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Hayley A. Valla
Touro Law Center

UNCLE SAM'S DILEMMA: WHETHER PRIORITIZING CONFEDERATE MEMORIALS OVER NATIONAL SENTIMENT IS A MONUMENTAL MISTAKE

Hayley A. Valla[*]

I. INTRODUCTION

When asked to make an appearance at an event to commemorate Civil War monuments, General Robert E. Lee replied, "I think it wiser . . . not to keep open the sores of war, but to follow the example of those nations who endeavored to obliterate the marks of civil strife, and to commit to oblivion the feelings it engendered."[1] Unfortunately, the Confederate general's antipathy toward Confederate monuments fell on deaf ears. As of June 9, 2020, approximately 1,800 Confederate monuments and statues stood in the United States.[2] While the removal of Confederate monuments is an

[*] J.D. Candidate 2022, Touro College Jacob D. Fuchsberg Law Center; B.A. in Italian Studies, Stony Brook University. I would like to thank my faculty advisor, Professor Tiffany C. Graham, for providing me with a wealth of knowledge on my topic, and for her unwavering support and guidance with this Note. I would also like to thank Professor Ann L. Nowak for proofreading this Note and for answering all of my legal writing questions at all hours of the night. Thank you to the entire staff and editorial board of the Touro Law Review, including Professor Rena C. Seplowitz, for assisting me throughout the process of preparing this Note for publication. Thank you to my notes editors, Shannon L. Malone and Dana Ortiz-Tulla, for their assistance throughout the writing and editing process. I would also like to give a special thanks to my family and my boyfriend, Dylan, for their unconditional love and support. Finally, I would like to thank my sister, Ashley M. Valla, for being my number one fan and for inspiring me to attend law school.

[1] Lisa Desjardins, *Robert E. Lee Opposed Confederate Monuments*, PBS NEWS HOUR (Aug. 15, 2017, 1:55 PM), https://www.pbs.org/newshour/nation/robert-e-lee-opposed-confederate-monuments.

[2] Madison Hoff, *This Map Shows How Many Confederate Monuments and Symbols Still Stand in the US*, BUS. INSIDER (June 13, 2020, 3:27 PM), https://www.businessinsider.com/confederate-monuments-and-other-symbols-in-the-us-2020-6.

ongoing process within the United States dating back to the 1960s,[3] efforts to remove the controversial memorials have increased exponentially following tragic incidents such as the Charleston Church Massacre in 2015,[4] the Unite the Right Rally in 2017,[5] and most recently, the killing of George Floyd in 2020.[6] Proponents of the removal of Confederate monuments believe that the monuments not only glorify white supremacy, but also memorialize a treasonous government, known as the Confederate States of America, whose founding principle was the perpetuation of slavery.[7] On the other hand, those opposed to the removal of Confederate statues argue that removing Confederate monuments, memorials, and statues would erase the Civil War from American history.[8]

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[3] *See* Jasmine Aguilera, *Confederate Statues are Being Removed Amid Protests Over George Floyd's Death. Here's What to Know*, TIME (June 9, 2020, 4:15 PM), https://time.com/5849184/confederate-statues-removed. A plethora of Confederate statues were erected following the end of the Civil War to remind the community that "Southern order and Southern culture depended upon white supremacy." *Id.* A somewhat cyclical reaction occurred during the 1950s when school campuses were renamed to honor Confederate soldiers in response to the Supreme Court's ruling in Brown v. Board of Education. *Id.* The impacts of these events led to the spark in debates over the presence of Confederate monuments, statues, and flags beginning around the 1960s and continuing today. *Id.*

[4] *See* Samuel Momodu, *The Charleston Church Massacre (2015)*, BLACKPAST (Sep. 30, 2017), https://www.blackpast.org/african-american-history/charleston-church-massacre-2015 ("[O]n June 17, 2015 . . . a white supremacist killed nine people during . . . a prayer service at the Emanuel African Methodist Episcopal Church [located in Charleston, South Carolina].").

[5] *See* Debbie Lord, *What Happened at Charlottesville: Looking Back on the Rally That Ended in Death*, AJC (Aug. 13, 2019), https://www.ajc.com/news/national/what-happened-charlottesville-looking-back-the-anniversary-the-deadly-rally/fPpnLrbAtbxSwNI9BEy93K. The Unite the Right Rally, which occurred from August 11-12 in 2017, ultimately led to a fatal and violent clash in beliefs between white supremacists and counter-protesters over the removal of a Confederate monument. *Id.*

[6] Khara Coleman, *That Unspoken Thing*, 108 ILL. B.J. 10 (2020) ("By way of eight minutes and 46 seconds of video taken on May 25, 2020, the whole world witnessed the violation of the civil rights of George Floyd of Minneapolis, Minnesota, resulting in his death. [A police] officer put his knee on Floyd's neck because of an allegedly counterfeit $20 bill.").

[7] "Our new government is founded upon . . . the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition," Alexander H. Stephens, Vice President, Confederacy, Cornerstone Address in Savannah, Georgia (Mar. 21, 1861).

[8] *See* Chris Joyner, *As Monuments Tumble, Are We 'Erasing' History? Historians Say No*, AJC (July 11, 2020), https://www.ajc.com/news/state--

Given the competing perspectives of United States' citizens, how will this disconnect ever be solved? The answer is not simple because both the federal and state governments have discretion in the matter. This Note juxtaposes the respective positions of state governments regarding the removal of Confederate monuments to demonstrate how the United States prioritizes its controversial past over the present-day sentiments of its citizens. In order to incentivize states to stop implementing monument-oriented legislation, as many states are currently doing, the United States' federal government should use its power under the Spending Clause to condition the receipt of federal funds on state willingness to use their funds to support the continued removal of Confederate monuments.

Part II of this Note briefly explains why symbols of the Confederacy were scattered throughout the United States. Part III of this Note will address the current zeitgeist of the United States by recalling three horrific events that have served as catalysts of the movement to remove Confederate monuments. Part IV of this Note will discuss the commonalities and differences between the state governments regarding the removal of Confederate monuments. Finally, Part V of this Note will provide a brief overview of how Congress can utilize its power under the Spending Clause to incentivize states to remove Confederate monuments.

II. HISTORY OF UNITED STATES' CONFEDERATE MONUMENTS

Contrary to intuitive thought, many Confederate monuments were not immediately erected when the Civil War ended in 1865; rather, during that time, "commemorative markers of the Civil War" were typically memorials that mourned fallen soldiers.[9] After the Civil War, several southern states passed laws that discriminated against emancipated African Americans and, beginning in the 1890s, these laws became known as Jim Crow laws.[10] Whereas earlier memorials, né "commemorative markers," were placed in cemeteries

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regional/monuments-tumble-are-erasing-history-historians-say/upiNTQHu3gzGxI0BOjHQGL.

