War, Post-Embargo Vietnam*, 22 WHITTIER L. REV. 1029, 1048 (2001).

[15] Zschernig v. Miller, 389 U.S. 429, 440 (1968) (condemning those state actions that "impair the effective exercise of the Nation's foreign policy").

[16] Ending the War and Restoring Peace in Vietnam, January 27, 1973, U.S.-Vietnam, 24 U.S.T. 1 [hereinafter Paris Accords]. The Paris Accords are the informal name for the treaty between the United States and Vietnam which ended the Vietnam War.

[17] *See* Furniss, *supra* note 6, at 238 n.1.

[18] *See id.* at 238-39 (explaining that the United States effectively shut off any chance for Vietnam's economic independence when it pressured the World Bank to withdraw $60 million dollars in low-interest loans).

[19] Paris Accords, *supra* note 16, art. 21.

[20] *See* Ky Tran-Trong, *supra* note 11, at 1586.

[21] *See* Furniss, *supra* note 6, at 238.

Administration responded by officially ending diplomatic ties with Vietnam.[22]

In an attempt to balance the United States' changing economic and political needs, George Bush Sr.'s administration initiated a four-step plan for reconciliation in 1991.[23] The United States' relative position of power over Vietnam had changed somewhat: in 1986, after a decade of financial turmoil, Vietnam had initiated a new economic policy called doi moi, or "renovation," allowing private and foreign investment within its borders for the first time and initiating a process of business-friendly legal reform.[24] Without the fear of expropriation of assets, other countries responded with fervor and began to invest in Vietnam.[25] This international reprieve not only crippled the United States' embargo strategy, but also threatened American businesses as they continued to lose out on a burgeoning Vietnamese market.[26] The four-step plan therefore emphasized a careful *quid pro quo* approach of humanitarian aid and graduated economic relations in exchange for resolution of the POW/MIA issues and a market-style economy.[27] With considerable protest from human rights' groups and Vietnam War veterans, President Clinton lifted the U.S. embargo on Vietnam on February 4, 1994.[28] By 1996, the United States had become Vietnam's sixth largest foreign investor, with more than $1.2 billion in investments.[29] However, the issues of trade, human rights, and the POW/MIA situation remain unresolved and are threatened by the symbolic affront posed by measures such as S.B. 839.

B. *Broken Promises Regarding the POW/MIA Situation Continue to Add Tension to the U.S.-Vietnam Relationship*

The POW/MIA issue has historically been both lynchpin and leverage in the ongoing tug-of-war in U.S.-Vietnam relations.[30] U.S. veterans' groups responded furiously to the lifting of the embargo in 1994, claiming that Vietnam had only succeeded in providing more deceit and double-talk

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22 *See* David Mowry, Note, *Lifting the Embargo Against Cuba Using Vietnam as a Model: A Policy Paper for Modernity*, 25 BROOKLYN J. INT'L L. 229, 247 (1999).

23 *See* Ky Tran-Trong, *supra* note 11, at 1591.

24 *See* Lan Cao, *supra* note 14, at 1039-40.

25 *Protection of Foreign Direct Investment in a New World Order: Vietnam – A Case Study*, 107 HARV. L. REV. 1995, 1996 n.15 (1994) ("Vietnam's international trade quintupled between 1989 and 1992 . . . exports surged at an average annual rate of 30 percent from 1988 to 1992 . . . and foreign investment quadrupled between 1988 and 1993.") (citations omitted)).

26 *See* Furniss, *supra* note 6, at 241.

27 *See* Ky Tran-Trong, *supra* note 11, at 1591-93.

28 *See id.* at 1593.

29 *See id.* at 1592-93.

30 *See* Furniss, *supra* note 6, at 240.

on the POW/MIA issue.[31] In 1996, when trade relations resumed, the U.S. government's official figure for POWs/MIAs in Vietnam was 2238, many of whom were known to be dead.[32] Attempting to assuage angry war veterans, President Clinton "took pains" to convey that economic considerations "played no role in the decision" to open up Vietnam's borders, citing Vietnam's "significant tangible progress" on POW/MIA issue as his main impetus.[33] However, as of 2001, the United States estimated the number of servicemen still unaccounted for at 1948.[34] This lack of resolution has complicated the United States' embrace of Vietnam as both a trading partner and a true ally.

C. *The Economic Relationship Between the United States and Vietnam is Already at Risk Even Without the Added Political Insult of Legislation Such as S.B. 839*

Although the last decade has seen historic leaps in the ongoing economic reconciliation between the United States and Vietnam, the relationship itself is still quite delicate. On July 13, 2000, after five years of negotiation, the United States and Vietnam signed a Bilateral Trade Agreement ("BTA"), which Congress approved a year later.[35] The agreement allows Vietnamese and American firms to import and export freely within Vietnam, lowers tariffs on American goods, adopts World Trade Organization ("WTO") standards for intellectual property rights and customs-related matters; permits full market access for services; and establishes investment and transparency provisions to promote a market-style economy.[36]

The trade relationship stumbled almost immediately, however, with claims of thinly veiled protectionist economics by Vietnam and accusations of dumping and cutthroat pricing by the United States.[37] This animosity manifested itself principally in the Vietnamese catfish debacle, which resulted in the imposition of large tariffs on Vietnamese catfish and a later

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[31] *See* Farrell & Kranish, *supra* note 6, at 1.

[32] Ruth Marcus & Thomas W. Lippman, *Clinton Lifts Vietnam Trade Embargo; President Calls It 'the Best Way' to Ensure Progress on MIA Issue*, WASH. POST, Feb. 4, 1994, at A1.

[33] *See* Marcus & Lippman, *supra* note 32, at A1.

[34] *See* ROBERT L. GOLDICH, CONGRESSIONAL RESEARCH SERVICE, POWS AND MIAS: STATUS AND ACCOUNTING ISSUES 4, at http://www.fas.org/man/crs/IB92101.pdf (last visited Jan. 23, 2005).

[35] MARK E. MANYIN, CONGRESSIONAL RESEARCH SERVICE, THE VIETNAM-U.S. NORMALIZATION PROCESS 4 (2003), at http://vietnam.usembassy.gov/wwwfta98e.pdf (last visited Jan. 23, 2005).

[36] Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 677, 701 (2000).

[37] *See* Walton, *supra* note 9.

ruling that forbade the labeling of these fish as "catfish."[38] By visibly snubbing the government of Socialist Vietnam, S.B. 839 risks inflaming that country to the point of legitimizing Vietnamese complaints of political blackmail.

D. *The United States Continues to Allege Human Rights Violations in Vietnam*

The issues of human and religious rights have emerged as more recent points of contention between the United States and Vietnam. Over the past two years, the U.S. House of Representatives has passed several bills attacking Vietnam's restrictive polices regarding freedom of information,[39] human rights,[40] and religious freedom.[41] Vietnam has also been subject to general public condemnation of its policies by the United States.[42] Vietnam has complained bitterly about this interference with its internal affairs,[43] and it may prove difficult for the United States to continue the encouragement of democratic ideals while visibly tolerating insurgent state action such as S.B. 839.

III. A STATE'S IMPACT ON FOREIGN RELATIONS INDICATES A VIOLATION OF THE DFAP DOCTRINE

The United States federal government has historically dominated the realm of foreign affairs, with courts allowing it to establish near-exclusive control over international relations.[44] Over the years, courts have developed

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[38] *See id.* Recent controversy involving the marketing and selling of Vietnamese catfish in the United States has made Mississippi, Arkansas, Alabama, and Louisiana the locus of heated debate over protectionist economics and state compliance with the BTA. As one of the four main catfish-farming states in the United States, Louisiana benefits considerably from the current laws outlawing the marketing of Vietnamese catfish as "catfish."

[39] Freedom of Information in Vietnam Act, H.R. 1019, 108th Cong. (2003).

[40] Vietnam Human Rights Act, H.R. 1587, 108th Cong. (2003).

[41] HR. Res. 427, 108th Cong. (2003). The U.S. Senate has also passed similar resolutions regarding religious freedom in Vietnam. *See* S. Res. 343, 108th Cong. (2004).

