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How Devolved is Too Devolved?: A Comparative Analysis Examining the Allocation of Power Between State and Local Government Through the Lens of the Confederate Monument Controversy

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Cover Page Footnote

J.D. Candidate, 2018, University of Georgia School of Law. I wish to thank Associate Dean Lori A. Ringhand for her support in framing and improving this Note and my family for their continued support in all that I do.

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HOW DEVOLVED IS TOO DEVOLVED?: A COMPARATIVE ANALYSIS EXAMINING THE ALLOCATION OF POWER BETWEEN STATE AND LOCAL GOVERNMENT THROUGH THE LENS OF THE CONFEDERATE MONUMENT CONTROVERSY

*W. Davis Riddle**

At various critical junctures in our nation's history, lawmakers have struggled to strike the proper balance between centralization and delegation of authority. Recently, the debate over whether to remove Confederate monuments has again brought to the fore this centuries-old struggle. Beginning in 2000, state legislatures throughout the South enacted statutes primarily designed to protect Civil War monuments, which in the South predominantly pay tribute to the Confederate cause. Recent attempts by Southern localities to remove Confederate monuments have revealed the inadequacy of these recently-enacted statutes. Virtually every state legislature that has successfully passed a statute on the topic has produced a law that entirely prohibits removal of Confederate monuments by localities, save certain extreme exceptions. Conversely, in those states where no statute addresses the issue of removal, the decision is left entirely to individual localities, as state officials have no legal authority on the matter. Both arrangements fail to provide for the proper allocation of authority between state and local government. In failing to do so, the respective governmental responses fall short in realizing the attendant policy benefits of proper

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allocation of authority. The statutory responses of two states, Georgia and Kentucky, provide a useful lens through which to analyze the effects of improper allocation of authority and, on the other hand, to consider the potential benefits of the proper allocation of authority. In light of these considerations, this Note suggests a model statutory approach that provides a process for both protection and removal of Confederate monuments and, by striking the proper balance, allows for meaningful political engagement at both the state and local level.

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I. INTRODUCTION

"With the terrorist attack, these monuments were transformed from equestrian statues into lightning rods." – Charlottesville, Virginia Mayor Mike Signer.[1]

A. TENSIONS COME TO A HEAD

Recent events and controversies in the South concerning Confederate monuments have brought to light centuries-old social tensions, compelling state and local authorities to search for the proper policy response.[2] These tensions are the product of years of repugnant racial beliefs and policies, and the intermittent attempts to rectify these evils.[3] Pivotal moments throughout American history—such as the Civil War, the second-era Ku Klux Klan of the 1920s,[4] and the Civil Rights Movement[5]—have resulted from such tensions and contribute to modern-day perspectives on racial issues. Today, these tensions remain. As one black American from Mississippi put it: "What's happening in Charlottesville, that's not shocking. That's been happening.

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[1] Erik Ortiz, *Charlottesville Mayor Changes Position, Agrees with Confederate Statue Removal*, NBC NEWS (Aug. 18, 2017, 3:37 PM), https://www.nbcnews.com/news/us-news/charlottesville-mayor-changes-position-agrees-confederate-statue-removal-n793931.

[2] *See* Cleve R. Wootson Jr., *In the Wake of Charlottesville Protests, a Kentucky Mayor Wants to Remove Confederate Statues*, WASH. POST (Aug. 13, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/08/13/in-the-wake-of-charlottesville-protests-a-kentucky-mayor-wants-to-remove-confederate-statues/?utm_term=.507b28fc2ac0 ("The [Charleston church shooting] tragedy mobilized once-hesitant Southern cities to get rid of polarizing Civil War statuary.").

[3] *See* generally Richard Wolf, *Equality Still Elusive 50 Years After Civil Rights Act*, USA TODAY, (Jan. 19, 2014, 6:00 AM), https://www.usatoday.com/story/news/nation/2014/01/19/civil-rights-act-progress/4641967/ (discussing the strides that have been made towards racial equality in the past fifty years, while acknowledging that racial inequality still exists).

[4] Ben Cosgrove, *Bigotry in the USA: Photos From a Ku Klux Klan Initiation,* TIME (Mar. 5, 2013) http://time.com/3746389/bigotry-in-the-usa-photos-from-a-ku-klux-klan-initiation ("The KKK's fortunes as a cultural and political force have waxed and waned over the decades, with Klan membership peaking in the 1920s, during the era of the 'Second Klan.'"); *id.* (noting that the "Klan claimed literally millions of members at the height of the Second Klan era").

[5] CIVIL RIGHTS MOVEMENT, WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2005), https://www.encyclopedia.com/social-sciences-and-law/political-science-and-government/political-parties-and-movements/civil-rights-movement ("The civil rights movement was a struggle by African Americans in the mid-1950s to late 1960s to achieve civil rights equal to those of whites . . . .").

Whether a statue is standing or a flag is waving, it's been happening. They just showing it on the news now."[6]

It is undeniable that the past three to four years have seen a renewed and intense public debate centered around Confederate monuments, which many consider to be symbols of white supremacy.[7] This renewed attention can likely be traced to the 2015 murder of nine black churchgoers by a white supremacist in Charleston, South Carolina.[8] In the following days and months, many leaders throughout the South called for removal of not only flags but also prominent monuments erected in remembrance of the Confederate cause.[9] These calls sharply intensified in the fall of 2017, after the tragedy in Charlottesville, Virginia, where a white nationalist rally in opposition to a plan by the city to remove a prominent statue of Confederate general Robert E. Lee escalated into violence.[10] Clashes between white nationalists and counter-protestors, left one dead and at least thirty-four people wounded.[11]

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[6] B. Brian Foster, *Confederate Monuments are More than Reminders of our Racist Past. They are Symbols of our Racist Present,* WASH. POST (Aug. 24, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/08/24/confederate-monuments-are-more-than-reminders-of-our-racist-past-they-are-symbols-of-our-racist-present/?utm_term=.efc043067622.

[7] *See, e.g.*, Miles Parks, *Confederate Statues Were Built to Further a 'White Supremacist Future'*, NPR (Aug. 20, 2017, 8:31 AM) http://www.npr.org/2017/08/20/544266880/confederate-statues-were-built-to-further-a-white-supremacist-future ("'These statues were meant to create legitimate garb for white supremacy,' [James] Grossman [executive director of the American Historical Association] said. 'Why would you put a statue of Robert E. Lee or Stonewall Jackson in 1948 in Baltimore?'").

[8] *See* Kathleen Hennessey & Michael Muskal, *South Carolina Church Killings Foster Unity over Removal of Confederate Flag*, L.A. TIMES (June 22, 2015, 9:46 PM), http://www.latimes.com/nation/la-na-charleston-shooting-confederate-flag-20150622-story.html ("[O]n Monday, Gov. Nikki Haley and other leading officials called for the flag's removal, a… show of unity spawned by the deaths of nine people in a black church last week during a massacre whose white suspect embraced the flag as a symbol of his racist ideology.").

[9] *See, e.g.*, Maya Rhodan, *New Orleans Mayor Asks City to Remove Confederate Statues*, TIME (July 9, 2015), http://time.com/3952177/new-orleans-confederate-statues ("[New Orleans Mayor Mitch] Landrieu formally asked the City Council to start the process to remove four statues erected to honor Confederate leaders from their prominent positions throughout the city . . . in the wake of the massacre at Emanuel AME Church in Charleston, South Carolina.").

[10] *See* Maggie Astor, et al., *A Guide to the Charlottesville Aftermath*, N.Y. TIMES (Aug. 13, 2017), https://www.nytimes.com/2017/08/13/us/charlottesville-virginia-overview.html (describing the Charlottesville protests and the events that followed).

[11] *Id.*; *see also* Hawes Spencer, *A Far-Right Gathering Bursts Into Brawls,* N.Y. TIMES (Aug. 13, 2017), https://www.nytimes.com/2017/08/13/us/charlottesville-protests-unite-the-right.html?module=inline ("[A] car plowed into a crowd of counterdemonstrators, killing a woman and injuring at least 19 other people.").

Two state troopers also died while monitoring the situation when their helicopter crashed.[12]

B. THE MONUMENTS

As of 2016, there were approximately 718 Confederate monuments and statues in a total of 31 states, with a total of 90 monuments in Georgia and 41 in Kentucky.[13] In the absence of controlling federal authority, state and local authorities are left to their own devices to craft the proper policy response.[14] Local leaders faced with demands for monument removal are prompted to first consider whether removal is the desired response.[15] If answering in the affirmative, these leaders must then consult the proper legal process for effecting such removal.[16] However, upon deciding that removal is in fact the desired response, many of the Southern leaders most inclined to act quickly to remove—officials from more liberal cities and towns[17]—are, upon consultation of the relevant legal processes, "reckoning with the fact that they don't actually have the power to [remove the monuments]."[18]

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[12] *Id.*

[13] Booth Gunter & Jamie Kizzire, *Whose Heritage? Public Symbols of the Confederacy*, SOUTHERN POVERTY LAW CENTER (Apr. 21, 2016), https://www.splcenter.org/sites/default/files/com_whose_heritage.pdf.

[14] *See* Crutcher v. Kentucky, 141 U.S. 47, 61 (1891) ("When [Congress' commercial] power, or some other exclusive power of the federal government, is not in question, the police power of the state extends to almost everything within its borders . . . ."); *see also* U.S. CONST. amend. X.

[15] *See generally* Campbell Robertson & Richard Fausset, *Southern Cities Split with States on Social Issues*, N.Y. TIMES (Apr. 15, 2016), https://www.nytimes.com/2016/04/16/us/southern-cities-move-past-states-on-liberal-social-issues.html.

[16] *See* discussion *infra* Part II.

[17] *See, e.g. id.* ("Many of these [Southern] cities have found themselves increasingly at odds with their states, and here in a region that remains the most conservative in the country, the conflicts are growing more frequent and particularly pitched."); *see also* Paul A. Diller, *Reorienting Home Rule: Part 2–Remedying the Urban Disadvantage through Federalism and Localism*, 77 LA. L. REV. 1045, 1047 ("[A]t least for those with progressive political leanings, local government is often now seen as the most responsive and nimble level of government in the United States . . . .").