[9] Becky Little, *How the US Got So Many Confederate Monuments*, HISTORY (Aug. 17, 2017), https://www.history.com/news/how-the-u-s-got-so-many-confederate-monuments.

[10] Becky Little, *Who Was Jim Crow?*, NAT'L GEOGRAPHIC (Aug. 6, 2015), https://www.nationalgeographic.com/history/article/150806-voting-rights-act-anniversary-jim-crow-segregation-discrimination-racism-history.

to honor the lives of those lost, the vast majority of monuments that were built during the era of Jim Crow segregation were strategically placed in public spaces, such as city squares and in front of state buildings, to teach American citizens the value of the "glorification of the cause of the Civil War."[11] As a result, the history behind many Confederate monuments is "intimately and inextricably bound up with campaigns of racial intimidation and violence designed to overturn Reconstruction, to establish Jim Crow, and to resist integration after *Brown v. Board of Education*."[12] The notion of removing Confederate monuments is often met with arguments that doing so would hide or change history when in reality, monuments memorializing the Confederacy "were meant to promote white supremacy and intimidate Black people, not just to pay homage to Southern pride."[13]

III. MOMENTUM BEHIND CONFEDERATE MONUMENT REMOVAL

As citizens of the United States confront the country's legacy of slavery and systemic racism, tragic events have amounted to political flashpoints, with some demanding the removal of monuments honoring the Confederacy and others warning of an attempt to erase history.[14] Although this Note only touches upon three horrific events that occurred within the United States, there have been countless others that have similarly provoked an overdue acknowledgment of the nation's flawed past.[15] Those who

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[11] *How the US Got So Many Confederate Monuments*, *supra* note 9.

[12] Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate "Statue Statutes"*, 91 TEMP. L. REV. 1, 13 (2018).

[13] Ryan Best, *Confederate Statues Were Never Really About Preserving History*, FIVETHIRTYEIGHT (Jul. 8, 2020, 7:00 AM), https://projects.fivethirtyeight.com/confederate-statues.

[14] Bill Nigut, *Political Rewind: Confederate Monuments Become Flash Points*, GPB (June 29, 2020, 12:22 PM), https://www.gpb.org/news/2020/06/29/political-rewind-confederate-monuments-become-flash-points.

[15] *See* John E. Taylor, *Reflecting on the Death of George Floyd*, 47 W. VA. LAW. 8, 9 (2020).

> [I]t is far too late in the day to dismiss George Floyd's death as an isolated incident. It's not even an isolated incident for policing in the Twin Cities (Philando Castile), let alone for policing generally (Breonna Taylor, Freddie Gray, Michael Brown, Tamir Rice and more).

romanticize the idea of memorializing the country's history overlook the fact that for each additional day these monuments remain standing, the United States further perpetuates racial injustice not only in the past but also in the present.[16]

A. The Charleston Church Massacre

On June 17, 2015, Dylann Roof, a twenty-one-year-old white male, entered the Emanuel African Methodist Episcopal Church, located in Charleston, South Carolina, and sat in and listened to an ongoing Bible study despite being a stranger to the church.[17] Even though he was welcomed in by the church, Roof shot and killed nine worshippers "like they were animals."[18] It was later established that Roof fired a total of seventy rounds, fatally wounding nine individuals and critically injuring three others.[19]

In 2016, Roof was charged with thirty-three counts of federal crimes including murder, attempted murder, damage to religious property, and obstruction of religious belief.[20] Additionally, the United States Department of Justice sought to impose hate crime enhancements to these charges.[21] A jury found Roof guilty on all thirty-three counts.[22] In 2017, the same twelve jurors from the 2016

> Nor do the violent deaths of unarmed Black people occur solely at the hands of the police (Ahmaud Arbery, Travon Martin).

Id.

[16]*See* Beth D. Jacob, *Confederate Monuments That Remain*, AM. BAR ASS'N (May 16, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/confederate-monuments/ ("The argument that removal of signs of white supremacy would be tantamount to 'erasing history' is easily debunked. Public monuments are not erected to study history; they are erected to express the values of the community.").

[17] Debbie Elliott, *5 Years After Charleston Church Massacre, What Have We Learned?*, NPR (June 17, 2020, 1:39 PM), https://www.npr.org/2020/06/17/878828088/5-years-after-charleston-church-massacre-what-have-we-learned.

[18] *Id.*

[19] *Id.*

[20] Rebecca Hersher, *Jury Finds Dylann Roof Guilty in S.C. Church Shooting*, NPR (Dec. 15, 2016, 3:33 PM), https://www.npr.org/sections/thetwo-way/2016/12/15/505723552/jury-finds-dylann-roof-guilty-in-s-c-church-shooting.

[21] *Id.*

[22] *Id.*

trial reached a unanimous decision to sentence Roof to death.[23] During the trial, the lead investigator on the case, FBI Special Agent Joseph Hamski, recounted to the jury that a few months before the shooting transpired, Roof joined a white supremacist website and reached out to other local separatists with the hopes to convene.[24] Hamski further testified that Roof was an active user on the website and posted statements and sent messages to others under the username of "LilAryan."[25] Roof further declared his allegiance to white supremacy when he wore shoes with "hand-drawn racist symbols" on them to court.[26] In the midst of the highly publicized trial and sentencing, a photograph of Roof, in which he is holding a gun in one hand and a Confederate flag in the other, which he previously posted on the white supremacist website, went viral.[27] The photograph depicting Roof's association with the Confederate flag drew attention from the public including that of former South Carolina Governor Nikki Haley.[28]

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[23]Rebecca Hersher, *Dylann Roof Sentenced to Death*, NPR (Jan. 10, 2017, 5:05 PM), https://www.npr.org/sections/thetwo-way/2017/01/10/509166866/jury-sentences-dylann-roof-to-die.

[24] Glenn Smith, Jennifer Berry Hawes, & Abigail Darlington, *FBI Agent: Dylann Roof Reached Out to Other White Supremacists Before Emanuel AME Church Shooting*, THE POST & COURIER (Jan. 7, 2017), https://www.postandcourier.com/church_shooting/fbi-agent-dylann-roof-reached-out-to-other-white-supremacists-before-emanuel-ame-church-shooting/article_b079eb56-d404-11e6-ab8b-3b2091783476.html.

[25] *Id.*

[26] *Id.*

[27] Frances Robles, *Dylann Roof Photos and a Manifesto Are Posted on Website*, N.Y. TIMES (June 20, 2015), https://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.