[42] *See, e.g.*, Jared Genser, *The Real Scandal About Vietnam*, WASH. POST, Aug. 25, 2004, at A17 (calling on the Bush Administration to "to insist on improved respect for human rights in Vietnam"); Andrew J. Pierre, *Vietnam's Contradictions*, FOREIGN AFFAIRS, Dec. 2000, at 69 (describing a "Vietnamese human rights record that has been a point of contention with the United States for many years").

[43] *Vietnam Radio Hails US Visit by Deputy Premier Nguyen Tan Dung*, BBC MONITORING INTERNATIONAL REPORTS, Dec. 18, 2001, LEXIS, Nexis Library, All News File.

[44] *See, e.g.*, U.S. v. Belmont, 301 U.S. 324, 330 (1937) ("Governmental power over external affairs is not distributed, but is vested exclusively in the national government"); U.S. v. Pink, 315 U.S. 203, 233 (1942) ("No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively").

and advanced a far-reaching DFAP doctrine, which forbids states from taking actions that impact foreign relations.[45] S.B. 839 directly violates this doctrine by establishing a policy that refuses to recognize the current socialist government of Vietnam.

A. Zschernig *Laid a Broad Blanket of Power Regarding the Federal Government's Exclusive Control of Foreign Policy*

In *Zschernig v. Miller*,[46] the Supreme Court of the United States declared that the realm of foreign affairs belonged exclusively to the federal government and thus prohibited any intrusive state action in that domain, regardless of whether any countervailing federal statute actually existed.[47] The state statute at issue in *Zschernig* prohibited nonresident foreign aliens from inheriting property located in the state of Oregon, absent a showing of: (1) reciprocal terms of inheritance that allowed American residents to take similar possession in that country; and (2) some sort of assurance that the foreign government in question could not confiscate the property.[48] In its decision, the Court advanced a broad prohibition on laws that required "the kind of state involvement in foreign affairs and international relations . . . which the Constitution entrusts solely to the Federal Government."[49] Such a broad prohibition, however, did not exist literally in the Constitution.[50] The Court nevertheless declared that even traditionally state-dominated areas of regulation "must give way if they impair the effective exercise of the Nation's foreign policy."[51] It apparently considered the DFAP doctrine so fundamental to effective government that it rendered irrelevant the federal government's acquiescence in the face of the Oregon act.[52] *Zschernig* remains the principal source of the DFAP doctrine; the Supreme Court has never overruled it, nor addressed the matter since.[53]

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[45] *See generally* Zschernig v. Miller, 389 U.S. 429 (1968).

[46] *Id.*

[47] *Id.* at 441 (stating that "even in absence of a treaty, a State's policy may disturb foreign relations").

[48] *Id.* at 430 n.1.

[49] *Id.* at 436.

[50] This question is hotly debated. Many scholars concede that the text of the Constitution itself does not expressly refer to a general foreign affairs power. *See, e.g.*, Carol E. Head, Note, *The Dormant Foreign Affairs Power: Constitutional Implications for State and Local Investment Restrictions Impacting Foreign Countries*, 42 B.C. L. REV. 123, 136 n.75 (2000) (arguing that "the Court has not explicitly delineated the roots of the Dormant Foreign Affairs Power"); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1641-42 (1997) (arguing that the Dormant Foreign Affairs Power is a federal common law doctrine not actually found in the text of the Constitution).

[51] *Zschernig*, 389 U.S. at 440.

[52] *Id.* at 434. In spite of the Department of Justice's concession in *Zschernig* that it did "not . . . contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes

B. *The* Zschernig *Court Was Primarily Concerned with Negative Impacts on Foreign Relations with Other Countries*

The Court took a dramatic step by making foreign affairs a per se state-free zone in *Zschernig*.[54] Justice Douglas underscored the threat of reduced leverage with and possible retaliation by any offended foreign nations as a primary motivation of the DFAP doctrine.[55] Because Oregon's reciprocity statute had "more than some incidental or indirect effect in foreign countries," wrote Justice Douglas, "its great potential for disruption or embarrassment makes us hesitate to place it in the category of a diplomatic bagatelle."[56] The Oregon courts' use of the statute to engage in a critical assessment of foreign inheritance laws, by their very nature, had produced "a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."[57]

That the Oregon statute could be viewed as a minor and occasional intrusion meant little. Quoting an earlier case which presaged the entrance of *Zschernig*'s full-blown DFAP doctrine, the Court stated, "[e]xperience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government."[58] Whether the United States recognizes the anger incited by S.B. 839 as "real or imagined," the only question, ultimately, is whether Vietnam perceives it as an insult of the "gravest moment."[59]

C. *A State's Forbidden Impact on Foreign Relations Does Not Have to Be Literally Expressed in the Offending Statute in Order to Violate the DFAP Doctrine*

The impact of a state statute on foreign affairs did not have to be literally stated: if the application of that statute resulted in offending a

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with the United States' conduct of foreign relations," the Court declared that "the Government's acquiescence . . . certainly does not justify" upholding the reciprocity statute. *Id.*

[53] LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 163 (2d ed. 1996).

[54] *Zschernig*, 389 U.S. at 441.

[55] *Id.* at 434-5.

[56] *Id* (quotations omitted).

[57] *Id.* at 441.

[58] *Id.* at 441 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 64).

[59] *See Zschernig*, 389 U.S. at 441.

foreign nation, it could constitute a violation.[60] The Oregon courts reviewed in *Zschernig*, for example, had "launched inquiries into the type of governments . . . in foreign countries,"[61] a fatal flaw that "led into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether [the parties actually] received delivery of funds."[62] Specifically, those courts had attacked the character and integrity of the Communist governments in question.[63]

This level of political judgment and anti-socialist sentiment not only echoes the legislative history behind S.B. 839, but also presages its dim future. By mandating the symbolic recognition of a government that no longer exists, and in the process incensing that country's current government, the state of Louisiana has overstepped the bounds of the DFAP doctrine set forth in *Zschernig*.

IV. S.B. 839 RAISES THE SAME CONCERNS AS DESCRIBED IN *ZSCHERNIG* REGARDING ENCOURAGEMENT OF UNWANTED STATE ACTION

One of the main concerns in *Zschernig* appeared to be the Court's fear of encouraging similar insurgent actions on the part of the other states.[64] Repeated in lower court decisions since then,[65] this "slippery slope" argument aptly describes the pandemic aspect[66] of flag-based legislation such as S.B. 839.

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[60] *Id.* at 442 (stating that "any realistic attempt to apply [the statute in question] . . . would necessarily involve the Oregon courts in an evaluation . . . of the administration of foreign law, the credibility of foreign diplomatic statements, and the policies of foreign governments").

[61] *Id.* at 434.

[62] *Id.* at 435.

[63] *Id.* at 437, n.8. The Court paid particular attention to the treatment of Communist recipients in other states with similar reciprocity statutes, citing one Pennsylvania judge's declaration that "I am not going to send money to Russia where it can go into making bullets which may one day be used against my son." *Id.* A Montana probate court opined that if it allowed receivership, it would be "knowingly contributing financial aid to a Communist monolithic satellite, fanatically dedicated to the abolishing of the freedom and liberty of the citizens of this nation." *Id.* Although the *Zschernig* court did note one Oregon decision that allowed the transfer of property to Poland, it observed that the probate judge had done so only after "appraisal of the current attitude of Washington, D.C. toward Warsaw." *Id.* The Court thus concluded that the Oregon statute "as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Id.*

[64] *Id.* at 440.

[65] N.Y. Times v. City of N.Y Human Rights Comm'n, 361 N.E.2d 963 (N.Y. 1977); Springfield Rare Coin Galleries v. Johnson, 503 N.E.2d 300 (Ill. Sup. Ct. 1986).

[66] *See* Roster, *supra* note 3 and accompanying text.