[18] David A. Graham, *Local Officials Want to Remove Confederate Monuments—But States Won't Let Them*, ATLANTIC (Aug. 25, 2017), https://www.theatlantic.com/politics/archive/2017/08/when-local-officials-want-to-tear-down-confederate-monuments-but-cant/537351; *see also* David A. Graham, *Red State, Blue City*, ATLANTIC (Mar. 2017), https://www.theatlantic.com/magazine/archive/2017/03/red-state-blue-city/513857 ("Over the past few years, city governments and state legislatures have fought each other in a series of battles involving preemption . . . . It hasn't gone well for the city dwellers.").

Beginning in 2000, state legislatures throughout the South enacted statutes which protected war monuments, including monuments dedicated to commemorating the Civil War (or the "War Between the States" as many legislatures preferred to call it).[19] In the South, these monuments predominantly pay tribute to the Confederate cause.[20] Though these statutes vary considerably, each contains a broadly-worded provision providing for protection of these controversial Confederate monuments.[21]

Tennessee's statute, the Tennessee Heritage Protection Act of 2016, typifies the language used in these statutes:

> Except as otherwise provided in this section, no memorial regarding a historic conflict, historic entity, historic event, historic figure, or historic organization that is, or is located on, public property, may be removed, renamed, relocated, altered, rededicated, or otherwise disturbed or altered.[22]

This language clearly indicates that these statutes were passed in response to concerns by Southern state legislatures that Confederate monuments would become the subject of public contempt and subsequent calls for removal.[23]

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[19] *See, e.g.*, S.C. CODE ANN. § 10-1-165 (2018) (prohibiting removal of monuments erected in remembrance of the "War Between the States").

[20] *See, e.g.*, *id.*; Alabama Memorial Preservation Act of 2017, ALA. CODE §§ 41-9-230 to -237 (2018); KY. REV. STAT. ANN. §§ 171.780–.788 (West 2018); O.C.G.A § 50-3-1 (2018); N.C. GEN. STAT. § 100-2.1 (2018); Tennessee Heritage Protection Act of 2016, TENN. CODE ANN. § 4-1-412 (2018); VA. CODE ANN. § 15.2-1812 (2018).

[21] *See, e.g.,* KY. REV. STAT. ANN. §§ 171.780–.788 (West 2018) (not explicitly protecting Confederate monuments but nonetheless providing a process for an object to be nominated and designated as a "military heritage object," with such designation now being used to protect Confederate monuments); *see also* Kasi E. Wahlers, *North Carolina's Heritage Protection Act: Cementing Confederate Monuments in North Carolina's Landscape*, 94 N.C. L. REV. 2176, 2182 (2016) ("Although the Acts vary considerably, each contains a provision for monument protection.").

[22] Tennessee Heritage Protection Act of 2016, TENN. CODE ANN. § 4-1-412(b)(1) (2018).

[23] As American legal scholar and professor Alfred Brophy put it: "[O]bviously [these statutes are] about Confederate monuments — no one's taking down Vietnam or WWII monuments." Alfred Brophy, *North Carolina Heritage Protection Act*, THE FACULTY LOUNGE (July 16, 2015), http://www.thefacultylounge.org/2015/07/north-carolina-heritage-protection-act.html. *But see* Joe Sterling, *A New Alabama Law Makes Sure Confederate Monuments Are Here to Stay*, CNN (May 26, 2017, 5:19 PM), http://www.cnn.com/2017/05/26/us/alabama-confederate-monuments-bill-trnd/index.html (quoting Alabama Memorial Preservation Act of 2017 bill sponsor, Sen. Gerald Allen, as stating: "It's a piece of

These concerns that Confederate monuments would be removed due to public pressure were not without merit. In April 2017, the Southern Poverty Law Center found that "at least 60 such publicly funded symbols of the Confederacy have been removed since . . . [2015 when] a white supremacist . . . kill[ed] nine black parishioners at a church in Charleston, South Carolina."[24] The statutes and the impetus behind their passage have come under close scrutiny due to these recent tragic events.[25] Additionally, some politicians who supported the statutes have conceded that they were passed in large part to protect Confederate monuments, which has only served to amplify public awareness.[26]

Public discourse has naturally centered around whether removal of these Confederate monuments is proper in light of their controversial history.[27] This Note does not seek to pass judgment on the moral quandaries and arguments present with such a deeply-rooted, emotional issue. Instead, this Note offers a comparative look at how state statutes passed in the early 2000s by Southern state legislatures, specifically those passed in Kentucky and Georgia, affect local governments' responses to the Confederate monument controversy. While other states have also passed statutes in response to the same controversy, Kentucky and

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legislation that protects all of Alabama history. It doesn't only touch the Confederates. It touches every facet of our state history.").

[24] *Weekend Read: The State of the Confederacy in 2017*, SOUTHERN POVERTY LAW CENTER (Apr. 28, 2017), https://www.splcenter.org/news/2017/04/28/weekend-read-state-confederacy-2017.

[25] *See* Graham, *Local Officials Want to Remove Confederate Monuments—but States Won't Let Them*, *supra* note 18; Jim Galloway, *The Georgia Law that Protects Stone Mountain, Other Confederate Monuments*, ATLANTA J.-CONST. (Aug. 17, 2017), http://politics.blog.ajc.com/2017/08/17/the-georgia-law-that-protects-stone-mountain-other-confederate-monuments ("William Reilly, the House clerk in the [Georgia] state Capitol, reports that his office has been inundated with inquiries about the law that protects all Confederate monuments in Georgia.").

[26] *See, e.g.*, Joel Ebert, *Tenn. House Votes for Heritage Protection Law*, USA TODAY (Feb. 18, 2016, 6:12 PM), https://www.usatoday.com/story/news/nation-now/2016/02/18/tennessee-heritage-protection-act/80574928 (noting that "Majority Leader Gerald McCormick conceded that [bill sponsor Rep. Steve] McDaniel drafted the bill after there was a 'stampede to remove all vestiges of the old Confederacy'").

[27] Some believe that removal is necessary as the statues are constant reminders of a shameful racial past and serve to promote white supremacy, while others believe the monuments are important reminders of history and removal results in the "danger that we'll forget the connections of past racial crimes to current racial inequality." Alfred L. Brophy, *Why Northerners Should Support Confederate Monuments*, WASH. POST (July 14, 2015), https://www.washingtonpost.com/posteverything/wp/2015/07/14/why-northerners-should-support-the-preservation-of-confederate-monuments/?utm_term=.054664aabc36.

Georgia's distinct approaches, historical understandings of the relationship between state and local government, and recent attempts to remove prominent Confederate monuments provide the best lens for succinct and insightful comparison and analysis.[28] The Kentucky and Georgia statutes address the same issue in different ways, have brought about different results, and have both been the subject of calls for legislative reform.

This Note undertakes a comparative analysis of these two statutes to show that the statutes fail to respect the authority ordinarily delegated to localities, and thus fail in realizing the attendant policy benefits of proper devolution of authority to localities. In light of these inadequacies, this Note will argue that legislatures should amend present statutes and craft future policy to (1) allocate more authority to localities and (2) operate less as complete prohibitions of removal or alteration of Confederate monuments.

Part II will look at the bases of legal authority given to localities in Kentucky and Georgia and the interplay between state and local governments in those states on other, less controversial issues. Part III will focus on differences between the Kentucky and Georgia statutes that protect these monuments, and the process, or lack thereof, set out by the statutes when removal of a monument is proposed. Part III will also analyze the legal processes required to remove monuments in certain other states throughout the South and recent legal battles over removal. Part IV of this Note will introduce recognized policy and legal arguments and considerations related to delegation of authority to

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[28] *See, e.g.,* Beth Musgrave & Jack Brammer, *Lexington Council Wants Statues Moved. Meet the Obscure Board That Could Overrule Them.*, LEXINGTON HERALD-LEADER (Aug. 18, 2017, 4:39 PM), https://www.kentucky.com/news/local/counties/fayette-county/article168036622.html ("Lexington's leaders spoke with one voice Thursday about the need to remove two Confederate statues from the grounds of the former Fayette County courthouse, but the decision ultimately lies with a little-known state commission that meets twice a year."); Matthew Terrell, *In Atlanta, Considering Which Confederate Monuments Should Go*, HYPERALLERGIC (Nov. 27, 2017), https://hyperallergic.com/413181/confederate-monuments-atlanta ("[Atlanta] Mayor Kasim Reed has formed a committee to make recommendations on what to do with this city's Confederate monuments."); Harriet Sinclair, *Stone Mountain Confederate Memorial in Georgia Has to Go, Democrat Gubernatorial Candidate Says*, NEWSWEEK (Aug. 18, 2017, 6:11 PM), http://www.newsweek.com/confederate-mountain-carving-must-go-georgia-gubernatorial-candidate-says-651679 ("Stacey Abrams, the Democrat favorite candidate for state governor, said the carvings should be removed following the weekend of violence at a white nationalist rally in Charlottesville, Virginia.").

localities in the United States. Part V will advocate for the appropriate level of delegation to localities from the states, arguing that statutes should allocate more authority to localities at two critical stages: (1) when determining whether a particular monument should be protected within the scope of the controlling state statute and (2) determining whether a monument should be removed.

II. HISTORY AND BACKGROUND OF DELEGATION OF POWER FROM STATE TO LOCAL GOVERNMENT IN KENTUCKY AND GEORGIA

An understanding of how power is vested from state to local governments lays the groundwork for state and local officials to determine how they can, and should, respond to the monument controversy. Historically, the "struggle for local control over public decisions has characterized the American experiment in democratic government."[29] It is not disputed that a state may "fashion its basic law so as to grant home rule or self-government to its municipal corporations."[30] Present within this proposition, however, is a limitation: "[a] municipal corporation, in the exercise of all of its duties, including those most strictly local or internal, is but a department of the State."[31] Put differently, cities and counties have no independent legal standing, but instead are fully reliant on authority delegated from the state government either by the state constitution or statute.[32]

The state government's delegation of authority to a locality is a concept known as "home rule."[33] Consideration of home rule principles impacts the rule of law regarding many controversial

[29] DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 1 (2001).