[28] *See* Devan Cole, *Haley: Dylann Roof 'Hijacked' Confederate Flag From People Who Saw it as Symbolizing 'Service and Sacrifice and Heritage'*, CNN (Dec. 6, 2019, 4:51 PM), https://www.cnn.com/2019/12/06/politics/nikki-haley-confederate-flag/index.html During an interview, Haley, who was widely praised for her removal of the Confederate flag from South Carolina's statehouse grounds, was asked about Roof to which she responded, "these 12 people were amazing people, they loved their church, they loved their family, they loved their community . . . and here is this guy that comes out with this manifesto, holding the Confederate flag and had just hijacked everything that people thought of (about the flag)." *Id.*

In the wake of the Charleston Church Massacre, the "Black Lives Matter"[29] movement called for the removal of Confederate monuments, which led to a revival of the controversy surrounding the Confederate flag, especially when displayed in government settings.[30] In July of 2015, following intense public pressure, Governor Nikki Haley ordered the removal of the Confederate flag from the South Carolina statehouse after both houses of the state legislature voted to remove the flag from its state capitol.[31] Unfortunately, the national sentiment of unity against white supremacy would be questioned again in 2017.

B. Unite the Right Rally

On August 11, 2017, hundreds of white nationalists marched throughout the University of Virginia campus with burning torches in their hands on the eve of the "Unite the Right" rally that took place the following day at a park named after Confederate General Robert E. Lee.[32] "Violence erupted in the college town of Charlottesville" on August 12, 2017, when a swarm of white nationalists, who gathered for a rally in response to plans to remove a Confederate statue, were met by counter-protesters; Virginia's governor declared a state of emergency in response to a violent outbreak.[33] The clash between the two groups transitioned from violent to deadly when a

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[29] BLACK LIVES MATTER, https://blacklivesmatter.com/about (last visited Sep. 20, 2020). The Black Lives Matter movement emerged in 2013 in response to the verdict in State of Florida v. George Michael Zimmerman. *Id.* The movement's official website states that the "Black Lives Matter Foundation, Inc is a global organization in the US, UK, and Canada, whose mission is to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes." *Id.*

[30] James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 513-14 (1991) ("[T]he [Confederate] flag has been adopted knowingly and consciously by government officials seeking to assert their commitment to black subordination.").

[31] Meghan Keneally, *South Carolina Gov. Nikki Haley Orders Removal of Confederate Flag from Statehouse Grounds*, ABC NEWS (July 9, 2015, 4:17 PM), https://abcnews.go.com/US/south-carolina-gov-nikki-haley-orders-removal-confederate/story?id=32338923.

[32] Andrew Katz, *Unrest in Virginia Clashes Over a Show of White Nationalism in Charlottesville Turn Deadly*, TIME , https://time.com/charlottesville-white-nationalist-rally-clashes (last visited Sep. 20, 2020).

[33] *Id.*

twenty-year-old man drove his car into a throng of counter-protesters killing one and leaving nineteen others injured.[34]

Although the counter-protesters' plan to remove the statue of Confederate General Robert E. Lee was overshadowed and thwarted by the violence that the group of white nationalists incited, the counter-protesters' efforts still proved to be successful.[35] Following the event, city officials in Kentucky and Maryland were inspired to "tear down Confederate monuments after years of debates."[36] Additionally, demonstrators in Durham, North Carolina, toppled a statue of a Confederate soldier.[37] A Confederate statue that once stood in front of a county building, located in Gainesville, Florida, was moved to a private cemetery.[38] The former mayor of Charlottesville, Michael Signer, explained that at the time, the chaos that unfolded in 2017 "seemed singular" but that the summer of 2020 "brought eerie echoes of that day."[39] The former mayor also explained the effects that tragic events have had on the nation:

> [America] changed after Dylann Roof attacked Emanuel African Methodist Episcopal Church, with Republicans across South Carolina supporting the removal of the rebel flag from the State House grounds. And it has changed since a police officer, Derek Chauvin, knelt on George Floyd's neck for more than eight minutes in Minneapolis, with Black Lives Matter becoming the largest protest movement in American history.[40]

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[34] Meghan Keneally, *What to Know About the Violent Charlottesville Protests and Anniversary Rallies*, ABC NEWS (Aug. 8, 2018, 4:44 PM), https://abcnews.go.com/US/happen-charlottesville-protest-anniversary-weekend/story?id=57107500.

[35] Caroline Cournoyer, *Post-Charlottesville, Cities Rush to Remove Confederate Monuments*, GOVERNING (Aug. 15, 2017), https://www.governing.com/archive/tns-charlottesville-confederate-monuments.html.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] Michael Signer, *Charlottesville Keeps Happening All Over America*, WASH. POST. (Aug. 11, 2020, 6:00 A.M.), https://www.washingtonpost.com/outlook/2020/08/11/charlottesville-lessons-cities-provocations.

[40] *Id.*

C. George Floyd

Many are aware of the protests that emerged throughout the country following the horrific death of George Floyd, which went viral after a graphic video taken by an onlooker was posted online, but many are unaware of the details surrounding his death.

On May 25, 2020, police officers were called to a store in Minneapolis following a report that a man was using counterfeit money to purchase a pack of cigarettes.[41] Soon after the call, Derek Chauvin, his partner Tou Thao, and two other officers struggled to get Floyd into the backseat of a squad car.[42] A statement from the Minneapolis Police Department, which was released on May 26, 2020, stated that the struggle between the officers and Floyd occurred because he physically resisted arrest.[43] Floyd vocalized to the officers that he was claustrophobic and did not want to enter the police vehicle; he repeatedly stated that he was unable to breathe even while standing upright.[44] Shortly thereafter, Chauvin pulled Floyd away from the vehicle and caused Floyd to fall to the ground.[45] While on the ground, Floyd was shouting "I can't breathe," as Officer Chauvin kneeled on his neck in an effort to restrain him.[46] The graphic video, filmed by Darnella Frazier, showcases the horrific scene and also captures the audio in which the listener can hear not only the cries of Floyd but also the surrounding crowd's pleas to the officers to stop.[47] Several minutes later, Officer Chauvin continued to kneel on Floyd's neck despite his unresponsive state and he was later declared dead at a hospital.[48] Despite meager attempts to

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[41] Chris Graves, *The Killing of George Floyd: What We Know*, MPR NEWS (June 1, 2020, 10:50 AM), https://www.mprnews.org/story/2020/06/01/the-killing-of-george-floyd-what-we-know.
[42] *Id.*
[43] John Elder, *Investigative Update on Critical Incident*, MINNEAPOLIS POLICE (May 26, 2020), https://www.insidempd.com/2020/05/26/man-dies-after-medical-incident-during-police-interaction.
[44] *Id.*
[45] *George Floyd: What Happened in the Final Moments of His Life*, BBC (July 16, 2020), https://www.bbc.com/news/world-us-canada-52861726.
[46] Hannah Gold, *Everything We Know About the Killing of George Floyd*, CUT (Aug. 10, 2020), https://www.thecut.com/2020/08/man-pinned-down-by-minneapolis-police-officer-dies.html.
[47] *Id.*
[48] Elliott C. McLaughlin, *Three Videos Piece Together the Final Moments of George Floyd's Life*, CNN (June 23, 2020, 9:14 AM),

conceal it, the United States' deeply rooted legacy of systemic racism lives on every time a black person is killed due to police brutality, especially at the current "rate of more than one every other day."[49] Given the regular occurrence of deaths at the hands of police officers, what made George Floyd's death so influential? Some say the timing.[50]