A. *A Statute's Provocation of Similar Legislation Indicates a Violation of the DFAP Doctrine*

In *Zschernig*, the Court characterized the rapid spread of reciprocity laws targeting Communist countries as a "notorious" trend.[67] It listed with disapproval a long series of state court decisions similar to those decided by the probate courts in Oregon.[68]

Over the years, lower courts have noted with similar concern the infectious nature of state actions targeting such explosive international topics as apartheid practices in South Africa,[69] the Iran hostage crisis,[70] Holocaust reparations,[71] and American involvement in Vietnam.[72] In *N.Y. Times v. City of N.Y Human Rights Comm'n*, the New York Human Rights Commission had attempted to prevent the New York Times' publication of employment opportunities in apartheid South Africa.[73] The New York Court of Appeals described as "disastrous" the consequences of approving such a measure: "The true danger is that if New York City could do this in one instance, it could do so in many instances . . . [and] adopt its own foreign policy."[74] In *Tayyari v. N.M. State Univ.*, the District Court of New Mexico indicated the "commonplace" trend of "strong negative reactions" towards Iran when it overturned a university's admissions policy forbidding entry to students whose home country held or permitted the holding of U.S. hostages.[75] The university, a public institution, had instituted the policy in the wake of the 1980 Iran hostage crisis.[76] The Illinois Supreme Court seemed particularly concerned with the consequences of approving a selectively high tax on South African kruggerands in *Springfield Rare Coin Galleries v. Johnson*: "[T]he practical effect of [such selective taxation] is to impose, or at least encourage, an economic boycott of the South African krugerrand."[77] As noted earlier, a great number of cities have already passed proclamations similar to the one in Louisiana, and a great many more

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67 *Zschernig*, 389 U.S. at 440.
68 *Id.*
69 *N.Y. Times*, 361 N.E.2d at 965; *Springfield*, 503 N.E.2d at 307.
70 Tayyari v. N.M. State Univ., 495 F. Supp. 1365 (D.N.M. 1980).
71 Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003).
72 Silberman v. Katz, 283 N.Y.S.2d 895 (1967).
73 *N.Y. Times*, 361 N.E.2d at 963.
74 *Id.* at 969
75 *Tayyari*, 495 F. Supp. at 1376.
76 *Id.*
77 Springfield Rare Coin Galleries v. Johnson, 503 N.E.2d 300, 307 (Ill. Sup. Ct. 1986).

continue to do so.[78] Seen in this context, S.B. 839 embodies the very type of encouragement forbidden by the lower courts.

B. *S.B. 839 Represents a Growing National Movement to Eradicate Use of the Socialist Vietnamese Flag*

S.B. 839 represents the power of momentum. As the twelfth piece of flag legislation passed in recent years, it has joined a group of fifty-nine cities and three other states denouncing use of the Socialist flag.[79] These laws are not the direct fruit of the Louisiana bill per se, but rather reflect the persistence of the movement as a whole. As the first successful state law of its kind, it represents the most visible benchmark and the most potent evidence of the movement's growing influence.

At last count, sixty-two other localities across the country have passed flag legislation declaring, in one form or another, their recognition of the South Vietnamese flag.[80] The most remarkable fact behind this figure is not its size, but the rate at which it materialized. The first successful resolution passed in the city of Westminster, California, on February 12, 2003, and in little more than a year, similar resolutions have raced across almost every single region of the United States.[81] This translates into roughly four cities per month and includes major metropolitan hubs such as Boston, Philadelphia, Honolulu, San Diego, and Houston.[82] The organizations responsible for flag resolutions have ranged from student associations[83] to civic groups,[84] and even a group of parents at Anthony Lane Elementary School in Fairfax, Virginia.[85] Thus far, no one has established a national clearinghouse or unified coalition dedicated to the flag issue and no single group has commandeered and guided the effort.

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[78] *See* Roster, *supra* note 3.

[79] *See id.*

[80] *See id.*

[81] *See id.*

[82] *See id.*

[83] *See, e.g.*, Judy Gibbs Robinson, *Vietnamese Politics Cause Flap Over Flag in Stillwater*, DAILY OKLAHOMAN, Nov. 2, 2003, at 4A (discussing efforts of the Vietnamese American Student Association at Oklahoma State University); *Activists Want South Vietnamese Flag Recognized*, THE HOLLAND SENTINEL, May 23, 2003 (noting influence of Vietnamese Student Association at San Jose State University), *at* http://hollandsentinel.com/stories/052503/new_052503028.shtml (last visited Jan. 23, 2005).

[84] Steven Ginsberg & William Branigin, *Bid to Honor South Vietnamese Elicits Anger, Va. Bill to Display Defeated Republic's Flag Called 'Insolent' by Ruling Government*, WASH. POST, Jan. 29, 2003, at B01 (discussing activism of Boat People SOS, a Vietnamese American civic group in Falls Church, VA).

[85] William Branigin & Phuong Ly, *Vote on Vietnam Flag Ignites Deep Passions, Communist Emblem Painful to Many*, WASH. POST, Jan. 31, 2003, at B04.

Both the United States and Vietnamese governments have pointed out the potential or realized encouragement of similar action on the part of other states.[86] Indeed, states and cities seem aware of this domino effect, reflected by one city legislator's suggestion that "if [similar bills] are passed in different communities, that will send the message to our government in Washington."[87] Binh Nguyen, vice-president of the public affairs committee for the Vietnamese-American Community in Houston, noted the trigger-effect of Virginia's first attempt to pass a flag referendum: "[It] is further evidence of Vietnamese-Americans' growing numbers and political sophistication. They're starting to get to know more about how the system works and they have people in the system."[88] Newspaper coverage described how the flag movement "ignited [in February 2002] in Virginia and spread from city to city among a network of activists."[89]

V. S.B. 839 IMPACTS FOREIGN RELATIONS BETWEEN THE UNITED STATES AND VIETNAM IN VIOLATION OF THE DFAP DOCTRINE

Zschernig forbade state actions that impacted relations between the United States and other countries.[90] Both the United States and the Vietnamese Embassy have drawn attention to specific negotiations between the United States and Vietnam that could potentially suffer because of the flag legislation.[91] The most prominent include the return of all POW/MIA servicemen to the United States, the derailment of trade relations, and the concern over human rights violations.[92]

A. *A State Statute Need Only Have "Some Incidental or Indirect Effect"[93] in Foreign Countries to Violate the DFAP Doctrine*

Although *Zschernig* offered little guidance beyond the phrase "some incidental or indirect effect in foreign countries" to determine a violation of

[86] *See* Mai Tran, *Garden Grove Makes Choice in Vietnamese Flags: South Wins, the City Joins Westminster in Refusing to Display the Communist Banner*, L.A. TIMES, Mar. 23, 2003, Pt. 2, at 9 [hereinafter *Garden Grove*].

[87] *Id.*

[88] *Activists Want South Vietnamese Flag Recognized*, *supra* note 83.

[89] *Id.*

[90] Zschernig v. Miller, 389 U.S. 429, 440 (1968).

[91] *See Vietnam Terms Virginia Bill on South Vietnamese Flag "Unacceptable,"* GLOBAL NEWS WIRE, Feb. 10, 2003 [hereinafter *Unacceptable*]; Steven Ginsberg, *Global Furor Dooms Vietnam Flag Bill, Va. Panel Shelves Honor for Symbol of Fallen Republic*, WASH. POST, Feb. 16, 2003, at C06 [hereinafter *Global Furor*].

[92] *See* Ky Tran-Trong, *supra* note 11, at 1591-93.