[30] District of Columbia v. John R. Thompson Co., 346 U.S. 100, 108 (1953).

[31] *Id.* (citing Barnes v. District of Columbia, 91 U.S. 540, 544 (1875)); *see also id*. at 108–09 ("[D]ecision after decision has held that the delegated power of municipalities is as broad as the police power of the state, except as that power may be restricted by terms of the grant or by the state constitution.").

[32] *See* KRANE ET AL., *supra* note 29, at 1 ("[A] right of home rule does not exist; rather, legal theory in the United States declares local government to be the agent, creature, and delegate of state government."); DOUGLAS J. WATSON, ALA. STATE UNIV.: CENTER FOR LEADERSHIP & PUB. POLICY, HOME RULE IN ALABAMA AND THE SOUTH 3 (2013) ("Local governments are not mentioned in the United States Constitution, and, as a result, have no independent standing in the fifty states beyond what state governments grant them.").

[33] *See* KRANE ET AL., *supra* note 29, at ix ("The term 'home rule' . . . [refers] to proposals to amend state constitutions or pass state laws that would increase the power of local governments . . . .")

social, political and economic issues, and, significantly, can "lead to different outcomes in different states."[34] These different outcomes are largely due to the fact that use of the term "home rule" is varied, as scholars and courts have long struggled with its scope and derivation.[35] As home rule "takes many legal forms and follows many models,"[36] analysis of Georgia and Kentucky, two Southern states which have distinct understandings of the concept, will provide fertile ground to consider the benefits of varying levels of delegation to localities. Additionally, an understanding of the states' respective views of home rule helps to explain the differences between the legislative solutions passed by the Kentucky and Georgia state legislatures in response to the Confederate monument controversy.

Often, legal scholarship seeks to define the authority delegated by states to localities as creating a relationship between the two that makes a state either a "Dillon's rule state" or a "home rule state."[37] While an in-depth analysis of the respective characteristics of these two classifications is beyond the scope of this Note, the basic difference is noteworthy. In home rule states, localities "are given latitude to solve problems or address issues," as long as they are not in conflict with a constitutional provision or statute of the state.[38] This structure provides for what is often called "initiative autonomy."[39] In contrast, Dillon's rule "permits cities to act only when they can identify a relatively clear state law delegation of power."[40] At a broader level of analysis, "home rule"

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[34] Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 256 (2004).

[35] *Id.* at 253 ("Home rule is a complex topic. Home rule takes many legal forms and follows many models . . . [and] is . . . controversial for both scholars and courts.").

[36] *Id.*

[37] *See, e.g.*, 1 JAMES A. KUSHNER, SUBDIVISION LAW AND GROWTH MGMT. § 1:18 (2d ed. 2018) ("While some states restrict local power following Dillon's rule that local government possesses only the powers and authority expressly and specifically delegated by the state legislature, others following a home rule philosophy allow local exercise of all authority exercisable by the state unless preempted by the state legislature through disabling legislation.").

[38] WATSON, *supra* note 32, at 3.

[39] Jonathan M. Kopcsik, *Constitutional Law—Home Rule and Firearms Regulation: Philadelphia's Failed Assault Weapons Ban*—Ortiz v. Commonwealth, *681 A.2d 152 (Pa. 1996)*, 70 TEMP. L. REV. 1055, 1058 (1997) ("Initiative autonomy enables a home rule municipality to perform a wide range of functions without previous express authorization from the state legislature . . . .") (internal citations and quotations omitted).

[40] GERALD E. FRUG ET AL., LOCAL GOVERNMENT LAW 139 (3d ed. 2001).

is understood to encompass any delegation of authority to a locality,[41] and the term becomes relatively standardized to mean simply that localities only have as much freedom and authority to govern their affairs as the state gives them, however broad or narrow.[42] While acknowledging that the distinction between a "home rule state" and "Dillon's rule state" is a meaningful one at a narrower level, for purposes of succinct analysis, the remainder of this Note will use the term "home rule" in accordance with its broader meaning, which effectively encompasses any delegation of authority from a state to a locality, whatever its scope of generality.[43]

Understanding home rule to encompass both general and specific grants of authority, the delegations of authority to localities by the state governments in Georgia and Kentucky illustrate different views on the appropriate level of delegation via home rule. Over the latter half of the twentieth century, both the Georgia and Kentucky state legislatures amended their constitutions to expressly provide that the legislature could allow localities to self-govern.[44] Each amendment sought to clarify—and in some ways, establish—the origin of legal authority of home rule in the state.[45] Although both amendments were passed in response to similar concerns, the statutory grants of authority given to localities by the respective state legislature differed substantially.

Whereas the Kentucky home rule statute grants general powers to localities in one sentence, Georgia's legislature decided instead to grant home rule powers to localities in specific areas, spanning

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[41] *See* KRANE ET AL., *supra* note 29, at ix ("[A]ny statute or constitutional provision that enhances the authority and opportunities for a local jurisdiction to control its own affairs can be considered as an effort to grant an additional degree of 'home rule.'").

[42] *See id.* at 10 (need parenthetical).

[43] *See, e.g.*, *id.* (need parenthetical); Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L.J. 181, 190 (2017) ("Home [r]ule defines the basic legal standing of local governments and their relationship with the state.").

[44] *See* GA. CONST. Art. IX, § 2, ¶ II. (enacted in 1954); KY. CONST. § 156b. (enacted in 1994).

[45] In Georgia, the 1954 amendment was a direct response to the ruling in *Phillips v. City of Atlanta*, 210 Ga. 72 (1953), where the Georgia Supreme Court struck down a general statute passed by the legislature in 1951 granting powers to localities. KRANE ET AL., *supra* note 29, at 104–05. In Kentucky, the 1994 amendment removed uncertainty about the constitutionality of a broadly-worded 1980 statute which granted cities a version of home rule. *Id.* at 166–67.

eight statute subsections.[46] Furthermore, in Kentucky, where the key statutory limitation on home rule authority is that a municipal regulation cannot be "in conflict with a constitutional provision or statute,"[47] there has been recent movement by the Kentucky Supreme Court to provide more latitude to local governments.[48] This small movement, however, should not engender the belief that the Kentucky courts and legislature are overly deferential to local legislation. In regard to city ordinances raising the minimum wage, for example, the Kentucky Supreme Court held that "while cities like Louisville and Lexington have broad authority under home rule, the sovereignty of the state is supreme in the area of minimum wage, where state law already exists."[49]

While Kentucky home rule can be characterized as a conservative yet progressing understanding of delegation to localities, Georgia home rule is simply a conservative understanding. Georgia courts continue to interpret grants of authority to localities strictly, and its strict "constructionism" is "reinforced by city and county attorneys who are generally conservative and who prefer to see clear authorization in writing."[50] In fact, under Georgia law, determining the validity of a city ordinance is a two-step process. First, a court must determine whether the local government possessed the power to enact the

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[46] *Compare* KY. REV. STAT. ANN. § 82.082 (West 2018) ("A city may exercise any power and perform any function within its boundaries, including the power of eminent domain in accordance with the provisions of the Eminent Domain Act of Kentucky, that is in furtherance of a public purpose of the city and not in conflict with a constitutional provision or statute.") *with* O.C.G.A. §§ 36-34-1 to -8 (2018) (containing specific subsections such as § 36-34-5.3, entitled "Leases for public zoos in certain counties").

[47] KY. REV. STAT. ANN. § 82.082 (West 2018).

[48] *See* Lexington Fayette Cty. Food & Beverage Ass'n v. Lexington-Fayette Urban Cty. Gov't, 131 S.W.3d 745, 750 (Ky. 2004) ("Local regulation is not always precluded simply because the legislature has taken some action in regard to the same subject.").

[49] NICOLE DUPUIS ET AL., CIVIL RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 7 (2017), http://nlc.org/sites/default/files/2017-02/NLC%20Preemption%20Report%202017.pdf ("[I]n 2016, the Kentucky Supreme Court struck down Louisville's minimum wage ordinance, ruling that the city does not have the authority to set a minimum wage above the level set by the state. The ruling also invalidated an ordinance from the city of Lexington that would have raised its minimum wage to $10.10 by 2018."); *see* Kentucky Rest. Ass'n v. Louisville/Jefferson Cty. Metro Gov't, 501 S.W.3d 425, 430 (Ky. 2016) ("[E]xpress preemption is not required when the General Assembly has enacted a comprehensive statutory scheme.").

[50] KRANE ET AL., *supra* note 29, at 106; *see also* Kemp v. City of Claxton, 269 Ga. 173, 177 (1998) ("Municipal corporations are creations of the state, possessing only those powers that have been granted to them, and allocations of power from the state are strictly construed.").

ordinance. If a court finds the power exists, then it must determine whether the locality's exercise of the power is "clearly reasonable."[51] "Georgia's concept of home rule is . . . in line with the national trend toward the limitation of local autonomy in favor of state interests."[52]

III. PASSAGE AND SUBSTANCE OF THE STATUTES THAT CONTROL REMOVAL OF CONFEDERATE MONUMENTS

With these principles in mind, it becomes evident that the respective actions of the Georgia and Kentucky legislatures in response to the Confederate monument controversy were in accordance with previous government policies concerning delegation of authority from state to local governments. That is, while the Georgia state legislature preferred to limit local autonomy entirely in the favor of state interests, the Kentucky state legislature sought to strike a balance, while still maintaining substantial control at the state level.[53] These statutes and subsequent responses from citizens and local governments provide examples of the respective home rule understandings of Georgia and Kentucky in action and, in light of scholarship discussed in Part IV, an opportunity to identify ways by which states can better accomplish appropriate delegation of authority to localities.

A. GEORGIA'S STATUTE: O.C.G.A SECTION 50-3-1.

The passage of Georgia's relevant statute makes clear the depth of the issue and serves to forewarn future policymakers of the complexity of legislating regarding the issue. In the 2001 Georgia state legislative session, then-Governor Roy Barnes successfully pushed for the replacement of the 1956 state flag which prominently displayed the Confederate battle flag.[54] Within the bill that removed the Confederate battle flag from the Georgia

[51] Porter v. City of Atlanta, 259 Ga. 526, 526 (1989) (citations omitted).