A demonstrator explained, "It's either COVID is killing us, cops are killing us, [or] the economy is killing us. Every corner that people of color turn, they're being pushed."[51] Nationwide demonstrations emerged in the midst of social distancing and quarantine orders imposed due to the Coronavirus pandemic.[52] While predominantly in response to George Floyd's death, the protests represented a culmination of tensions arising from the pandemic, police brutality, and systematic racism.[53] It is undeniable that Floyd's death demonstrated yet another horrific instance of police brutality but the protests that emerged following it were unprecedented; prior to Floyd's killing, the highest estimate for any American protest was 4.6 million.[54] Following Floyd's death, it is estimated that as many as twenty-one million adults attended a protest related to Black Lives Matter or police brutality.[55]

> The reaction to Floyd's killing has indeed been different . . . owing to the graphic nature of the video

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https://www.cnn.com/2020/06/01/us/george-floyd-three-videos-minneapolis/index.html.

[49] Alex Altman, *Why The Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), https://time.com/5847967/george-floyd-protests-trump.

[50] *Id.*

[51] Charlotte Alter, *'America Has Its Knee on People of Color' Why George Floyd's Death Was a Breaking Point*, TIME (May 31, 2020, 9:13 PM), https://time.com/5845752/america-has-its-knee-on-us-george-floyds-death-was-a-breaking-point-protests.

[52] Helier Cheung, *George Floyd Death: Why US Protests Are So Powerful This Time*, BBC (June 8, 2020), https://www.bbc.com/news/world-us-canada-52969905.

[53] Roni Caryn Rabin, *Will Protests Set Off a Second Viral Wave?*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/health/protests-coronavirus.html.

[54] Eliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning That Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020, 11:31 AM), https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html.

[55] *Id.*

> that captured it, the nation's calls for justice in other killings, a pandemic disrupting normality, widespread unemployment, a phenomenon known as "vicarious trauma" and White people joining people of color in the streets.[56]

Demonstrators subsequently reignited the debate regarding Confederate statues and monuments in several states including Virginia, Alabama, and South Carolina.[57] As protesters in Alabama toppled a statue of Confederate General Robert E. Lee from its pedestal, a small crowd gathered to watch and cheered as the statue fell.[58] Similarly, protestors in Virginia covered a Robert E. Lee memorial in graffiti.[59] In fact, statistics released on August 11, 2020 from the Southern Poverty Law Center demonstrated that fifty-nine Confederate symbols on public land were removed, relocated, or renamed in the time that had passed since George Floyd's death.[60] On October 13, 2020, The Southern Poverty Law Center released data that showed that the number of Confederate symbols on public land that had been removed, relocated, or renamed since George Floyd's death had increased from fifty-nine to one-hundred-and-two.[61] And yet despite the evident efforts of many to purge the United States of publicly-displayed Confederate symbols, many still remain.

It is incredibly disheartening that numerous states are so fixated upon the preservation and display of Confederate monuments

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[56] *Id.*

[57] Johnny Diaz & Aimee Ortiz, *George Floyd Protests Reignite Debate Over Confederate Statues*, N.Y. TIMES (June 3, 2020), https://www.nytimes.com/2020/06/03/us/confederate-statues-george-floyd.html.

[58] Cara Kelly, *Confederate Monuments Toppled, Burned as Protests over George Floyd's Death Continue*, USA TODAY (June 2, 2020, 3:38 PM), https://www.usatoday.com/story/news/nation/2020/06/01/george-floyds-death-causes-confederate-monuments-targeted/5310736002.

[59] *Id.*

[60] *SPLC Whose Heritage? Dataset Updates as of August 11, 2020*, S. POVERTY L. CTR., https://www.splcenter.org/presscenter/splc-whose-heritage-dataset-updates-august-11-2020.

[61] *Symbols of the Confederacy Removed Since George Floyd's Death*, S. POVERTY L. CTR., https://www.splcenter.org/symbols-confederacy-removed-george-floyds-death.

that they have legislation specifically devoted to protecting these monuments. States that prioritize the protection of controversial monuments are romanticizing the Civil War by siding with ideals that caused treason and secession from the United States in the past and perpetuate racism in the present.

IV. VARIOUS STATE APPROACHES

Symbols commemorating the Confederacy have long stood in the United States and most notoriously throughout the southern states.[62] Recurrent trends of tragedies involving systemic racism and/or police brutality, such as the Charleston Church Shooting, the Unite the Right Rally, and the death of George Floyd, caused many people to target their fight for social justice toward toppling Confederate monuments.[63] The efforts of these residents have proven successful; since the Charleston massacre, 114 Confederate symbols have been removed.[64] Despite these successes, the movement to rid the United States of Confederate monuments is far from over, and the state legislatures ensure exactly that. It is helpful to compare the states' statutes side by side because although each state's law relies on different procedural provisions, they ultimately accomplish the same end goal.

Several southern states have enacted legislation whose purpose is to expressly limit the removal of Confederate monuments. For example, Alabama, North Carolina, and Tennessee enacted monument protection acts after 2015.[65] In an effort to facilitate the reader in identifying the similarities and differences of each state's

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[62] Jess R. Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FLA. L. REV. 627, 633 (2019).

[63] Marc Fisher, *Confederate Statues: In 2020, A Renewed Battle in America's Enduring Civil War*, WASH. POST (June 11, 2020, 6:44 PM), https://www.washingtonpost.com/history/2020/06/11/confederate-statues-attacked-protesters-george-floyd.

[64] *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy.

[65] Alabama Memorial Preservation Act of 2017, 2017 Ala. Laws 354 (codified as amended at ALA. CODE §§ 41-9-230-237); Cultural History Artifact Management and Patriotism Act of 2015, N.C. Sess. Laws 170 (codified as amended at N.C. GEN. STAT. §§ 100-2, 100-2.1, 144-5, 144-9, 147-36); 2018 Tenn. Pub. Acts 1033 (codified as amended at TENN. CODE ANN. §§ 4-1-405, 4-1-406, 4-1-407, 4-1-412).

respective statute, the following section intentionally focuses on the noteworthy attributes of each statute separately.