[93] *Zschernig*, 389 U.S. at 433.

the DFAP doctrine,[94] lower courts have generally interpreted this key phrase quite broadly.[95] In *N.Y. Times v. City of N.Y Comm'n on Human Rights*,[96] the state court of appeals characterized the city commission's charges of discrimination against South Africa as a sufficient violation of the "incidental or indirect effect" test.[97] There, the court stated that the apartheid government of South Africa had been recognized as "the legitimately constituted governmental authority for that country" and that "it is beyond the province of the State courts, much less municipal agencies, to sit in review of the laws of foreign governments."[98] The *Springfield* court, while noting that the "line of demarcation between incidental and unconstitutional intrusions into foreign affairs is difficult to draw with absolute precision,"[99] concluded that a compromise in the federal government's "ability . . . to choose between a range of policy options in developing its foreign policy"[100] with another country was enough to constitute an incidental and indirect effect. Such a compromise occurred simply "by the existence of State-sponsored sanctions which the Federal government could not remove or modify to fit changing conditions."[101]

B. *S.B. 839 Impacts United States and State Interests*

The opening of the Vietnamese border came at an arguably great cost: the loss of key leverage in resolving the POW/MIA issue. Without the proven clout of an economic embargo, the United States now has less room to risk antagonizing Vietnam and losing further ground on the recovery of nearly 2000 outstanding missing servicemen. One Pittsburgh newspaper noted with concern that Vietnamese officials were still "cooperating actively" with the United States in "making a full accounting of servicemen listed as missing or killed in Indochina."[102]

The enticement of a new Asian market as consolation pales in the harsh light of reality. Because Vietnam continues to struggle with the

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[94] *Id.*

[95] *See* N.Y. Times v. City of N.Y Comm'n on Human Rights, 361 N.E.2d 963 (N.Y. 1977); Tayyari v. N.M. State Univ., 495 F. Supp. 1365 (D.N.M. 1980); Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003); Silberman v. Katz, 283 N.Y.S.2d 895 (1967).

[96] *N.Y. Times*, 361 N.E.2d at 963.

[97] *Id.* at 968.

[98] *Id.*

[99] Springfield Rare Coin Galleries v. Johnson, 503 N.E.2d 300, 307 (Ill. Sup. Ct. 1986).

[100] *Id.*

[101] *Id.*

[102] *See Red Flag: State Governments Shouldn't Do Foreign Policy*, PITTSBURGH POST-GAZETTE, Feb. 24, 2003, at A-14 [hereinafter *Red Flag*].

conversion of its socialist business practices to a market-friendly legal system,[103] the prospects for a successful new Asian market remains uncertain. The United States' encouragement of mass reform in areas of Vietnamese contract law and other steps towards a true market economy may become more difficult as states and major cities insist on, in essence, thumbing their nose at the current government.[104]

On the other hand, if the new Asian market in Vietnam becomes a thriving reality, states and municipalities such as Louisiana risk angering the bearer of that market's fruits. In its official statement to the State Department, the Vietnamese Embassy repeated its warnings of economic repercussions, stating that Virginia's effort to raise the South Vietnamese flag "has revived past animosities, and runs counter to the trend of developing relations for mutual interests [sic] of the Vietnamese and U.S. people, including the people of Virginia State."[105] Opponents of the bill in the Virginia Chamber of Commerce expressed corresponding fears that "if the bill passes, state businesses could be denied their long-awaited foray in to Vietnamese markets [and that] Vietnamese trade would be diverted from Virginia ports."[106]

Louisiana is in an already fractious economic position because of the recent controversy surrounding the importation of Vietnamese catfish.[107] As one of the four states most heavily dependent on the catfish industry,[108] Louisiana benefited significantly from the drastically hiked tariffs on Vietnamese catfish in 2003.[109] Beginning a mere ten days after the bilateral trade agreement was signed,[110] the controversy spilled over into the very inauguration of open trade between the two countries and left a bitter taste in the mouths of the Vietnamese.[111] While the ongoing catfish controversy is one of the most significant issues facing Louisiana today, for reasons of

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[103] Duc V. Trang, *Eighteenth Annual International Law Symposium "Doing Business In Vietnam: Law/Economy/Politics": The Practice of Law and Foreign Investment in Vietnam*, 22 WHITTIER L. REV. 1067, 1070 (2001).

[104] *See* Duc V. Trang, *supra* note 103.

[105] *See Unacceptable, supra* note 91.

[106] Mary Shaffrey, *Virginia Bill Would Fly South Vietnam Flag, Its Inclusion Sought at Public Events*, WASH. TIMES, Feb. 11, 2003, at A01.

[107] *See* Seth Mydans, *Americans and Vietnamese Fighting over Catfish*, N. Y. TIMES, November 5, 2002, at A-3.

[108] Timothy R. Brown, *Catfish Farmers Seek Relief In Petition*, THE COMMERCIAL APPEAL, June 30, 2002 at DS12. *See also Vietnam Catfish Spark Trade Duel*, STATE-TIMES/MORNING ADVOCATE, Oct. 6, 2001, at 12-B ("In Louisiana, there are more than 100 catfish farms, producing 67 million pounds of catfish worth more than $47 million last year.").

[109] *Tariffs Ordered on Catfish and Computer Chips*, N. Y. TIMES, June 18, 2003, at C-4 (subjecting Vietnamese catfish farmers to anti-dumping tariffs of 44.66 percent to 63.88 percent).

[110] David Lamb, *U.S., Vietnam in Dispute Over Catfish Exports*, L. A. TIMES, Dec. 8, 2002, at pt. 1, 5.

[111] *See* Walton, *supra* note 9.

space and economy this Comment will not elaborate on the details.[112] It is sufficient to say that the sentiments of S.B. 839 certainly do not endear Louisiana to the government of Vietnam. The political condemnation presented by S.B. 839 can hardly do anything but exacerbate the situation.[113]

Another consequence of these questionable state and city incursions into foreign affairs could be the derailing of recent efforts by Congress to address Vietnam's human rights violations.[114] House Resolution 427, for example, proposes to withhold aid to Vietnam until it demonstrates visible progress toward religious and other human freedoms.[115] Nineteen out of twenty-two of the bill's co-sponsors represent states with city referendums against the socialist Vietnam flag.[116] The consequence of this figure remains uncertain. However, it is fair to say that the simultaneous criticism levied by the House bill simply seems repetitive.

That is not to say that the fate of the United States-Vietnam relationship lies exclusively in the hands of Vietnam. Although Vietnam's economy reacted immediately and favorably to the institution of doi moi in 1986,[117] its rate of economic growth through foreign investment has plummeted and stagnated in the past decade.[118] The decline began in 1996, with foreign direct investment eventually sliding below 1992 levels in 2000 and the gross domestic product taking an equal hit.[119] Foreign investors, initially enthusiastic at the opportunity to enter the Vietnamese market, have cut back dramatically in recent years.[120]

The ultimate issue, then, is how much each country can tolerate in this constantly-shifting balance of power between money and human rights issues. Regardless of how this conflict eventually plays out, the matter most importantly remains a federal one. The current panoply of state voices behind the U.S. government can only serve to frustrate and confuse the

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[112] For a more detailed discussion of the catfish controversy, *see Walton*, *supra* note 9.

[113] One letter to the editor of the Birmingham News, entitled "Communist Catfish Have No Place Here," echoes the complaints of the state courts in *Zschernig*, stating that "dollars paid for Vietnam catfish go directly into the Communist Party treasury." Michael Deck, Letter to the Editor, BIRMINGHAM NEWS, Mar. 7, 2001.

[114] *See* H. Res. 427, 108th Congress, 1st Sess. (Oct. 30, 2003).

[115] *Id.*

[116] *Id.* Those nineteen co-sponsors are Rep. Davis R-VA, Rep. Lofgren D-CA, Rep. Royce R-CA, Rep. Berman D-CA, Rep. Crowley D-NY, Rep. Delahunt D-MA, Rep. Green D-TX, Rep. Hoeffel D-PA; Rep. Lantos D-CA, Rep. McNulty D-NY, Rep. Napolitano D-CA, Rep. Rohrabacher, Rep. Ros-Lehtinen R-FL, R-CA, Rep. Schiff D-CA, Rep. Watson D-CA, Rep. Wexler D-FL, Rep. Bell D-TX, Rep. Culberson R-TX, Rep. Solis D-CA.

[117] *See supra* note 25 and accompanying text.

[118] *See* Duc V. Trang, *supra* note 103.

[119] GDP growth has dropped from approximately eight percent in the early 1990s, to two to four percent in recent years. *See id.*

[120] *See id.*

rehabilitation process. Here, without "one voice," the United States risks losing opportunities to make improvements at both humanitarian and economic levels.