[52] Paul Vignos, *Georgia Local Government Law: Court Resolution of County Government Disagreements*, 46 MERCER L. REV. 599, 607 (1994).

[53] *See* discussion *supra* Part II.

[54] *See* Roy Barnes, Opinion, *How We Got Confederate Emblem Off Georgia's Flag*, CNN (June 30, 2015, 3:30 PM), http://www.cnn.com/2015/06/30/opinions/barnes-georgia-confederate-flag/index.html ("As governor of Georgia, I successfully pushed for the replacement of that flag during our 2001 legislative session.").

state flag, protections for other Confederate symbols and historical objects were included as political compromise.[55]

The statute provides that:

> "[n]o publicly owned monument . . . erected . . . or maintained on the public property of this state or its agencies . . . in honor of the military service of any past or present military personnel of this State, . . . or the Confederate States of America . . . shall be relocated, removed, . . . or altered *in any fashion* . . . ."[56]

As written, the statute effectively preempts any local government action as it concerns removing Confederate monuments.[57] In contrast to certain other statutes with similar purposes throughout the South, the plain language of the statute provides no process for removal,[58] outside of a narrow exception in

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[55] *See* O.C.G.A. § 50-3-1 (2018) (entitled "Description and use of state flag; duty to carry; preservation and protection of certain public monuments and memorials"); *see also* Michael Jones, *Petition Seeks Change In Ga. Law That Protects Confederate Monuments*, WABE 90.1 FM (Aug. 15, 2017), https://www.wabe.org/petition-seeks-change-ga-law-protects-confederate-monuments ("When Georgia took the Confederate battle symbol off the state flag in 2001, part of the compromise lawmakers struck was a new state law that protected Confederate memorials and monuments from being removed, relocated or even altered."); Lorraine Boissoneault, *What Will Happen to Stone Mountain, America's Largest Confederate Memorial?*, SMITHSONIAN.COM (Aug. 22, 2017), https://www.smithsonianmag.com/history/what-will-happen-stone-mountain-americas-largest-confederate-memorial-180964588 ("'[M]embers of the [Legislative Black Caucus] weren't completely comfortable with [the statute], but we thought that was a compromise to make,' says Lester Jackson, a Georgia state senator from Savannah. 'Fast forward 15 years and we need to go back and revisit that.'").

[56] O.C.G.A. § 50-3-1(b)(2) (2018) (emphasis added).

[57] *See* Jake Reynolds, *Georgia State Law Makes it Difficult to Completely Remove Confederate Monuments*, 13WMAZ (Aug. 17, 2017), http://www.13wmaz.com/news/local/georgia-state-law-makes-it-difficult-to-completely-remove-or-hide-confederate-monuments/464932603 ("[Jim] Elliott [City Attorney in Warner Robbins, GA] . . . said it's important for protestors, or others who do not support the monuments, to know that the state preempted local government's action and has basically kept their hands tied when it comes to removing statues and monuments."); *see also* Jacyln Schultz, *Legal Questions Loom Over Georgia Confederate Memorials*, FOX 5 ATLANTA (Aug. 17, 2017, 12:57 AM), http://www.fox5atlanta.com/news/legal-questions-loom-over-georgia-confederate-memorials ("State Sen. Elena Parent of Decatur's District 42 released the following statement: 'My hope is that the Senate Democratic caucus will file a bill in the 2018 legislative session to change O.C.G.A. [Section] 50-3-1(b)(2) and allow local officials to determine if Confederate memorials should be moved in their communities.'").

[58] *See, e.g.*, Tennessee Heritage Protection Act of 2016, TENN. CODE ANN. § 4-1-412 (2018) (providing a process for a "public entity" to petition the controlling state agency to

O.C.G.A. Section 50-3-1(b)(2), which states that "appropriate measures for the preservation, protection, and interpretation of such monuments or memorials shall not be prohibited." While in contrast to certain similar Southern statutes,[59] the Georgia statute's outright prohibition of removal and lack of a separate decision-making body, is representative of a small number of statutes enacted recently throughout the South.[60]

Some believe that local Georgia officials could remove monuments by claiming they are acting to preserve and protect the monuments, "pointing to the recent violent rallies hosted by white supremacists around these monuments."[61] Proponents of this solution assert that officials would "have a leg to stand on" as the public—and, presumably, a court—may be convinced that removal is the only way to adequately protect the monument.[62] While the stability of that leg is suspect at best, those exploring legal avenues for removal are predominantly looking to the state legislature to repeal or amend the 2001 statute[63] which included what was, at the time, thought to be an agreeable compromise.[64]

Predictably, the response from the legislature has been a mixed bag. The controversy surrounding Confederate monuments and attention directed at the restrictive statute at issue, O.C.G.A. Section 50-3-1, did result in solutions that were to be proposed at the 2018 legislative session.[65] One draft bill, for example, proposed

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waive protection of a monument so as to remove or relocate); *see also* KY. REV. STAT. ANN. §§ 171.780–.788 (West 2018) and discussion *infra* Part II.B.

[59] *See supra* note 58 and accompanying text.

[60] *See, e.g.*, S.C. CODE ANN. § 10-1-165 (2018) (acting as a complete prohibition of removal of monuments erected in remembrance of the "War Between the States"); VA. CODE ANN. § 15.2-1812 (2018) (acting as a complete prohibition of removal of "Confederate or Union" monuments).

[61] Charlotte Norsworthy, *Division on Broad Street: Confederate Monument in the Heart of Athens Stirs Controversy*, THE RED & BLACK (Aug. 24, 2017), http://www.redandblack.com/athensnews/division-on-broad-street-confederate-monument-in-the-heart-of/article_e2d0184e-8879-11e7-982a-8faa013e2660.html.

[62] *Id.*

[63] *See, e.g.* Schultz, supra note 57.

[64] *See* Boissoneault, *supra* note 55.

[65] Greg Bluestein, *Bipartisan Duo Proposes Compromise on Civil War Symbols After 'Go Missing' Warning Sparks Controversy*, ATLANTA JOURNAL-CONSTITUTION (Sep. 27, 2017), http://politics.blog.myajc.com/2017/09/27/bipartisan-duo-proposes-compromise-on-civil-war-symbols-after-go-missing-warning-sparks-controversy ("Their proposal would allow local communities to decide whether Civil War monuments should remain on their grounds, overhauling a provision . . . that makes it illegal to 'relocate, remove, conceal or obscure' any Confederate memorial.").

to allow localities to decide whether Confederate monuments remain on public property.[66] Under this draft bill, if the locality decides that removal is proper, then it may sell or auction it to a private party or, if no buyer can be found, Stone Mountain will function as a repository for otherwise unwanted monuments.[67] Similarly, others have sought to tackle the problem by introducing "legislation [that] would simply return this decision making authority to Georgia's cities and counties and provide more local control."[68]

Upon introduction, some—including current Democratic members of the Georgia House—were dubious that this type of bill would pass in the near future.[69] However, conservative members of state government, including Governor Nathan Deal, expressed a willingness to reconsider the issue.[70] In a September 2017 statement, Governor Deal acknowledged that any response from the government must bear in mind the appropriate allocation of authority to localities, stating: "I think [state legislators] will do a pretty in-depth look into whether or not we should continue to restrict local jurisdictions—counties and cities—in terms of what they may want to consider in their areas."[71] Despite these assurances, however, the bills were not introduced during the

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[66] *Id.*

[67] *Id.*; *see also* Wes Wolfe, *Bill Could Put Confederate Monuments on the Move*, THE BRUNSWICK NEWS (Sep. 28, 2017), http://thebrunswicknews.com/news/local_news/bill-could-put-confederate-monuments-on-the-move/article_c3c58f40-0c8d-5958-bd2c-b15c15402566.html ("(Local governments) can do one of two things in this bill [if removal is desired] . . . they can decide to move [the monument] to an interested private party [or] send the monument to Stone Mountain [which] would serve as a repository.").

[68] Stanley Dunlap, *Two Georgia Legislators Want Local Governments Decide Fate of Confederate Memorials,* THE TELEGRAPH (Nov. 20, 2017, 11:45 AM), http://www.macon.com/news/state/georgia/article185263078.html; *see also* Dan Whisenhunt, *State Rep. Mary Margaret Oliver Pre-Files Bill to Allow for Removal of Confederate Monuments*, DECATURISH (Nov. 16, 2017), https://decaturish.com/2017/11/state-rep-mary-margaret-oliver-pre-files-bill-to-allow-for-removal-of-confederate-monuments ("Citizens . . . of Decatur and DeKalb have voiced their opinions and asked me to introduce legislation to allow local governments to . . . remove or modify monuments that are located in public spaces, [State Rep. Mary Margaret] Oliver said in an email.").

[69] *See* Jones, *supra* note 55 ("'I know that from the governor's office, down to the House and Senate leadership that they're not too keen on pulling the trigger to make that [change] happen,' state [Rep.] Howard Mosby (D-Atlanta) said in August.").

[70] *See* Bluestein, *supra* note 65 ("Gov. Nathan Deal said in a recent interview he expects lawmakers to take a 'serious look' at how to handle monuments, memorials and street signs commemorating the Confederacy.").

[71] *Id.*

spring 2018 legislative session.[72] One bill sponsor claimed that Republican leadership did not want to address the legislation, and some blamed the reticence to take on such a controversial topic on the fact that 2018 is an election year.[73]

B. KENTUCKY'S STATUTE: KY. REV. STAT. ANN. SECTIONS 171.780–.788.

As signed into law in March 2002,[74] the "Kentucky Military Heritage Act" prescribes a substantially different process than Georgia's statute for protection, and potential removal, of Confederate monuments.[75] Split into five sections, the Act first establishes the Kentucky Military Heritage Commission (the "Commission") as an independent agency and grants the agency near-absolute control over monument protection.[76] Under the Act, any person or organization may nominate an object for designation as a "military heritage object," and members of the Commission decide, by majority vote, whether to accept the object to the registry of Kentucky military heritage sites and objects significant to the military history of Kentucky.[77] Designation of an object as a military heritage object then confers certain protections upon the object: "the object cannot be destroyed, removed, sold, or significantly altered . . . without the written consent of the [C]ommission."[78] Once accepted as a military heritage object, "a unanimous vote of the members of the commission" is required to

[72] Mimi Kirk, *What Should I Do With My Family's Confederate Hero?*, CITYLAB (Apr. 10, 2018), https://www.citylab.com/equity/2018/04/what-should-i-do-with-my-familys-confederate-hero/556337.