A. North Carolina

North Carolina's Cultural History Artifact Management and Patriotism Act of 2015 strategically preempts local authority by requiring approval from the state's historical commission prior to any Confederate monument being "removed, relocated, or altered in any way."[66] The Act explicitly prohibits the permanent or temporary removal of any "object of remembrance" unless it is done with approval of the commission in accordance with the Act.[67] It is noteworthy that the statute employs the term "object of remembrance" because it allows the legislation to circumvent directly referencing Confederate monuments.[68] The statute defines the term "object of remembrance" as "a monument, memorial, plaque, statue, marker, or display of permanent character that commemorates an event, person, or military service that is part of North Carolina's history."[69] Although the statute may seem simple on its face, it is deceiving because the statute only allows relocation to "a site of similar prominence, honor, visibility, availability, and access that are within the boundaries of the jurisdiction" where the object of remembrance originally stood.[70] The Act places further limitations by stating that a Confederate monument "may not be relocated to a museum, cemetery, or mausoleum unless it was originally placed at such a location."[71] For instance, if a Confederate monument was originally erected in a public park, under the Act, the monument would never be able to be relocated to a museum, cemetery, or mausoleum because it was initially placed elsewhere.

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[66] N.C. GEN. STAT. § 100-2.1(a) (2021).
[67] *Id.* § 100-2.1(b) ("An object of remembrance located on public property may not be permanently removed and may only be relocated, whether temporarily or permanently, under the circumstances listed in this subsection and subject to the limitations in this subsection.").
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*

B. Alabama

The Memorial Preservation Act of 2017 differs from North Carolina's statute because the Act contains no exceptions or procedures for approval unless the monument is more than twenty but less than forty years old, in which case the monument may qualify for a waiver.[72] Specifically, the statute explains that even if a waiver is granted, the committee "may provide reasonable conditions and instructions to ensure that the architecturally significant . . . monument is restored or preserved to the greatest extent possible."[73] An additional unique feature of North Carolina's statute is its violation provision which fines an entity twenty-five thousand dollars for each individual violation.[74] The statute further explains that a violation occurs when the Attorney General determines that "an entity exercising control of public property . . . has relocated, removed, altered, renamed, or otherwise disturbed an architecturally significant . . . monument" from public property without either obtaining a waiver or complying with the requirements laid out within the statute.[75] The Act states that after fines are collected by the Attorney General, they are then sent to the State Treasurer, and thereafter deposited into the Alabama State Historic Preservation Fund.[76]

Just two years after the inception of its Memorial Preservation Act, the state of Alabama took a drastic step and as a result, proved its commitment to enforcing the Act. In 2019, Alabama sued Randall L. Woodfin, in his official capacity as Mayor of the City of Birmingham, after he violated the Memorial Preservation Act by ordering City employees to place a screen made out of plywood around the base of a Civil War monument in a city park.[77] The Supreme Court of Alabama ultimately held that the Mayor's actions violated the Memorial Preservation Act because the plywood screen altered the appearance of the monument.[78] The plywood screen resulted in a modification and interference with the monument in

[72] *See* ALA. CODE §§ 41-9-232(b), 41-9-235 (2020).
[73] *Id.* at § 41-9-235(2)(a)(2)(a).
[74] *Id.* at § 41-9-235(2)(a)(2)(d).
[75] *Id.*
[76] *Id.*
[77] State v. City of Birmingham, 299 So.3d 220, 223 (Ala. 2019).
[78] *Id.* at 227.

violation of the plain meaning of the terms as used in the statute.[79] As a result of the Alabama Supreme Court siding with the State of Alabama, the City of Birmingham was subject to the Act's penalties and ordered to pay a fine of twenty-five thousand dollars.[80] The outcome of the 2019 lawsuit did not deter Mayor Woodfin from removing a "115-year-old obelisk dedicated to Confederate soldiers" in June of 2020 in response to protests in Birmingham following the death of George Floyd.[81] Once again, the Attorney General has asked the court to declare that Birmingham violated the Alabama Memorial Preservation Act and to impose fines.[82]

C. Tennessee

In response to national efforts to remove symbols memorializing the Confederacy, the Tennessee House of Representatives approved a bill that makes it harder to remove Confederate monuments from public areas.[83] The Tennessee Heritage Protection Act resembles North Carolina's monument-specific law because it also gives a historical commission the power to make decisions regarding controversial monuments; the Act requires anyone interested in renaming, removing, or relocating any monuments to receive a two-thirds majority vote from the Tennessee Historical Commission.[84] Tennessee's Act is less discreet than the similar statutes of North Carolina and Alabama about its underlying purpose. The Act specifically lays out definitions for the following terms: historic conflict, historic entity, historic event, historic figure,

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[79] *Id*.
[80] *Id.* at 238.
[81] Daniel Jackson, *Alabama AG Sues Birmingham for Removing Rebel Monument*, COURTHOUSE NEWS SERV. (June 3, 2020), https://www.courthousenews.com/alabama-ag-sues-birmingham-for-removing-rebel-monument.
[82] *Id.*
[83] *See Tennessee Heritage Protection Act*, TENN. HIST. COMM'N, https://www.tn.gov/environment/about-tdec/tennessee-historical-commission/redirect---tennessee-historical-commission/tennessee-heritage-protection-act.html (last visited on Mar. 25, 2021) ("The Tennessee Heritage Protection Act was initially enacted in 2013 and amended in 2016 and 2018. Generally, the Tennessee Heritage Protection Act prohibits the removal, relocation, or renaming of a memorial that is, or is located on, public property.").
[84] *See* TENN. CODE ANN. § 4-1-412 (2020).

and historic organization – all of which hint at Confederate monuments related to the Civil War.[85]

Tennessee's statute features a unique exception which enables local governments to petition the Tennessee Historical Commission for a waiver.[86] The statute explains that a waiver can be granted by a two-thirds roll call vote of the entire membership of the commission and that the commission "may include reasonable conditions and instructions to ensure that a memorial is preserved and remains publicly accessible to the greatest extent possible."[87]

D. Georgia

Georgia is no stranger to symbols of the Confederacy; until 2001, the Confederate emblem was part of the peach state's flag.[88] In 2001, a quid-pro-quo occurred when the Georgia Legislature approved a change of the flag's design in exchange for a statute which protects all Confederate monuments located within the state of Georgia.[89] Georgia's statute is similar to Tennessee's because it is also transparent about its purpose; the statute protects all publicly owned monuments associated with Confederate or United States military service by expressly prohibiting any local government official from attempting to either remove or conceal the monuments.[90]

E. South Carolina

As mentioned previously, South Carolina's decision to remove the Confederate flag from the top of the Capitol dome was a legislative sleight of hand rather than a conscious effort to strip the

[85] *Id*. at § (2)-(6).
[86] *Id*. at § (c)(1).
[87] *Id*. at § (c)(8)(B).
[88] *See* David Firestone, *Redesigned Georgia Flag is Advanced by House*, N.Y. TIMES (Jan. 25, 2001), https://www.nytimes.com/2001/01/25/us/redesigned-georgia-flag-is-advanced-by-house.html.
[89] *See* Jim Galloway, *The Georgia Law that Protects Stone Mountain, Other Confederate Monuments*, AJC (Aug. 17, 2017), https://www.ajc.com/blog/politics/the-georgia-law-that-protects-stone-mountain-other-confederate-monuments/IIyMj6919d5JFo40QMS4RJ.
[90] *See* GA. CODE ANN. § 50-3-1(b)(1)-(2) (2020).