C. *The Vietnamese Embassy Has Protested Flag Legislation and the United States Has Responded by Condemning Those State Actions*

Protests on the part of the Vietnamese embassy and the U.S. State Department have been both swift and forceful.[121] The embassy has lodged at least two successful complaints against a city (San Francisco) and state (Virginia) for their ordinances mandating state recognition of the South Vietnamese flag.[122] After the introduction of a flag-based bill in the 2003 session of the Virginia General Assembly, Secretary of State Colin Powell sent a letter to the Vietnamese Foreign Minister detailing his opposition to the bill "on the grounds that it would usurp the federal government's power to make foreign policy."[123] Deputy U.S. Secretary of State Richard Armitage also warned the General Assembly that H.B. 2829 could have "potentially serious adverse consequences" on the effectiveness of United States foreign policy, adding that it might encourage other "aggrieved ethnic groups" to produce similar legislation.[124] Abroad, the U.S. Ambassador in Hanoi emphasized that "the United States has formally recognized the Socialist Republic of Vietnam and its flag is on public display along with other nations with which we have diplomatic relations."[125] State Department spokesman Lou Fintor also cited the exclusive foreign relations power of the president in Article II of the Constitution to demonstrate the impropriety of Virginia's action.[126]

The Vietnamese Embassy in Washington also reacted angrily to H.B. 2829, demanding that the General Assembly "kill it."[127] The *Washington Post* reported that the State Department contacted Virginia state legislators "almost immediately after the [General Assembly] vote to express concern

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[121] *See Unacceptable, supra* note 91; *Global Furor, supra* note 91.

[122] *See* Patrick Hoge, *Protesters See Red Over S.F. Flag Veto, South Vietnam's Banner Unlikely to Fly*, S. F. CHRONICLE, July 29, 2003, at A13 (describing San Francisco's withdrawal of its resolution after protest from the Vietnamese consulate in San Francisco); *Vietnam Objects to Virginia's Lower House Allowing Former Saigon Govt. Flag*, VIETNAM NEWS BRIEFS, Feb. 10, 2003 (describing the Vietnamese embassy's issuance of protest shortly before the demise of the Virginia bill).

[123] Ben Stocking, *Virginia Seeks to Ban Flying of Vietnam Flag, Powell Says Measure Usurps U.S. Power to Set Foreign Policy*, THE RECORD (Bergen County, NJ), Feb. 17, 2003, at A07.

[124] *See Red Flag, supra* note 102.

[125] *See* Stocking, *supra* note 123.

[126] *See* Shaffrey, *supra* note 106.

[127] *Global Furor, supra* note 91.

about constitutional issues and fear that the action could cause an international rift."[128] Vietnam's most politically powerful newspaper termed the possible passage of H.B. 2829 "the most bizarre act in the history of the United States."[129] Finally, the Vietnamese Embassy issued an official statement stating its emphatic disapproval of the bill:

> The approval of the Bill by the Virginian House of Representatives is diametrically opposed to the Constitution of the United States of America, disregarding international standards and it is absolutely unacceptable in the relationship between nations having official diplomatic ties . . . Vietnam strongly protests against the bill and requires the US government, the US Congress, and the governor and the legislature of Virginia State to take timely measures to cancel this erroneous bill.[130]

These protests have had some effect. Pressured by the State Department, the Virginia General Assembly effectively extinguished that state's first attempt in 2003.[131] The second version, which passed in April 2004, toned down its language markedly, pushing aside all mention of Communism and substituting a more benign statement recognizing the "flag with three red stripes" as a "heritage" flag.[132]

The Embassy's reaction to the actions of Westminster and Garden Grove, California, deserves special attention. These two cities sit side by side in Orange County, home to the highest concentration of Vietnamese people outside of Vietnam.[133] In a letter to Governor Gray Davis, Vietnam Consul General Nguyen Manh Hung stated that the two cities' "actions are unacceptable and strongly rejected by the Vietnamese people," labeling the referendum's two most vocal supporters "overseas extremists."[134] Consul General Nguyen stated plainly in his letter to Governor Davis that the

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[128] Steven Ginsberg & William Branigin, *Bid to Honor South Vietnamese Elicits Anger: Va. Bill to Display Defeated Republic's Flag Called 'Insolen" by Ruling Government*, WASH. POST, Jan. 29, 2003, at B01.

[129] *Politics & Law: Vietnam Objects To Virginia's Lower House Allowing Former Saigon Gov't Flag*, GLOBAL NEWS WIRE, Feb. 10, 2003, *available at* LEXIS, Nexis Library, All News File.

[130] *Unacceptable*, *supra* note 91.

[131] *Global Furor*, *supra* note 91.

[132] H.R. 1475, 2003 Gen. Assem., Reg. Sess. (Va. 2003), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?041+sum+HB1475 (last visited Jan. 23, 2005).

[133] Mai Tran, *Vietnam Criticizes 3 O.C. Officials for Pushing Rival Flag*, L.A. TIMES, Apr. 22, 2003, pt.2, at 5 [hereinafter *3 O.C. Officials*].

[134] *Id.*

Orange County resolutions "run counter to the development of the relationship for mutual interest of the Vietnamese and United States."[135] In another letter to Governor Davis, Nguyen Tam Chien, Vietnam's Ambassador to the United States, made clear that "the [Orange County] resolutions . . . will only serve to revive the past of hatred . . . and damage the potential relationship of mutual benefit between our two countries and between Vietnam and your state."[136] The fact that Ambassador Nguyen referred not only to the relationship between the two countries, but to the tension between Vietnam and the individual states, implicates the degree to which these relationships hang in jeopardy as a direct consequence of the proclamations.

Even the cities that have successfully passed such legislation have not done so without considerable protest from within their own communities. Mayor Willie Brown vetoed San Francisco's flag referendum within two weeks of its favorable vote by the San Francisco Board of Supervisors.[137] Pressured by the State Department and the Vietnamese Consul General in San Francisco, the Board did not object.[138] It instead claimed it had misunderstood the referendum's language, thinking that it had proposed recognition of the current flag of the Socialist Republic of Vietnam.[139] Following the flap, Board President Matt Gonzalez stated, "[r]ecognizing a country's flag . . . gets you dangerously close to foreign policy, something that I don't think a municipal legislature should be doing."[140]

In sum, it is clear that the Vietnamese government is aware of and strongly disapproves the message behind flag-based legislation such as S.B. 839. In addition, the federal government has responded to these concerns, dismissing arguments that the statutes are not impacting foreign relations.

VI. S.B. 839'S LANGUAGE AND LEGISLATIVE HISTORY INDICATE AN INTENT TO AFFECT FOREIGN AFFAIRS AND THEREFORE A VIOLATION OF THE DFAP DOCTRINE.

Both the *Zschernig* Court and other courts have scrutinized, as a question of fact, the veracity of a state or city's claim of political neutrality

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[135] *Id.*

[136] Mai Tran & Scott Martelle, *Vietnam's Flag Raises Hackles*, L.A. TIMES, Mar. 11, 2003, pt. 2, at 1 [hereinafter *Hackles*].

[137] *See* Hoge, *supra* note 122.

[138] *See id.*

[139] *See id.*

[140] *See id.*; Janine DaFeo, *South Vietnam Flag Won't Fly in Oakland: Brown Removes Controversial Topic from Council Agenda*, S.F. CHRON., June 4, 2003, A20 (reporting how one Oakland Councilmember stated that "it's an international issue I don't believe the city needs to get in the middle of").

or non-interference.[141] S.B. 839 fails under such scrutiny because its very language describes hostility against the current Vietnamese government,[142] and its birth was attended by open condemnations of Communism.[143]

A. *A Statute Can Violate the DFAP Doctrine Either Facially or Through Practical Application*

In *Zschernig*, the Court found that even though the statute in question did not facially dictate an intent to affect foreign affairs, "as construed [it] seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own."[144]

Other courts have summarily judged the true intent of state laws by examining the political and social context under which they were passed. In *Tayyari*, the Court pointedly questioned the Regents' argument that they did not "intend to enter the area of . . . foreign policy," ultimately finding that the "Regents' true purpose in enacting the . . . motion was to make a political statement."[145] Similarly, when upholding a city clerk's refusal to place a referendum the New York City ballot for "Anti-Vietnam War Coordinator," the *Silberman* Court declared that the "obvious intent" of the citizen-petitioners was to take "a public opinion poll."[146] The petitioners themselves conceded that the City of New York was powerless "to effectuate the withdrawal of troops from Vietnam" and as such could not even create such a position.[147] The Court in *N.Y. Times* also undercut the Commission on Human Rights' accusations of discriminatory behavior at the New York Times when it concluded that "the reality is that complainants seek to impose an economic boycott aimed at the present government of the Republic of South Africa."[148] Most recently, the Court in *Springfield* declared it "undisputed" that "the purposes of [Illinois' targeted taxation of

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[141] Zschernig v. Miller, 389 U.S. 429, 440 (1968); Tayyari v. N.M. State Univ., 495 F. Supp. 1365, 1376 (D.N.M. 1980); Silberman v. Katz, 283 N.Y.S.2d 895, 901 (1967).