[73] *See id.* ("[I]t's also an election year, making controversial bills even less likely to be taken up.").

[74] KENTUCKY GOVERNOR'S MESSAGE, 3/14/2002 ("AN ACT relating to the Kentucky Military Heritage Act.").

[75] In further contrast to Georgia's controlling statute, the passage and signing of the bill by the Kentucky state government received little to no media attention at the time of passage, outside of that from the Kentucky chapter of Confederate Veterans who found the signing to be cause for "celebration." *The Kentucky Military Heritage Act: Putting It to Work Preserving History*, THE JOURNAL OF THE KENTUCKY DIVISION, SONS OF CONFEDERATE VETERANS (Apr. 23, 2010) (originally published in 2004), http://thelostcauseky.blogspot.com/2010/04/kentucky-military-heritage-act-putting.html ("On March 12th, 2002, surrounded by SCV members, legislators and others . . . , Governor Patton signed into law the Kentucky Military Heritage Act. It was the culmination of two years' hard work by many people, and signing day was truly a celebration.").

[76] KY. REV. STAT. ANN. § 171.782 (West 2018).

[77] *See id.* §§ 171.784(1), (2), (6).

[78] *See id.* § 171.786(2).

revoke the protective designation.[79] If a Confederate monument is not so designated, then decisions to remove a monument are within the discretion of local officials.[80]

A recent highly-publicized and successful attempt by the city of Lexington, Kentucky to remove two prominent monuments associated with the Confederacy has raised questions about the Commission and the inner-workings of the statute.[81] In accordance with the administrative regulations promulgated pursuant to the Kentucky Military Heritage Act, if the Commission receives an application to designate a publicly owned monument as a "military heritage object," it must notify the public "owner" and can either "submit a written agreement with, or objection to, the application."[82] This extra step thus allows the locality to participate in the designation process, either agreeing or objecting to the proposed designation.[83] The two Lexington monuments of Kentuckian Confederate figures[84] were previously thought to be properly designated as military heritage objects.[85] Upon review,

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[79] *See id.* § 171.784(7).

[80] *See* Sons of Confederate Veterans, Ky. Div. v. Louisville Jefferson County Metro Government, No. 16-CI-2009 (Jefferson Circuit Court, June 15, 2016), https://www.scribd.com/doc/316250827/Judge-s-ruling-in-Confederate-monument#fullscreen&from_embed (denying an injunction of removal of prominent Confederate monument in Louisville, KY, holding: "As the monument is not designated as a military heritage object by the Kentucky Military Heritage Commission, it is afforded no protection under [the Kentucky Military Heritage Act]."); *see also* Callan v. Fischer, 3:16-CV-734, 2016 WL 6886870 (W.D. Ky. Nov. 19, 2016) (denying motion for Temporary Restraining Order filed to prevent removal of the same monument which was the subject of the state court case until the Kentucky Military Heritage Commission could hold its next meeting to consider a newly filed application for designation of the monument as a military heritage object).

[81] *See* Musgrave & Brammer, *supra* note 28.

[82] Procedure for Kentucky Military Heritage Nomination, Designation, and Rescission, 202 KY. ADMIN. REGS. 8:030 § 2(8)(b) (2004).

[83] KY. REV. STAT. ANN. § 171.784 (West 2018); 202 KY. ADMIN. REGS. 8:030 § 2(8)(b) (2004).

[84] The first, John Hunt Morgan, was "known as the 'Thunderbolt of the Confederacy' and remembered as the ideal of the romantic Southern cavalryman." *See Biography: John Hunt Morgan*, CIVIL WAR TRUST, https://www.civilwar.org/learn/biographies/john-hunt-morgan (last visited Sep. 3, 2018). The second, John C. Breckinridge, was a former Vice President of the United States and U.S. Senator who served as Secretary of War for the Confederacy. *See generally* WILLIAM C. DAVIS, BRECKINRIDGE: STATESMAN, SOLDIER, SYMBOL (Louisiana State University Press 1974) (2010).

[85] *See* Musgrave & Brammer, *supra* note 28 ("The two statues were put under the commissions' control in May 2004, according to documents . . . received through an Open Records Act request. . . . Samuel Flora, president of the local chapter of the Sons of Confederate Veterans, filed a petition with the [C]ommission to put the two statues under

however, Lexington Mayor Jim Gray and Kentucky Attorney General Andy Beshear, claimed to have found they were not.[86] "We discovered the city council did not authorize the mayor to give up local authority to the state Military Heritage Commission in 2003 . . . . That action wasn't lawful, and it is void. The Attorney General confirmed our finding this morning. That means our local authority remains intact," Gray said.[87] After announcing the alleged flaw in designation and resolving that the city had retained authority over the monuments, city officials began removing the monuments the same day.[88]

Whether the alleged flaw in designation of these monuments as military heritage monuments did in fact render their designation unlawful, meaning that "local authority remains intact," remains to be seen.[89] One thing is clear: had the designation been proper, under the Kentucky Military Heritage Act, the Commission would have had the ultimate say.[90] However, this is no consolation for some in the Kentucky state legislature, and recently-introduced bills intend to further restrict local authority over historical monuments in the state.[91]

C. LEGAL PROCESS TO REMOVE IN OTHER SOUTHERN STATES

In contrast to the strict legal process required to remove monuments in states like Georgia and Kentucky, the removal of Confederate monuments can be swift, covert, and arguably

its auspices in June 2003. Then-Mayor Teresa Isaac signed Flora's petition to the [C]ommission.").

[86] Morgan Eads, et. al., *In a Surprise Move, Lexington Removes Controversial Confederate Statues*, LEXINGTON HERALD-LEADER (Oct. 17, 2017, 6:46 PM), http://www.kentucky.com/news/local/counties/fayette-county/article179392076.html.

[87] *Id.*

[88] *Id.*

[89] See *id.* (acknowledging "potential litigation" which could follow in the aftermath of the Attorney General and mayor finding that the assent to designation was not lawful).

[90] *See* KY. REV. STAT. ANN. § 171.784(7) (West 2018) ("[T]o rescind the designation of an object as a military heritage object requires a unanimous vote of the members of the commission.").

[91] *See* Jack Brammer, *Lawmaker was 'Sick' When Confederate Statues Moved. His Bill Would Make It Harder*, LEXINGTON HERALD-LEADER (Jan. 12, 2018, 5:18 PM), http://www.kentucky.com/news/politics-government/article194378369.html ("[State Rep. C. Wesley] Morgan's legislation — House Bill 54 — would set up a Committee on Monument Protection to oversee statues and monuments on all property owned or leased by the state or any county, municipal or metro government" and would presumptively protect all monuments, not requiring any prior designation).

paternalistic in states where there is no controlling statute.[92] A dispute in New Orleans over the removal of four Confederate monuments is particularly illustrative of the interplay between state and local authorities where there is no controlling statute. In the direct aftermath of the massacre at Emanuel AME Church in Charleston, South Carolina, New Orleans Mayor Mitch Landrieu called for the removal of four Confederate monuments, formally asking the City Council to pass an ordinance classifying the monuments as public nuisances.[93] In December 2015, the New Orleans City Council affirmatively voted (6-1) to remove the monuments,[94] and the monuments, now recognized as public nuisances, were slated for removal.[95]

Throughout the process, Louisiana Governor Bobby Jindal opposed removal of the monuments.[96] A statement from his office indicated that he "instructed his staff to look into the Heritage Act to determine the legal authority he has as governor to stop it."[97] However, a review of state laws revealed that, in contrast to other Southern states, Louisiana had no "heritage act."[98] In the absence

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[92] *See, e.g.*, Nicholas Fandos, et. al., *Baltimore Mayor Had Statues Removed in 'Best Interest of My City'*, N.Y. TIMES (Aug. 16, 2017), https://www.nytimes.com/2017/08/16/us/baltimore-confederate-statues.html ("'It was 'in the best interest of my city,' [Baltimore] Mayor Catherine Pugh said Wednesday, as she explained why she ordered Confederate monuments removed under the cover of darkness . . . '[W]ith the climate of this nation . . . I think it's very important that we move quickly and quietly.'").

[93] Daniel Victor, *New Orleans City Council Votes to Remove Confederate Monuments*, N.Y. TIMES (Dec. 17, 2015), https://www.nytimes.com/2015/12/18/us/new-orleans-city-counil-confederate-monuments-vote.html?_r=0.

[94] *Id.*

[95] Landrieu invoked a 1993 ordinance, Article VII § 146.611, that gave the City Council authority to declare public monuments nuisances and have them removed. That ordinance sets up a three-part test to determine if a monument may be removed. To remove, the council must find that the monument: (1) "[p]raises a subject at odds with the message of equal rights under the law"; (2) "[h]as been or may become the site of violent demonstrations"; and (3) "[c]onstitutes an expense to maintain that outweighs its historic importance and/or the reason for its display on public property." Robert McClendon, *Mitch Landrieu Invokes Public 'Nuisance' Ordinance for Confederate Monuments*, NOLA.COM (July 9, 2015, 9:14 AM), http://www.nola.com/politics/index.ssf/2015/07/mitch_ landrieu_confederate_rem.html.

[96] *See* Jeff Adelson, *Four Confederate Statues in New Orleans Recommended for Removal, but Bobby Jindal Trying to Block the Move*, THE NEW ORLEANS ADVOCATE (Aug. 16, 2015, 4:42 PM), http://www.theadvocate.com/new_orleans/news/politics/article_eaaa8bab-229a-5f5c-9f4d-111d73122ac8.html (describing an email from the Governor's office that stated: "Governor Jindal opposes the tearing down of these historical statues").