Capitol of any Confederate symbols.[91] A trade-off occurred ultimately resulting in the birth of the South Carolina Heritage Act.[92] The Act was designed with the intent of protecting Confederate monuments standing in South Carolina and does exactly that; further, the Act protects Confederate monuments by requiring a two-thirds vote from both South Carolina's House of Representatives and Senate for the removal of any Confederate monument.[93] South Carolina's statute refers to the Civil War as the "War Between the States."[94]

In August of 2020, South Carolina's Attorney General asked the state's Supreme Court to determine whether the Heritage Act is constitutional. The underlying suit which prompted the letter from the Attorney General to the Supreme Court was filed by Jennifer Pinckney, the widow of a pastor, named Clementa Pinckney, who was killed in the Charleston Church Shooting.[95] The lawsuit alleges that "the Heritage Act violates several pillars of the S.C. Constitution by restraining legislative authority, creating a special law and stripping home rule powers from municipal and county-level governments."[96]

F. Virginia

Virginia's history of monument protection laws has recently proven to be more dynamic than any of the previously mentioned states. Cities located within the state of Virginia were formerly restrained from altering or removing monuments by Virginia's adoption of Dillon's Rule, which is an "interpretive methodology for municipal authority which 'limits the power of local governments to those expressly granted by the state or those necessarily implied or

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[91] Kali Holloway, *S.C. Confederate Monuments Remain as a Symbol of Black Subjugation*, CHARLESTON CITY PAPER (May 15, 2019, 4:00 AM), https://www.charlestoncitypaper.com/story/sc-confederate-monuments-remain-as-a-symbol-of-black-subjugation?oid=28290077.
[92] *Id.*
[93] *See* S.C. CODE ANN. § 10-1-165 (2020).
[94] *Id.*
[95] Gregory Yee, *Heritage Act Case Pushed to SC Supreme Court by State Attorney General Wilson*, POST & COURIER (Aug. 13, 2020), https://www.postandcourier.com/news/heritage-act-case-pushed-to-sc-supreme-court-by-state-attorney-general-wilson/article_21d6172c-ddbe-11ea-9ece-df49ad01bbfd.html.
[96] *Id.*

essential to express powers.'"[97] In other words, Virginia state law allowed local governments to erect war monuments, but prohibited local governments from removing or modifying them.

In January of 2020, the city council in Richmond, Virginia, which was the former capital of the Confederacy, passed a resolution to petition the state legislature for permission to remove or modify the city's Confederate statues, specifically a monument of Robert E. Lee.[98] Two months later, the Virginia House of Representatives and the Senate passed a bill "provid[ing] that a locality may remove, relocate, or alter any monument or memorial for war veterans in its public space, regardless of when erected."[99] In June of 2020, Virginia's governor, Ralph Northam, announced his plans to remove Richmond's statue of Confederate General Robert E. Lee and explained that "in Virginia, we no longer preach a false version of history. One that pretends the Civil War was about 'state rights' and not the evils of slavery. No one believes that any longer."[100] Unsurprisingly, not all of Virginia's residents shared the same mentality as Governor Northam; five Richmond residents filed a lawsuit to prevent the Governor from removing the monument arguing that removing the monument would cause emotional loss and lead to a reduction in property values.[101] On October 27, 2020, Judge W. Reilly Marchant. of the Richmond Circuit Court, sided with the state when he ruled that the Governor's proposed "executive action

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[97] Amanda Lineberry, Payne v. City of Charlottesville *and the Dillon's Rule Rationale for Removal*, 104 VA. L. REV. ONLINE 45, 48 (2018).

[98] Anna Sturla & Monica Haider, *Richmond, the Former Capital of the Confederacy, Seeks Local Control of its Civil War Monuments*, CNN (Jan. 6, 2020, 11:45 PM), https://www.cnn.com/2020/01/06/us/richmond-confederate-statue-vote/index.html.

[99] Giulia McDonnell Nieto del Rio & Amir Vera, *Virginia House and Senate Adopt Bill Allowing Localities to Remove Confederate Statues and Monuments*, CNN (Mar. 9, 2020, 7:26 PM), https://www.cnn.com/2020/03/09/us/virginia-confederate-monuments-bill-trnd/index.html.

[100] Elizabeth Tyree, *Confederate States in Richmond to be Removed, Northam says Lee Statue to be Removed First*, ABC 13 NEWS (June 4, 2020), https://wset.com/news/local/confederate-statues-in-richmond-to-be-removed.

[101] Eric Kolenich, *After Judge's Ruling Richmond's Robert E. Lee Statue Will Stay in Place Until at Least October*, RICHMOND TIMES DISPATCH (Aug. 25, 2020), https://richmond.com/news/local/after-judges-ruling-richmonds-robert-e-lee-statue-will-stay-in-place-until-at-least/article_70295c3b-e0cf-508e-b91b-d481ca0f0309.html.

would no longer contravene public policy nor be in violation of the Virginia Constitution."[102]

As demonstrated above, it is clear that many states are willing to go to extreme lengths to protect Confederate monuments; the actions taken by these states are extremely detrimental to the country. In order for the country to begin healing its preexisting wounds of systemic racism and police brutality that continue to be repeatedly ripped open, many habits of America must change. For example, Americans must acknowledge that publicly displayed monuments honoring the Civil War haunt many citizens of the United States because they perpetuate racial injustice. However, mere acknowledgement is not sufficient; action is also necessary. Compared to the inception of the nation, the American public has recently demonstrated its increased acceptance of government activism and intervention into domestic matters and as such, the federal government should intervene and involve itself with the effort to incentivize states to remove publicly displayed Confederate monuments.[103]

V. PROPOSED FEDERAL ACTION

The United States is currently lacking uniform legislation between the federal government and the state governments regarding Confederate monuments. The growing national sentiment toward the removal of Confederate monuments, which has been emphasized following numerous flashpoints, demonstrates the need for the federal government to enact unifying legislation calling for the removal of Confederate monuments. Although federal government involvement with seemingly state issues may not seem probable, it is not completely out of character. In fact, "the federal intergovernmental system of governance has . . . [become] increasingly centralized and coercive, with the federal government using federal grants . . . to expand its influence in many policy areas previously viewed as being the traditional responsibility of state and

[102] Taylor v. Northam, No. CL 20-3339, 2020 Va. Cir. LEXIS 443, at *17 (Va. Cir. Ct., Oct. 27, 2020).