[142] The language states, "recogniz[ing]. . . [Vietnamese who] were valiant in their resistance to the aggression of the communist North Vietnam." S.B 839, codified as LA. REV. STAT. ANN. § 49:153.3 (2004).

[143] *See Senate Hearing on S.B. 839*, 2003 Sen., 2003 Reg. Sess. (La. 2003) [hereinafter *Sen. Hearing*] (statements of Sen. Jon Johnson, Sen. Robert J. Barham, Sen. J. Chris Ullo, Members, Committee on Senate and Gov't Affairs); *Legislative Hearing on S.B. 839*, 2003 Leg., 2003 Reg. Sess. (La. 2003) [hereinafter *Leg. Hearing*] (statements of Rep. Edwin R. Murray, Rep. Loulan Pitrie, Jr., Members, Comm. on House and Gov't Affairs).

[144] *Zschernig*, 389 U.S. at 440.

[145] *Tayyari*, 495 F. Supp. at 1376.

[146] *Silberman*, 283 N.Y.S.2d at 901.

[147] *Id.* at 900.

[148] N.Y. Times v. City of N.Y Human Rights Comm'n, 361 N.E.2d 963, 967 (N.Y. 1977).

the South African kruggerand] are to express disapproval of South Africa and to discourage investment in its products."[149] In rejecting the California statute in *Deutsch*, Judge Reinhardt concluded that the statute was "a remedy for wartime acts that California's legislature believed had never been fairly resolved."[150]

B. *The Language of S.B. 839 Explicitly Protests the Communist Regime in Vietnam*

The text of S.B. 839 reveals an intent to express the community's feelings against Communism.[151] Whether that anti-Communist animus originated in state legislators themselves or in their constituency of Vietnamese-Americans, the motive itself is undeniable. Despite claims by the bill's proponents that they merely want the South Vietnamese flag to represent the Vietnamese in Louisiana, the statutory language of S.B. 839 itself clearly indicates otherwise, honoring all Vietnamese who were "valiant in their resistance to the aggression of Communist North Vietnam."[152] The text of S.B. 839 indicates a purpose of celebrating the ideals of democracy over Communism, referring to a particular country that no longer exists and whose battlefield has already been drawn and lost. It purports to "honor" this past over the reality, however difficult, of the present.

Indicating their similar awareness of the federalism issues presented by flag legislation, several cities have tailored their language to reflect a more defensible "community-based" position. The city of Falls Church, Virginia, for example, deleted certain language at the advice of its attorney, which would have required flying the South Vietnamese flag at official government events and city locations.[153] However, the Falls Church bill continues to designate the South Vietnamese flag "the official flag of the Vietnamese-American community in the United States."[154] Boston also addressed the issue by "confining [its] resolution to Boston's Vietnamese-American community [to] keep it within City Council rules prohibiting motions that do not have 'a direct bearing on the business of the council.'"[155] San Jose followed suit, changing its language to allow the flag to be flown at

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[149] Springfield Rare Coin Galleries v. Johnson, 503 N.E.2d 300, 305 (Ill. Sup. Ct. 1986).

[150] Deutsch v. Turner Corp., 324 F.3d 692, 712 (9th Cir. 2003).

[151] *See Sen. Hearing*, *supra* note 143; *Leg. Hearing*, *supra* note 143.

[152] S.B. 839, *supra* note 1.

[153] *Flag of South Vietnam Okd to Fly at Eden Shopping Center*, FALLS CHURCH NEWS-PRESS, Apr. 17, 2003.

[154] *See id.*

[155] Yvonne Abraham, *A Fight for Viet Flag: For Immigrants, Old Banner is a Rallying Point*, BOSTON GLOBE, Aug. 13, 2003, at B1.

city events, but refraining from declaring it the official flag of the Vietnamese community or banning the Republic of Vietnam's flag entirely.[156]

These instances of careful drafting demonstrate municipal bodies' understanding of the federalism issues at stake. The adoption of S.B. 839, therefore, presents the most immediate danger to hobbled relations with Vietnam. Of the sixty-three localities that have adopted flag-based resolutions, S.B. 839 remains the first successful state bill to use vigorous anti-Communist language and forbid the flying of the actual Socialist flag.[157]

C. *The Legislative History of S.B. 839 Reveals a Desire to Oppose the Current Regime in Vietnam*

The legislative history of S.B. 839 also reveals a bill primarily focused on protesting the current Communist government of Vietnam.[158] At the meeting of the Committee on Senate and Government Affairs on April 30, 2003, Senator Jon Johnson (D-Orleans) stressed the Vietnamese-American community's "very strong feelings . . . about Communism and the condition [of] their country" before introducing the bill.[159] He characterized that community's support of S.B. 839 as an effort "to assist in promoting a democracy in the Republic of Vietnam."[160]

Before reporting the bill favorably to the House, the Senate deferred to various members of the Vietnamese American Community of Louisiana (VACL), a local organization that served as the engine behind the flag legislation.[161] Cindy Nguyen, VACL's external affairs assistant, compared her community's desire for a South Vietnamese flag to that of well-known community groups such as the Girl Scouts and the local 4-H club, who have a flag "to represent their interests."[162] John Nguyen, the group's Internal Affairs Assistant, identified the visible separation between the ideologies of Vietnamese-Americans and native Vietnamese as one of those interests: "[T]he [expatriate] Vietnamese believe . . . freedom, especially the freedom

[156] DaFeo, *supra* note 140.
[157] S.B. 839, *supra* note 1.
[158] *See Sen. Hearing*, *supra* note 143; *Leg. Hearing*, *supra* note 143.
[159] *See Sen. Hearing*, *supra* note 143 ("The bill is designed to allow the Vietnamese community to recognize the former flag of the Republic of Vietnam before it fell into Communist hands").
[160] *See id.*
[161] *See id.*
[162] *See id.* (statement of Cindy Nguyen, External Affairs Assistant, Vietnamese-American Community of Louisiana).

of speech and the freedom of religion, [to be] the basic rights of a person."[163] He denied that the flag issue would interfere with foreign relations and asked the Senate "to recognize this flag to be the flag of the Vietnamese-Americans who are living in Louisiana."[164]

The Senate reacted extremely favorably to this testimony. Senators Robert J. Barham (R-Ouachita) and J. Chris Ullo (D-Jefferson), both Vietnam War veterans, noted the great work ethic and significant economic force of the Vietnamese-American community, which in recent years has taken over and revitalized the fishing industry in this impoverished state.[165] Together with Senators Johnson and Ullo, Senator Barham then pledged his support in honor of "what [the Vietnamese have] been through, [their] resilience and [their] courage."[166]

The Senate did not mention the bill's possible interference in the realm of foreign affairs. The House, however, expressed some initial concern regarding this matter before ultimately reporting favorably on the bill.[167] Representative Loulan J. Pitre, Jr. (R-Jefferson), warned that although he "agree[d] in substance with everything in the resolution personally," he reserved "some caution about [the] state legislature doing anything that would undermine U.S. foreign policy or represent any attempt . . . [to conduct] foreign policy."[168] The bill's House sponsor, Rep. Edwin R. Murray (D-96th District), simply responded, "I am not conducting U.S. Foreign policy and I can assure you that this bill doesn't either."[169]

Louisiana, along with other states and municipalities, has insisted that its purpose in enacting flag-based legislation centers on enhancing community pride and denies that its actions will affect foreign policy.[170] However insistent these claims may be, the reality remains that: (1) the statutory language and transcripts of committee hearings directly contradict those assurances, and (2) regardless of whether one can ferret out the "true intent" of legislators, their actions have caused effects in foreign relations between the two countries.