[97] *Id.*

[98] Jeff Adelson, *'Heritage Act' Cited by Bobby Jindal Admin to Defend Confederate Statues Apparently Doesn't Exist*, NEW ORLEANS ADVOCATE (Aug. 16, 2015, 4:42 PM),

of such a law, the state government acknowledged there was nothing it could do "to interfere with decisions Mayor Mitch Landrieu and the City Council make about monuments on property that the city owns."[99] Various organizations sued to enjoin the city from removing the monuments, but none were successful.[100] In the end, the District Court for Eastern District of Louisiana recognized that such public nuisance ordinances were "squarely within the City's police powers"[101] and that "the City has authority to remove the Monuments because they are located on public property."[102]

The vigorous public backlash to removal evidences how hot-button an issue Confederate monuments have become in recent years.[103] The backlash further illustrates the starkly contrasting opinions in the South between progressive cities, such as New Orleans, and more rural areas throughout the South. One poll taken by Louisiana State University showed that "[a]lmost three out of every four [73%] Louisiana residents oppose removing Confederate monuments and symbols from public space."[104] In 2017, the Louisiana state legislature introduced a bill to protect Confederate monuments from removal but, after advancing through the House with a vote of 65-31,[105] the bill died in the

http://www.theadvocate.com/new_orleans/news/politics/article_dadcd6f0-da16-58fb-a084-8c5c678815da.html.

99 *Id.*

100 *See* Kevin Litten, *Confederate Monuments: Court Rejects Attempt to Halt Beauregard Removal*, NOLA.COM (May 10, 2017), https://www.nola.com/politics/index.ssf/2017/05/beauregard_monument_injunction_1.html (detailing the efforts of the Monumental Task Committee and others to prevent the removal of the New Orleans monuments).

101 Monumental Task Comm., Inc. v. Foxx, 240 F. Supp. 3d 487, 494–95 (E.D. La. 2017) (citations omitted).

102 Monumental Task Comm., Inc. v. Foxx, 259 F. Supp. 3d 494, 508 (E.D. La. 2017).

103 *See* Victor, *supra* note 93 ("The opposition to the monuments' removal—in op-ed articles, social media posts and shouting at public meetings—was vigorous.").

104 Julia O'Donoghue, *Louisiana Residents Oppose Confederate Monument Removal by a Wide Margin*, NOLA.COM (Apr. 18, 2016, 7:42 PM), http://www.nola.com/politics/index.ssf/2016/04/confederate_monuments.html (noting further that "[t]he LSU survey also found that more African Americans opposed monument removal, 47 percent, than supported it, 40 percent").

105 Drew Broach, *To Protect Monuments, Here's How Louisiana House Voted*, NOLA.COM (May 15, 2017), https://www.nola.com/politics/index.ssf/2017/05/confederate_monument_house_vote.html.

Senate and Governmental Affairs Committee which voted 4-2 to scrap the House-backed bill.[106]

That "[t]he struggle for local control over public decisions has characterized the American experiment in democratic government"[107] has possibly never rung more true than in relation to controversial social issues such as this. Confederate monuments, and the strong beliefs and emotions surrounding the debate over their removal, expose tensions between state and local authorities. In light of these tensions, the question remains: how devolved is too devolved?

[106] Melinda Deslatte, *La. Senators Reject Confederate Monument Protection Bills*, U.S. NEWS (May 31, 2017, 8:21 PM), https://www.usnews.com/news/best-states/louisiana/articles/2017-05-31/la-senators-reject-confederate-monument-protection-bills (nothing that "[a]ll four Democratic senators who voted against the bills are black. Two white Republican senators supported the measures.").

[107] *See* KRANE ET AL., *supra* note 29.

IV. LEGAL AND POLICY ARGUMENTS CONCERNING THE DELEGATION OF AUTHORITY TO LOCALITIES

Since this nation's conception, the question of where governmental power should lie—the federal government, states, localities?—has been one of great difficulty.[108] There are numerous arguments on either side of the debate concerning the appropriate degree of delegation to localities. This Note seeks to capture the main arguments on both sides that are relevant in the context of controversial social issues like removal of Confederate monuments.

A. ARGUMENTS AGAINST DELEGATION OF AUTHORITY

The arguments regarding where governmental power should lie have been articulated at critical junctures in our nation's history.[109] Supporters of state authority make two main arguments in support of more centralized authority: 1) centralized authority is necessary to protect against the "mischiefs of faction" and 2) statewide uniformity of regulation for certain significant issues is a desirable policy goal.

1. Centralized Authority is Necessary to Protect Against the "Mischiefs of Faction."

Perhaps no argument for centralized authority is more prevalent than that of James Madison in Federalist No. 10. The Federalist Papers constituted a project whose "immediate object . . . was to vindicate & recommend the new Constitution to the State of [New York] . . . ."[110] Federalist No. 10 is one of the most

[108] The impetus for debate over proper delegation of authority is not limited to controversial social issues but includes economic and military issues as well. While there is overlap with these arguments and considerations, they are mostly outside the scope of this Note. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 476 (2d ed. 1998) (discussing Federalists blaming many evils of society, including "the breakdown of authority, the increase of debt . . . [e]ven the difficulties of the United States in foreign affairs," on the disorganized, decentralized politics of the pre-1789 Constitution United States).

[109] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 523 (1989) (Scalia, J., concurring) ("An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history.").

[110] *Letter from James Madison to James K. Paulding (July 23, 1818)*, *in* 8 THE WRITINGS OF JAMES MADISON 410, 410 (Galliard Hunt ed., 1908).

discussed essays within the collection,[111] and devotes itself to considering the benefits of allocating authority to a more centralized government to help account for "the mischiefs of faction,"[112] thus necessarily reducing powers of smaller communities. Madison articulated the concept as follows:

> Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.[113]

The danger of factions is that the political process will devolve to the point that "measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."[114] "[A]t the local level, the dominating faction can become a permanent majority, lording its power over opposing factions without bothering to [compromise with opposing groups]."[115]

These concerns have been realized throughout U.S. history, and the struggle for racial equality in the South is one of the most memorable instances.[116] A particularly vivid example is when the federal government required the integration of schools[117] and the

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[111] Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 818 (2007) (discussing essays which merit special attention, "like No. 10, which many academic works discuss"); *see also* Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 100 (1989) ("Everyone is . . . tediously aware of the Federalist argument that we need a large republic as a safeguard against faction.").

[112] THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

[113] *Id.* at 83.

[114] *Id.* at 77.

[115] Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 UCLA L. REV. 1681, 1687 (2007).

[116] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 523 (Scalia, J., concurring) ("[R]acial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise.").

[117] Brown v. Bd. of Educ., 347 U.S. 483, 495, (1954), *supplemented sub nom.* Brown v. Bd. of Educ., 349 U.S. 294 (1955) ("Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the

then-governor of the state of Alabama, George Wallace, refused to integrate, citing "the constitutional right of states to operate public schools, colleges and universities."[118] Integration was only accomplished after President John F. Kennedy federalized the Alabama National Guard, forcing Wallace to relent.[119] This example, involving an extremely controversial social issue of the twentieth century, illustrates the frequent need "to refine and enlarge the public views."[120]

2. There is a Policy Need for Statewide Uniformity of Regulation for Certain Significant Issues.

Proponents of limited delegation of authority to localities also argue for statewide uniformity of regulation regarding significant social issues.[121] For statewide uniformity to be beneficial from a policy standpoint, two premises are necessary.[122] First, the state legislature must have the "willingness and ability to craft a law that assures 'informed and realistic expectations' for the parties."[123] The reality is that state legislatures are not particularly concerned with many localized and non-controversial issues.[124] With such issues, there is little harm where states allow localities to exercise "their own localized judgments."[125]

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actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

[118] Debbie Elliot, *Wallace in the Schoolhouse Door: Marking the 40th Anniversary of Alabama's Civil Rights Standoff*, NPR (June 11, 2003, 12:00 AM), http://www.npr.org/2003/06/11/1294680/wallace-in-the-schoolhouse-door.

[119] *See* John F. Romano, *State Militias and the United States: Changed Responsibilities for a New Era*, 56 A.F. L. REV. 233, 246 (2005) ("[F]ederal officials, supported by the National Guard, confronted Governor Wallace at the door of the University of Alabama and enforced the federal court's order of integration.").

[120] THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

[121] Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 Denv. U.L. Rev. 1337, 1352 (2009) ("Not surprisingly, the need for statewide uniformity and concerns about extraterritorial effects of local decisions loom large as factors in home rule analyses.").

[122] *See* City of Longmont v. Colorado Oil & Gas Ass'n, 369 P.3d 573, 580 (Colo. 2016) ("[W]e have said that, although uniformity in itself is no virtue, it is necessary 'when it achieves and maintains specific state goals.'") (quoting City of Northglenn v. Ibarra, 62 P.3d 151, 160 (Colo. 2003)).

[123] *See* Baker & Rodriguez, *supra* note 121, at 1352.

[124] *See, e.g.*, O.C.G.A. § 36-34-5.3 (2018) (allowing certain state municipalities to enter into leases and contracts with private entities for the operation of private zoos).

[125] *See* Baker & Rodriguez, *supra* note 121, at 1353.

Moreover, delegation of certain issues to local authorities may result in a government that is more responsive to the needs and concerns of its citizens.[126] However, that a state is "unwilling" to act does not necessarily indicate apathy.[127] Where localities step in to fill the void on a variety of social issues, "many . . . have found themselves increasingly at odds with their states, and . . . in a region that remains the most conservative in the country, the conflicts are growing more frequent and particularly pitched."[128]

Second, non-uniform local laws and regulations must have deleterious extraterritorial effects if statewide uniformity is to be a benefit.[129] The concern here is that the local law-making locality will not be fully accountable if there are extraterritorial effects on outside citizens, even within the same state.[130] "There will . . . be . . . obvious cases where a city is clearly seeking to externalize costs to other cities, such as . . . draconian bans on sex-offender registry."[131] Another concern with extraterritorial effects is that "widespread local regulation will produce a maze of varying and potentially inconsistent regulations by other similarly situated home rule municipalities, the extraterritorial impact [lying] in the patchwork or the confusion resulting from 'a significant variety of conflicting local legislation.'"[132] If the above two premises hold

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[126] *See* Lawrence Rosenthal, Romer v. Evans *as the Transformation of Local Government Law*, 31 URB. LAW. 257, 274-75 (1999) ("Indeed, the primary benefit claimed by advocates of local government is that decentralization of power will provide greater opportunities for discrete communities to make their government more responsive to their needs.").