[103] ROBERT JAY DILGER & MICHAEL H. CECIRE, CONG. RSCH. SERV., R40638, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES (2019).

local governments."[104] Specifically, the federal government should use Congress's power under the Spending Clause to incentivize state governments to remove publicly displayed Confederate monuments by attaching conditions to the receipt of funds.

A. The Spending Clause

The Spending Clause, located in Article I, section 8, clause 1 of the Constitution, provides Congress broad discretion to tax and spend for the general welfare, which includes the funding of particular state programs or activities.[105] In 1987, the Supreme Court considered the constitutionality of a federal law that required the Secretary of Transportation to withhold five percent of South Dakota's federal highway dollars if the state allowed persons under the age of twenty-one to purchase alcohol.[106] Ultimately, the Court upheld the law but more importantly, through its decision in *South Dakota v. Dole*,[107] the Court created a four-part test for evaluating the constitutionality of conditions attached to federal spending programs: (1) the spending power must be exercised in pursuit of the general welfare; (2) the conditions made on spending must be unambiguous so that the states understand the terms; (3) the conditions on spending must be related to the particular federal project or program in question; and (4) no other constitutional provisions provide an independent bar to the conditional grant of federal funds.[108] The Court introduced an additional step to the original four-part test through its decision in *National Federation of Independent Business v. Sebelius*[109] in 2012. *Sebelius* held that any financial "inducement" that Congress chooses to employ can be "relatively mild encouragement" but may not place "a gun to the head" of states.[110] In other words, it is one thing to persuade states but forcing states into adopting certain conditions based upon their needs for public funding exceeds Congress's power under the Spending Clause. Due to their significance in determining whether limitations imposed by Congress on federal grants are permissible, it is worthwhile to further

[104] *Id.*
[105] Grant v. City of Roanoke, 265 F. Supp. 3d 654, 657 (W.D. Va. 2017).
[106] South Dakota v. Dole, 483 U.S. 203, 205 (1987).
[107] *Id.* at 203.
[108] *Id.* at 207-08.
[109] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581 (2012).
[110] *Id.*

elaborate on the four elements of the *Dole* test and the additional element of coercion that emerged from the *Sebelius* decision.

The Constitution states that "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[111] The operative language being "to . . . provide for the . . . general Welfare of the United States."[112] It is likely that as a result of the Constitution's language, Justice Rehnquist, writing for the majority in *Dole*, held that, "the exercise of the spending power must be in pursuit of 'the general welfare.'"[113] To the dismay of some, meeting this element of the test is usually not difficult.[114]

In order to comply with Supreme Court precedent, the second requirement of the *Dole* test mandates that federal grant conditions must be set forth unambiguously before a recipient, likely a state, enters into a grant agreement with the federal government.[115] The underlying purpose of this element is to certify that a state receiving funds fully understands the conditions placed upon the funds and the meaning behind the conditions.[116] Although this requirement has been deemed to be the most important of the four, the remaining elements are also significant.[117]

Grant conditions may be deemed improper if they are "unrelated to the federal interest in particular national projects or programs."[118] Although the Supreme Court has noted that grant conditions must "bear some relationship" to the underlying purposes of the funds, the Court has not elaborated further.[119]

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[111] U.S. CONST. art I, § 8, cl. 1.
[112] *Id.*
[113] *Dole*, 483 U.S. at 207.
[114] *See* Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 524 (2003) ("Under current doctrine, the requirement that federal funds be spent only for the general welfare is essentially empty.").
[115] *Dole*, 482 U.S. at 207.
[116] *Id.*
[117] *See* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 S. Ct. Rev. 125, 189 (1996) ("Of these four conditions, only the second has any effect on structuring spending power.").
[118] *Dole*, 483 U.S. at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).
[119] New York v. United States, 505 U.S. 144, 167 (1992).

In addition, the Supreme Court stated in *Dole* that any strings that Congress attaches to federally granted monies may not induce its recipients to engage in unconstitutional activities.[120] In other words, when analyzing if this element is met or not, a court considers if any other constitutional provisions provide a separate obstruction to the conditional grant of federal funds.[121] This element is often referred to as the independent constitutional bar prong of the *Dole* test.[122] This requirement of the *Dole* test was established directly in response to South Dakota's argument regarding the Twenty-First Amendment.[123]

As mentioned previously, the Supreme Court added the following additional element to the *Dole* test through its *Sebelius* decision: coercive conditions.[124] The Court further limited Congress's power under the Spending Clause when it stated that limitations imposed on funding would be impermissible in situations where the financial inducements offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion."[125] Through precedent, the Court has established that in situations where the conditioned federal funds represent a relatively small amount of the states' allotted budget, the conditions will be permissible because they will be viewed as "relatively mild encouragement," as opposed to coercive in nature.[126]

B. National Historic Preservation Act of 1966

Funds granted by the federal government are classified as conditional gifts, rather than contracts, because they are granted to a state on the condition that the state complies with certain conditions. The Supreme Court laid the foundation of "conditional spending" when it ruled, in *United States v. Butler*,[127] that the federal government's power to "authorize expenditure of public moneys for

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[120] *Dole*, 483 U.S. at 210 ("[T]he power may not be used to induce the States to engage in activities that would themselves be unconstitutional.").
[121] *Id.* at 208.
[122] *Id.* at 210 ("[T]he 'independent constitutional bar' limitation on the spending power is not . . . a prohibition on the indirect achievements of objectives which Congress is not empowered to achieve directly.").
[123] *Id.*
[124] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581 (2012).
[125] *Id.* at 577.
[126] *Id.* at 211.
[127] 297 U.S. 1, 1 (1936).

public purposes is not limited by the direct grants of legislative power found in the Constitution."[128] As a result, the conditional spending power empowers Congress to "incentivize state governments to adopt Congress's policy preferences, but only in a manner that preserves federalism."[129]

In response to the American public's concern about losing its heritage, Congress enacted the National Historic Preservation Act of 1966 ("NHPA").[130] The NHPA "established a partnership between the federal government and state, tribal, and local governments that is supported by federal funding for preservation activities."[131] Relating to monuments in general, the NHPA states "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."[132] Further, the NHPA provides that one of the various responsibilities of the Secretary of the Interior is to "review and evaluate the plans of transferees of surplus Federal properties transferred for historic monument purposes to assure that the historic character of such properties is preserved in rehabilitation, restoration, improvement, maintenance and repair of such properties."[133] Section 106 of the NHPA may complicate matters because it requires federal agencies to contemplate the potential adverse effects of their "undertakings" on historic structures before any action is taken.[134]