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163 *See id.* (statement of John Huang Nguyen, Internal Affairs Assistant, Vietnamese-American Community of Louisiana).
164 *See id.*
165 *See id.*
166 *See id.*
167 *See Leg. Hearing, supra* note 143.
168 *See id.*
169 *See id.*
170 *See id.*

VII. THE FIRST AMENDMENT DOES NOT PROTECT LEGISLATION REQUIRING THE USE OF THE SOUTH VIETNAMESE FLAG

S.B. 839 cannot pose as protected speech and thus escape scrutiny under the DFAP doctrine because it is government expression not addressed by the First Amendment.[171] The majority of cases invoking the DFAP doctrine have centered on cases with a direct impact on the economy or a tangible effect on a quantifiable liberty interest (i.e., denial of higher education).[172] But courts have also spoken definitively on more symbolic incursions into foreign affairs. Lest it be asserted that a controversy over a flag could not possibly merit serious consequences, one need only recall the Supreme Court's statement in *Hines v. Davidowitz*: "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government."[173]

A. *Government Speech is Not Protected by the First Amendment Under* CBS v. Democratic National Committee

The Supreme Court has spoken only once on the issue of First Amendment protection of government speech, when adjudicating the Democratic National Committee's claim of political favoritism on network television in *CBS v. Democratic National Committee.*[174] Justice Stewart stated in his concurrence that "[t]he First Amendment protects the press from governmental interference; it confers no analogous protection on the Government."[175] The lower courts have without exception followed this sole source of guidance, although several have characterized a somewhat qualified protection of government speech as an "open question."[176] Regardless of these disagreements, the lower courts have continued to

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[171] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

[172] Tayyari v. N.M. State Univ., 495 F. Supp. 1365 (D.N.M. 1980).

[173] Hines v. Davidowitz, 312 U.S. 52, 64 (1941).

[174] *Id.*

[175] *Id.* at 139.

[176] *See* Muir v. Alabama Education Television Commission, 688 F.2d 1033, 1038 (5th Cir. 1980) (deeming "essentially correct" the tenet that First Amendment protection "extends only to private expression and not to governmental expression," but that the "government is not prohibited from speaking."); American Library Association, Inc., v. United States, 201 F. Supp. 2d 401, n.36 (E.D. Penn.) (2002) (stating that "the question whether public entities are ever protected by the First Amendment . . . remains open."); Creek v. Village of Westhaven, 80 F.3d 186, 193 (7th Cir.) (1996) (designating the issue of a municipality's First Amendment rights "a question we need not decide").

adhere to the *CBS* decision.[177] Thus, the possibility of First Amendment protection of government speech remains dim.

The government evinces forbidden "government speech" when it confers the use of a public forum to one interest group whose philosophy it approves, but denies it to a different group with whose message it disagrees.[178] The Court in *NAACP v. Hunt*,[179] for example, stated that concern over such forbidden government speech "is especially important when the government's dedication of a forum suppresses controversial or political speech."[180] The *Hunt* court paved the way for the placement of a Confederate flag on the Alabama state dome when it denied that the dome was "public property, which 'by tradition or designation is a forum for public communication.'"[181] The *Hunt* court eventually concluded that Alabama could reserve the dome for communicative purposes as long as its reservation was "reasonable and . . . not an effort to suppress expression because the public officials oppose the speaker's view."[182] At least one other court has concluded, however, that municipal auditoriums, high school auditoriums, and public libraries qualify as public forums.[183] Furthermore, the *Hunt* court did not mandate the use of the Confederate flag in all public schools or properties to represent the current United States. S.B. 839's mandated use of a particular flag on all public property and institutions of public education, therefore, constitutes a form of government speech.

B. Flags Constitute Government Speech

A flag is the self-determined symbol of a nation and thus its adoption represents a core concept of sovereignty.[184] The Supreme Court has spoken on the powerful nature of a flag as a symbol, be it the American flag or the

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[177] *See* Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634, 638 (11th Cir. 1990) ("[A] government . . . speaker is not itself protected by the first amendment."); NAACP v. Hunt, 891 F.2d 1555, 1565 (11th Cir. 1990) ("The First Amendment protects citizens' speech only from government regulation; government speech itself is not protected by the First Amendment."); Student Gov't Ass'n v. Bd. of Trustees of the Univ. of Mass., 868 F.2d 473, 481 (1st Cir. 1989) (concluding that the legal services organization run by a state university, "as a state entity, itself has no First Amendment rights"); Estiverne v. La. State Bar Ass'n, 863 F.2d 371, 379 (5th Cir. 1989) (noting that "the First Amendment does not protect government speech").

[178] Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

[179] *Hunt*, 891 F.2d at 1555.

[180] *Id.* at 1566

[181] *Id.*

[182] *Id.*

[183] Muir v. Alabama Education Television Commission, 688 F.2d 1033, 1042 (5th Cir. 1980).

[184] Texas v. Johnson, 491 U.S. 397, 405 (1989) ("Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in 'America."). *See also* United States. v. Eichman, 496 U.S. 310, 316 n.6 (1990) ("[T]he flag is emblematic of the Nation as a sovereign entity").

flag of another country.[185] More significantly, the Court has stressed the flag not only as a static symbol, but also as a conduit for communication.[186] In *Texas v. Johnson*, the Court unequivocally stated that a flag's primary purpose serves to communicate the endorsement of a particular group's ideals:

> That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood."[187]

In characterizing the flag as a "shortcut from mind to mind" in *West Virginia Board of Education v. Barnette*,[188] the Court established the principle that the government can send messages through its adoption of certain symbols.[189] In later years, this principle has expanded to include religious displays on public property.[190] Lower courts have followed suit, asserting in one case that "[i]t seems clear that a flag flown on the state capitol dome is flown under state authority."[191]

Recent controversy over the use of the Confederate flag on state buildings highlights the extremely volatile nature of flags as communicative symbols.[192] In the past decade, four states have flown variants of the Confederate flag over state buildings: Alabama, Georgia, South Carolina, and Mississippi.[193] All four have faced a barrage of lawsuits, boycotts, and public ire.[194] At the heart of each attack lay the contextual background in which those states first adopted the Confederate flag.[195]

Governor George Wallace of Alabama, who surrounded the Birmingham public schools with National Guardsmen to prevent integration

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[185] *Id.*

[186] *See* County of Allegheny v. ACLU, 492 U.S. 573, 600 (1989) (finding that permitting a religious display in the county courthouse "sends an unmistakable message that [the government] supports and promotes [Christianity]"); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

[187] *Johnson*, 491 U.S. at 405 (quoting Smith v. Goguen, 415 U.S. 566, 603 (1974) (Rehnquist, J., dissenting)).

[188] *Barnette*, 319 U.S. at 624.

[189] *Id.* at 632.

[190] *See County of Allegheny*, 492 U.S. at 600

[191] NAACP v. Hunt, 891 F.2d 1555, 1562 (11th Cir. 1990).

[192] *See* James Forman, Jr., Note, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505 (1991); Beattie I. Butler, *Muzzling Leviathan: Limiting State Powers of Speech and Expression*, 5 KAN. J.L. & PUB. POL'Y 153 (1996).

[193] *See* Forman, *supra* note 192, at 507-09.