[127] *See* Robertson & Fausset, *supra* note 17 ("Across Mississippi, cities, counties and public institutions have responded to the Legislature's unwillingness to take the Confederate battle cross out of the state flag by refusing to fly the flag altogether."); *see also* Maxwell L. Steams, *Direct (Anti-) Democracy*, 80 GEO. WASH. L. REV. 311, 352 (2012) ("The reluctance of state legislatures in the South . . . to embrace needed reforms during the period of racially segregated schools . . . motivated the NAACP to pursue a strategy of favorable case orderings targeting important changes in Supreme Court doctrine.").

[128] *See* Robertson & Fausset, *supra* note 17.

[129] *See* Baker and Rodriguez, *supra* note 121, at 1353 ("Extraterritorial impact has considerable traction and appeal as a home rule criterion; it is difficult to see municipal legislation as dealing with purely local concerns when it . . . affects individuals outside the municipality.").

[130] *See, e.g.*, Diller, *supra* note 17, at 1069–70 ("[I]f a county loosens gun regulations, its voters may argue that they are doing so because allowing more guns in the hands of law-abiding citizens leads to less crime. Urban areas in the state are likely to disagree and . . . claim that they will be on the receiving end of the negative externality of loose gun sales.").

[131] *Id.*

[132] Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U.L. REV. 1271, 1279 (2009) (internal citations and quotations omitted) (citing City of Commerce City v. State, 40 P.3d 1273, 1281 (Colo. 2002)).

true, statewide uniformity is a persuasive argument against delegation of authority from states to localities.

B. ARGUMENTS IN FAVOR OF DELEGATION OF AUTHORITY

Recent scholarship has increasingly argued in favor of delegation of authority to localities.[133] These arguments for delegation, like those cautioning against delegation in Federalist No. 10,[134] have been made throughout the history of the United States. Supporters of increased delegation of authority make three main arguments: (1) centralized government lacks the ability to adequately and quickly address important issues; (2) increased local authority fosters civic involvement; and (3) delegating authority to localities allows for increased innovation and experimentation.

1. Centralized Government Lacks the Ability to Adequately and Quickly Address Important Issues.

Many commentators consider Democracy in America by Alexis de Tocqueville to be a response to Federalist No. 10's argument in favor of centralized government.[135] De Tocqueville, believing that "municipal institutions constitute the strength of free nations,"[136] argues that centralization succeeds "in subjecting the external actions of men to a certain uniformity, . . . [and] excels in prevention, but not in action."[137] He asserts that "when society is

[133] *See, e.g.*, GERALD E. FRUG ET AL., LOCAL GOVERNMENT LAW (3rd ed. 2001) (discussing the "tradition" of "American intellectuals" who "point to cities as the 'hope of democracy'"); Diller, *supra* note 17, at 1048 ("[T]his Article posits that local lawmaking in urban areas may serve as a modest corrective and shift the cumulative local, state, and national legal framework back toward the views of the national median voter."). *But see* Rosenthal, *supra* note 126, at 257 ("In the discussion that follows, I will . . . show that *Romer's* holding cannot be reconciled with the traditional rule that state governments have plenary authority to decide what powers to confer on their local governments . . . .").

[134] *See* discussion *supra* Part IV.A.

[135] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Francis Bowen ed., Henry Reeve trans., 1948); *see also* Williams, *supra* note 133, at 1183 ("[The] pro-centralization excerpt is James Madison's Federalist No. 10, which extols the virtues of centralization as an effective way to avoid 'faction' and to ensure a large enough arena so that fine leaders can emerge. The pro-decentralization position is a series of excerpts from de Tocqueville's *Democracy in America* that praise democracy over aristocracy and monarchy, and that praise towns in particular ('it is man who makes monarchies and establishes republics, but the town seem[s] to come directly from the hand of God').") (citations omitted).

[136] DE TOCQUEVILLE, *supra* note 135, at 61.

[137] *Id.* at 90.

to be profoundly moved, or accelerated in its course . . . the secret of [centralization's] impotence is disclosed."[138]

The superior responsiveness of local officials to local needs and issues is one of the primary arguments in favor of delegation of authority.[139] Indeed, "[a]t the local level, . . . minorities frequently are found in numbers disproportionate to their representation in the statewide population."[140] Thus, "it should come as little surprise that local governments will frequently be more responsive to [minorities'] concerns than the state will be."[141]

Commentators have interpreted a Supreme Court case, *Romer v. Evans*, as allowing potential for increased local authority. In *Romer*, Colorado citizens and municipalities sued to challenge the constitutionality of a state constitutional amendment.[142] The amendment at issue was adopted by a statewide referendum in response to Colorado municipalities' recent passage of ordinances banning discrimination based on sexual orientation.[143] Substantively, the amendment "preclude[d] all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their 'homosexual, lesbian or bisexual orientation, conduct, practices or relationships.'"[144] The Supreme Court found that the amendment violated the Equal Protection Clause.[145]

This dispute about sexual orientation policies, which is clearly a controversial social issue,[146] illustrates the interplay between

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[138] *Id.*

[139] *See* Rosenthal, *supra* note 126, at 274 ("[O]f course, presumably an important (if not primary) reason for states to create and confer powers upon local governments is that local officials are likely to be more knowledgeable about and responsive to local needs than state officials."); *see also id.* at 274–75 ("Indeed, the primary benefit claimed by advocates of local government is that decentralization of power will provide greater opportunities for discrete communities to make their government more responsive to their needs.").

[140] *Id.* at 274.

[141] *Id.*

[142] *See* Romer v. Evans, 517 U.S. 620, 620 (1996) (describing the claimants as "aggrieved homosexuals and municipalities").

[143] *See id.* at 623 ("The enactment challenged in this case is an amendment to the Constitution of the State of Colorado, adopted in a 1992 statewide referendum.").

[144] *Id.* at 620.

[145] *Id.*

[146] *See, e.g.*, Lawrence v. Texas, 539 U.S 558, 562, 585 (2003) (holding that a Texas statute criminalizing certain sexual conduct between members of the same sex violates the Due Process Clause); Obergefell v. Hodges, 135 S. Ct. 2584, 2588–89 (2015) (holding that the Due Process Clause requires state recognition of same-sex marriage); Romer v. Evans,

state and local authorities on such issues. As Justice Scalia noted in his *Romer* dissent, "because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide."[147] This concentration of political power results in governmental authorities, often large liberal cities,[148] that have the ability to quickly address controversial, "hot-button" issues.[149] But Justice Scalia pointed out how this might be a problem: where a minority group disproportionately possesses political power at a local level, that group can use its political power to achieve political outcomes that are clearly in opposition to the statewide majority's preferences.[150]

Such minority groups' possession of disproportionate power might be classified as one of the "mischiefs of faction" which should be checked by a more centralized authority.[151] However, one should hesitate to more broadly conclude that all large cities are "prone to domination by factions" regarding social issues that are distinct from prevention of sexual orientation discrimination.[152]

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517 U.S. at 624 ("What gave rise to the statewide controversy was the protection the [city] ordinances afforded to persons discriminated against by reason of their sexual orientation."); *see also* DANIEL COX, ET AL., A SHIFTING LANDSCAPE: A DECADE OF CHANGE IN AMERICAN ATTITUDES ABOUT SAME-SEX MARRIAGE AND LGBT ISSUES (2014), https://www.prri.org/research/2014-lgbt-survey (outlining the shift in cultural and social attitudes in the United States towards "LGBT issues").

147 517 U.S. at 645–46 (Scalia, J., dissenting) (citations omitted).

148 *See* Graham, *Red State, Blue City*, *supra* note 18 ("It makes sense that these [localities], finding themselves . . . increasingly progressive, and politically disempowered, would want to use local ordinances as a bulwark against conservative state and federal policies.").

149 *See* State v. Hutchinson, 624 P.2d 1116, 1126 (Utah 1980) ("Local power should not be paralyzed and critical problems should not remain unsolved while officials await a biennial session of the Legislature in the hope of obtaining passage of a special grant of authority."); *see also* Fandos, *supra* note 92 ("It was 'in the best interest of my city,' [Baltimore] Mayor Catherine Pugh said Wednesday, as she explained why she ordered Confederate monuments removed under the cover of darkness . . . '[W]ith the climate of this nation . . . I think it's very important that we move quickly and quietly.'").

150 *See* 517 U.S. at 645-46 (Scalia, J., dissenting) and *supra* note 147.

151 *See supra* notes 112–115 and accompanying text.

152 John D. Echeverria, *The Costs of Koontz*, 39 VT. L. REV. 573, 602 (2015) ("Many cities in the United States have substantially larger populations than some states. Moreover, cities vary enormously in their political operations and structure, making it impossible to generalize about whether they are prone to domination by factions. In some ways, the

Moreover, there are safeguards on local government power today that did not exist—at least not to the same degree—when Madison first articulated his concerns about factions. One of these safeguards is "exit—the ability to abandon something when dissatisfied—[which] exists most distinctively at the local level."[153] As stated by Professor Carol M. Rose:

> Faction would indeed be a local problem if voice were the only safeguard against local oppression; in smaller republics, minority voices can indeed be drowned out. But where localities genuinely differ, and where it is possible to move among them, oppression can be left behind, and even a local penchant for redistribution is muted.[154]

More simply stated, if you do not like it here, move.

2. Increased Local Authority Fosters Civic Involvement

One of the most basic benefits of increased authority at the local level is the incentive it provides for people to become civically involved.[155] Alexis de Tocqueville recognized this involvement as intrinsically beneficial, stating: "It is not the *administrative*, but the *political* effects of decentralization that I most admire in America."[156] Generally, local governments better provide opportunities to become involved because of ease of accessibility and lower costs of participation.[157] In fact, the "need for local democracy has grown as the federal and state governments have grown more complex and access to them for the ordinary citizen

governments of New York City and Los Angeles are more like the U.S. government than that of a small Vermont village.") (citation omitted).