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[128] *Id.* at 66.
[129] Daniel S. Cohen, *A Gun to Whose Head? Federalism, Localism, and the Spending Clause*, 123 DICK. L. REV. 421, 436 (2019).
[130] National Historic Preservation Act of 1966. 89 Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as 54 U.S.C. § 300101 (West 2014)).
[131] *National Historic Preservation Act*, ADVISORY COUNCIL ON HISTORIC PRES., https://www.achp.gov/digital-library-section-106-landing/national-historic-preservation-act (last visited on Nov. 19, 2020).
[132] 54 U.S.C. § 300101.
[133] *Id.* at § 300101(3)(g).
[134] *Confederate-monument Removals Slowed by Knot of Legal Issues*, A.B.A. (Dec. 2019), https://www.americanbar.org/news/abanews/publications/youraba/2019/december-2019/efforts-to-remove-confederate-monuments-slowed-by-knot-of-legal-.

C. Spending Clause Analysis

Recently, Confederate monuments, yet again, became the targets of protests against systemic racism and police brutality.[135] Since George Floyd's death, five "Confederate symbols have been relocated and thirty-three have been removed, including Mississippi's state flag," but thousands still dot the United States' landscape.[136] Ironically, states that prioritize the Civil War by displaying Confederate monuments should heed the warning of General Robert E. Lee by "obliterat[ing] the marks of civil strife, and [committing] to oblivion the feelings it engendered" by removing their publicly displayed Confederate monuments.[137] Assuming that many states are unlikely to change their stances on Confederate monuments on their own accord, who better to persuade them than the federal government? After all, as previously stated, the federal government can influence the states through the distribution of grants through Congress's power under the Spending Clause.[138] Some may argue that the very foundation of the United States was based upon federalism in order to avoid tyrannical interference from the federal government, but the Spending Clause has limitations that restrict the federal government from forcing the states into submission.

In order to persuade the states with lingering Confederate monuments and symbols to remove them, Congress should attach limitations to federal grants to the states. In order to pass muster, Congress would need to satisfy all four of the required elements that arose out of the *Dole* decision as well as the additional *Sebelius* requirement. Meeting the first requirement under the *Dole* test would likely pose the least difficulty for Congress because removing Confederate monuments from the United States would surely be in pursuit of the general welfare of the country's citizens. Removing Confederate monuments from the public landscape would advance racial equality within the country and thus, would benefit the nation's general welfare. Congress could also easily meet the second element by using unambiguous terms and explicitly stating that the terms

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[135] Nigut, *supra* note 14.

[136] Jeffery Martin, *House Bill Would Replace Confederate Monuments Across the U.S.*, NEWSWEEK (Aug. 26, 2020, 5:16 PM), https://www.newsweek.com/house-bill-would-replace-confederate-monuments-across-us-1527887.

[137] Desjardins, *supra* note 1.

[138] U.S. CONST. art I, § 8, cl. 1.

imposed on the states are to incentivize the states to remove their respective publicly displayed Confederate monuments. Because the NHPA oversees historical monuments in order to preserve the country's history it is undoubtedly germane to the project in question. Assuming that there would be no independent bar, the next consideration is to ensure that the federal government would only incentivize the states and not force them into removing their Confederate monuments by putting a gun to their heads. In other words, the amount of funding that Congress would withhold if the states chose not to remove their Confederate monuments could not be so great that the state would have no other option other than to succumb to Congress's demands. The overall goal is to encourage states to acknowledge the harm that they are imposing on undeserving residents by displaying Confederate monuments so that the states themselves will want to remove the offensive monuments; the goal is not to bribe states into adopting this perspective.

For example, Congress could condition the funds that states receive from the NHPA upon their relocating any remaining publicly displayed Confederate monuments within their state to battlefield parks. Congress's ability to condition NHPA funding on states removing all their publicly displayed Confederate monuments seems unlikely due to the nature of § 106. A close alternative, however, could potentially overcome § 106. Rather than incentivizing states to completely eradicate their Confederate monuments, Congress could condition NHPA funding on states relocating their publicly displayed Confederate monuments to battlefields administered by the National Park Service ("NPS"). A slight caveat is that if monuments were successfully moved to battlefields, which are commonly deemed as historic districts on the National Register,[139] § 106 would apply if further removals of the monuments were proposed. Monuments honoring those who fought in the Civil War would be more appropriately placed in Civil War battlefields than in modern parks or in front of courthouse buildings; misplaced monuments "promote misunderstanding, propaganda, and conflict."[140] It is likely that

[139] Patrick W. Andrus, *Guidelines for Identifying, Evaluating, and Registering America's Historic Battlefields*, NAT'L PARK SERV. (1999), https://www.nps.gov/subjects/nationalregister/upload/NRB40-Complete.pdf.

[140] *Move Confederate Statues to Military Parks*, COMMERCIAL APPEAL (Aug. 22, 2017, 6:00 AM),

someone who visits a Civil War battlefield is going there with the intention to learn about the Civil War, and thus, would understand the presence of relocated Confederate monuments.[141]

VI. CONCLUSION

As can be expected with any issue that sparks controversy, differing opinions surround the future of publicly displayed Confederate monuments. As this Note suggests, many Americans believe that removing or relocating Confederate statues would be a beneficial and long-overdue step for the country to take. Others argue that removing or relocating these memorials would be detrimental to society because it would erase the country's history. However, "[i]n suggesting history is being erased by removing these statues, what's often missed is that monuments already erase history – by selecting what will be remembered and how it will be remembered."[142] Rather than focusing on the past, the nation should consider the public sentiment following three vastly different but nevertheless eye-opening tragedies, specifically the Charleston Church Massacre, the Unite the Right Rally, and George Floyd's death, and how after each of those horrific acts, Americans have called for the removal of Confederate monuments.

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https://www.commercialappeal.com/story/opinion/2017/08/22/move-confederate-statues-military-parks/586869001.

[141] *See* Allison Wrabel, *County Confederate Soldier Statue to be Relocated to Shenandoah Valley Battlefield*, DAILY PROGRESS (Sep. 8, 2020), https://dailyprogress.com/news/local/govt-and-politics/county-confederate-soldier-statue-to-be-relocated-to-shenandoah-valley-battlefield/article_f6785d1d-5a24-5cbb-826f-8f14b9189bc1.html.

[142] Stephen Sawchuk, *Are Confederate-Statute Controversies Teachable Moments?*, EDUCATIONWEEK (June 20, 2017), https://www.edweek.org/leadership/are-confederate-statue-controversies-teachable-moments/2017/06.