[194] *See id.*

[195] *See id.*; *Butler, supra* note 192.

in the early 1960's,[196] first raised the Confederate flag above the Alabama state dome during his "Segregation Forever" campaign in 1963.[197] It stayed there as a means of protesting desegregation.[198] South Carolina, the first state to secede from the Union prior to the Civil War,[199] and the only other state to have flown the actual Confederate flag above its state dome, first raised it in 1962.[200]

Mississippi adopted its flag design during the desegregationist effort and has since required the flag to be displayed on public buildings, including schools.[201] The flag, while not an actual Confederate flag, carries the traditional Confederate symbol of the St. Andrew's cross prominently on its face.[202] The St. Andrew's cross also covered two-thirds of Georgia's state flag, in lock-step with Governor Marvin Griffin's public oath against segregation in 1956.[203]

Today, all states except one have succumbed to public pressure and removed their Confederate flags.[204] After an economic boycott by the NAACP, South Carolina finally capitulated and removed the flag from its state dome in 2001.[205] Facing mounting public pressure despite having survived an Equal Protection discrimination suit in federal court,[206] Alabama also removed the Confederate flag in 1993.[207] Although the Eleventh Circuit sustained Alabama's right to fly the flag, a state judge later ruled that Alabama law actually prohibited any flags except the national and state flags to fly from the state dome.[208]

After pressure from both its governor[209] and the Eleventh Circuit, Georgia re-designed its state flag in 2001 to include a much smaller emblem of the St. Andrew's cross and to be used in conjunction with five other

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[196] *See* Forman, *supra* note 192, at 508.

[197] *See id.* at 505.

[198] *See id.* at 508.

[199] Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach* 75 TEMPLE L. REV. 539, 584 (2002).

[200] *See* Forman, *supra* note 192, at 506.

[201] *See* Tsesis, *supra* note 199.

[202] *See id.*

[203] *See id.* at 604-5.

[204] Mississippi voted to retain the Confederate symbol in its flag in 2001. *See* Forman, *supra* note 192, at 602.

[205] Heather Hoope, *Shakeup in the South Carolina Senate*, STATE LEGISLATURES, Jul. 1, 1991, at 11.

[206] NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990).

[207] *See* Tsesis, *supra* note 192, at 605.

[208] *Confederate Flag is Pulled From Capitol*, L.A. TIMES, Apr. 30, 1993, at A25.

[209] At his 1991 State of the State address, Georgia Governor Zell Miller spent more than one-third of his hour-long speech denouncing the use of the Confederate symbol in the state flag. *All Things Considered* (NPR radio broadcast, Jan. 12, 1993) ("The current Georgia flag was adopted by a state Legislature in 1956 that wanted to show scorn for integration being mandated by the federal government and courts.").

banners.[210] The Georgian flag had narrowly survived an Equal Protection suit in *Coleman v. Miller*.[211] Unlike the Eleventh Circuit's earlier decision in *NAACP v. Hunt*, which dismissed the Equal Protection attack against the Alabama flag because "[c]itizens of all races are offended by its position,"[212] the *Coleman* panel struggled against the *Hunt* rationale, dismissing it as mere dicta.[213] It eventually felt compelled to follow it nonetheless:

> [B]ecause the Confederate battle flag emblem offends many Georgians, it has, in our view, no place in the official state flag. We regret that the Georgia legislature has chosen, and continues to display, as an official state symbol a battle flag emblem that divides rather than unifies the citizens of Georgia. As judges, however, we are entrusted only to examine the controversies and facts put before us.[214]

C. *The Raising of the South Vietnamese Flag is a Communicative Act by a State Government and Thus Not Protected by the First Amendment*

Flag-based legislation escapes a free-speech analysis because of its application to and sole focus on public property. S.B. 839 actually codifies the raising of a particular flag, whereas the states of Alabama and South Carolina simply did so by custom. A public school or city office in Lousiana, for example, may not opt out of using the South Vietnamese flag when referring to the country of Vietnam.[215] While S.B. 839 may not mandate the use of the South Vietnamese flag in international diplomatic functions, it raises a dangerous precedent nonetheless by allowing states or cities to choose which political symbol its citizens may recognize. The real injury occurs because of its placement above state building—including schools, municipal auditoriums, and city halls—all recognized by at least one circuit as public fora.[216] In a succinct observation, one newspaper in Quincy, Massachusetts, stated that "[t]he crux of the controversy seems to center on raising a flag of a foreign country—which isn't a country anymore—on city property."[217]

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[210] *See* Tsesis, *supra* note 192, at 604-5.
[211] Coleman v. Miller, 117 F.3d 527, 528 (11th Cir. 1997).
[212] NAACP v. Hunt, 891 F.2d 1555, 1562 (11th Cir. 1990).
[213] *Coleman*, 117 F. 3d at 530 n.7.
[214] *Id.* at 530.
[215] S.B.839 2003, Leg., Reg. Sess. (La. 2003) (enacted).
[216] Muir v. Alabama Education Television Commission, 688 F.2d 1033, 1042 (5th Cir. 1980).
[217] Christopher Walker, *Poles Apart: S. Vietnamese Flag Raising a Divisive Issue*, THE PATRIOT LEDGER (Qunicy, MA), Oct. 18, 2003, at 1.

The communicative nature of the South Vietnamese flag can hardly be denied. Alternatively hailed as a symbol, a show of support, and an act of defiance, the flag has become a protean medium of expression.[218] Garden Grove Councilman Mark Rosen added that his city's use of the flag "could send a loud message to the people of Vietnam, as well as to U.S. officials," announcing to a large crowd of constituents that "if we continue to wave the South Vietnam flag, we will help bring down the Communists in Vietnam."[219] A Westminster city council member stressed that "it's not as much as what it will do, but more importantly, what message it conveys."[220] In explaining their reasons for lobbying against the Socialist flag on their campus, South Puget Sound Community College students stated: "We cannot let the Vietnamese citizens, who are still fighting and hoping for freedom and democracy, lose their last hopes."[221] City Councilman Dave Jones of Sacramento affirmed that the city's "issuance of this resolution reflects our community support for the aspirations of the Vietnamese community for freedom and democracy."[222]

Perhaps Vietnamese diplomat Vu Khoan put it most succinctly on a recent visit to Washington, D.C. Vu, the most senior Vietnamese diplomat to set foot in America since the Vietnam War, met with Secretary of State Colin Powell in December 2003 to discuss the recent passage of the Vietnam Human Rights Act in the House of Representatives and various trade issues.[223] In regards to the recent rash of flag legislation, Vu stated:

> While America has relations with one country, they recognize the flag of another regime that is not in existence anymore. Imagine how you would feel if another country did not recognize the Stars and Stripes but only the Confederate flag.[224]

VIII. CONCLUSION

S.B. 839 violates the DFAP doctrine because of its intent to affect foreign policy, its actual impact on such foreign policy, and its status as unprotected government speech. Its validity, therefore, stands in serious question.

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218 *See, e.g.*, *Garden Grove*, *supra* note 86.
219 *See id.*
220 *See* Tran & Martelle, *supra* note 136.
221 *Compromise Has Merit on Flag Issue*, THE OLYMPIAN, Nov. 14, 2003, at 9A.
222 Jocelyn Wiener, *Savoring Liberty and Historic Flag*, SACRAMENTO BEE, Sept. 21, 2003, at B1.
223 David W. Jones, *Stable Relations Sought with U.S.*, WASH. TIMES, Dec. 6, 2003, at A06.
224 *See id.*

That the displaced Vietnamese have endured tremendous loss over the years is not in dispute. Their passion and anger are real, and the evidence of their suffering cannot be denied. It may take years for the repercussions of the Vietnam War to fade and its victims to find peace. However, this Comment indicates the improvidence of this particular medium of protest. Should the Vietnamese choose to further their cause, they risk losing credibility as a group by persistently pursuing the wrong avenue.

The fact remains that the purpose behind S.B. 839 and its sister legislation lies within the great political animosity harbored by the Vietnamese-American community. While this Comment does not challenge the reasons for this animosity, its role as the animus in the flag controversy remains. Even without conceding the true purpose of resolutions such as S.B. 839, the reactions of the federal and Vietnamese government indicate that they have already impacted relations between the two countries.

The Vietnamese-American community has established through its power as a political force through this exercise of flag-based legislation. As citizens, the Vietnamese-American community can stand proud that their voices have been heard. As arbiters of change, however, they will face more palpable returns and less discouragement by using the proper channels of protest in this federal system. The United States legislature, while arguably slower and less responsive than city government structure, also represents the single most influential voice in the foreign affairs arena. The federal government's clout has allowed Vietnam to receive world aid and bestowed its leaders with more of a voice themselves in the international community. Joining the other lobbies in Washington may result in less immediate gratification. By utilizing the obligations of Congress and the President, though, the Vietnamese-American community may finally be able to harness the necessary power for lasting change.