153 *See* Rose, *supra* note 111, at 97 (internal citations and quotations omitted).

154 *Id.* at 100.

155 *See* Briffault, *supra* note 34, at 258 ("People will bother to participate in local government decision making only if local governments have real power over matters important to local people. Local democracy thus requires local autonomy, much as local autonomy advances the prospects for local democracy.").

156 DE TOCQUEVILLE, *supra* note 135, at 94; *see also id.* at 251 ("This ceaseless agitation which democratic government has introduced into the political world influences all social intercourse. I am not sure that, on the whole, this is not the greatest advantage of democracy . . . .").

157 *See* Briffault, *supra* note 34, at 258 ("Democratic participation is more possible at the local level, where government bodies and public officials are more accessible and closer to home than they are at the state or national levels.").

has become more difficult."[158] Ideally, increased civic involvement produces a government characterized by an "all-pervading and restless activity, a superabundant force, and an energy which is inseparable from it and which may, however unfavorable circumstances may be, produce wonders."[159]

The apparent benefit of civic involvement is based on the premise that all citizens can contribute and be heard. Where, however, "factions are able to operate in concert more efficiently to dominate the locality or its legislature,"[160] it becomes possible for localities to take actions that are directly contradictory to the desires of the statewide majority—such as the New Orleans removal of Confederate monuments.[161]

3. Delegating Authority to Localities Allows for Increased Innovation and Experimentation.

A strong argument in favor of delegating authority is that delegation affords states and localities the freedom to innovate and act as laboratories to test the value of those innovations.[162] States have long been recognized for their potential to serve as laboratories, so "surely the 3,000 counties and 15,000 municipalities [in the United States] provide logarithmically more opportunities for innovation, experimentation, and reform."[163] This argument is particularly powerful because local governments have been leaders in policy response regarding numerous issues, including gay rights,[164] electoral reform,[165] term limits,[166] and public health.[167]

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158 *Id.*

159 DE TOCQUEVILLE, *supra* note 135, at 252.

160 Francisco Valdes, *Testing Democracy: Marriage Equality, Citizen-Lawmaking and Constitutional Structure*, 19 S. CAL. REV. L. & SOC. JUST. 3, 31 (2010).

161 *See* O'Donoghue, *supra* note 104 and accompanying text.

162 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

163 Briffault, *supra* note 34, at 259; *see also* Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371, 371 (2008) ("[C]onceptually speaking, the principles underlying federalism seem logically to apply not only to the relationship between the federal government and the states, but also to that between the states and local governments.").

164 *See* Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 148–53 (2005) (examining the role of local governments in the national debate over the morality and legality of same-sex marriage).

V. WHY SOUTHERN STATE LEGISLATURES SHOULD REASSESS STATUTES PASSED IN RESPONSE TO CONCERNS OF CONFEDERATE MONUMENT REMOVAL TO ALLOW FOR GREATER DELEGATION OF AUTHORITY TO LOCALITIES AND CLEARER PROCESSES

The concept of home rule is complex.[168] Similarly complex are the emotions and beliefs surrounding removal of Confederate monuments.[169] It is evident that there are legitimate concerns and benefits attendant with whichever degree of delegation states confer to local jurisdictions.[170] Policy responses at any level must therefore carefully account for constituents' wishes as well as potential consequences of delegation.[171] With these ends in mind, it is clear that actions taken by both state legislatures and localities have been lacking.

A. BALANCING CONSIDERATIONS

The statutes passed in Georgia and Kentucky are representative of most statutes passed by Southern states to prevent removal of Confederate monuments.[172] There are several important distinctions between the two statutes. First, for a

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165 *See* Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 31 (2006) (examining local political innovations and their implications for both home rule and political reforms).

166 *See* Patrick Basham, *Assessing the Term Limits Experiment: California and Beyond*, Policy Analysis (Cato Institute), Aug. 2001, https://object.cato.org/pubs/pas/pa413.pdf ("During [the 2000] elections, local term limits passed in California, Florida, Maryland, and New Mexico, adding to the total of nearly 3,000 municipal offices and more than 17,000 local politicians already subject to term limits.").

167 *See generally* Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U.L. REV. 1219 (2014) (describing how cities' smaller scale, concentrated political preferences, and streamlined processes facilitate public health innovation).

168 *See* Briffault, *supra* note 34, at 253 ("Home rule is a complex topic. Home rule takes many legal forms and follows many models . . . [and] is . . . controversial for both scholars and courts.").

169 *See* Brophy, *supra* note 27 and accompanying text.

170 *See supra* Part IV.

171 JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 170 (William Rehg trans., 2d ed. 1996) (1981) ("The rational acceptability of results achieved in conformity with [democratic] procedure follows from the institutionalization of interlinked forms of communication that, ideally speaking, ensure that all relevant questions, issues, and contributions are brought up and processed in discourses and negotiations on the basis of the best available information and arguments.").

172 *See* discussion *supra* Part III.

monument to be protected in Kentucky, a citizen or group must first petition for designation of the monument as a "military heritage object."[173] The state commission must then approve such designation by majority vote.[174] In Georgia, however, all monuments honoring the service of those from the "Confederate States of America" are presumptively protected.[175] Kentucky's decision not to presumptively protect all monuments, and instead only protect those that a citizen or group cares to protect, seems to avoid creating unnecessary conflicts.[176]

One can assume that certain citizens and groups aim to remove the very monuments that others aim to protect. The inquiry now shifts to the second major distinction between the two statutes: how much autonomy localities should have to make these decisions. Georgia's statute acts more as a complete prohibition of monument removal,[177] while Kentucky's affords more discretion to localities.[178] If a state legislature follows Georgia's lead by prohibiting local governments from having a say on this controversial issue, frustrated citizens may seek other, more destructive avenues to make themselves heard.[179] Alternatively, when the local government in Lexington, Kentucky sought to remove two prominent Confederate monuments, it first held a public forum, then decided by a city council vote.[180] This process

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[173] *See* Procedure for Kentucky Military Heritage Nomination, Designation, and Rescission, 202 KY. ADMIN. REGS. 8:030 (2018).

[174] KY. REV. STAT. ANN. § 171.784(6) (West 2018) ("[T]o designate an object as a military heritage object requires a majority vote of the members of the commission.").

[175] See O.C.G.A § 50-3-1(b)(2) (2018), *infra* notes 55-60, and accompanying text.

[176] Additionally, this fosters civic involvement on the front end. Admittedly, such involvement is not achieved through delegation to localities in this instance.

[177] *See* discussion *supra* Part III.

[178] KY. REV. STAT. ANN. §§ 171.780–.788 (West 2018).

[179] *See, e.g.*, Alex Horton, *Protesters in North Carolina Topple Confederate Statue Following Charlottesville Violence*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/08/14/protesters-in-north-carolina-topple-confederate-statue-following-charlottesville-violence/?utm_term=.9a0f5a6a017b ("A crowd toppled a bronze Confederate statue in front of a county administrative building in Durham, N.C., on Monday evening, as throngs of 'anti-fascist' groups gathered there days after white nationalist-fueled violence turned fatal in Virginia."); John Bowden, *Georgia Confederate Monument Damaged in Apparent Act of Vandalism*, THE HILL (Dec. 26, 2017, 7:01 PM), http://thehill.com/blogs/blog-briefing-room/news/366531-police-treating-georgia-confederate-monument-damage-as ("Police in Rome, Ga., are investigating damage done to a Confederate monument in the town's cemetery as vandalism . . . .").

[180] Shay McAlister, *Confederate Statue Controversy Continues in Lexington*, WHAS 11 (Aug. 15, 2017, 10:27 PM), http://www.whas11.com/news/local/confederate-statue-

fostered substantial civic involvement at the local level and featured a city council that was ultimately responsive to the community's sentiments.[181]

However, Kentucky's statute also has its flaws. The Kentucky statute only allows for token participation by local governments if a monument has been properly designated as a "military heritage object."[182] One of the main benefits of allocating more authority to localities is that it fosters civic involvement.[183] If only token participation is possible at the local level, then citizens might also become disillusioned, as people "bother to participate in local government decision making only if local governments have real power over matters important to local people."[184]

On the other hand, completely devolved is too devolved. Just as complete prohibition of removal can lead to public unrest,[185] allocating absolute power to localities to remove monuments can lead to rash, arguably paternalistic, decisions to remove monuments,[186] that might also be at odds with desires of the public-at-large.[187] New Orleans provides an example of where action taken by a government was arguably at odds with public

controversy-continues-in-lexington-council-hears-fiery-comments-from-public/464689782 (detailing the public debate comment process that took place in Lexington city council chambers prior to a city council vote on removal of the two monuments).

[181] *Lexington, Ky. Approves Plan to Move Confederate Monuments*, CBS NEWS (Aug. 17, 2017 10:19 PM), https://www.cbsnews.com/news/lexington-kentucky-approves-plan-to-move-confederate-monuments ("The proposal to relocate statues honoring Confederate officers John Hunt Morgan and John C. Breckinridge won unanimous approval from the Lexington-Fayette Urban County Council after nearly three hours of public testimony that overwhelmingly supported the resolution.").

[182] *See* KY. REV. STAT. ANN. § 171.784(7) (West 2018) (requiring "a unanimous vote of the members of the commission" to subsequently rescind a designation of an object as a military heritage object); *see also* Musgrave & Brammer, *supra* note 28 ("Lexington's leaders spoke with one voice Thursday about the need to remove two Confederate statues from the grounds of the former Fayette County courthouse, but the decision ultimately lies with a little-known state commission that meets twice a year.").

[183] *See* discussion *supra* Part IV.B.

[184] Briffault, *supra* note 34, at 258.

[185] *See* Horton, *supra* note 179 and accompanying text.

[186] *See* Fandos et. al., *supra* note 92 ("With no immediate public notice, no fund-raising, and no plan for a permanent location for the monuments once they had been excised — all things city officials once believed they would need — the mayor watched in the wee hours on Wednesday as contractors with cranes protected by a contingent of police officers lifted the monuments from their pedestals and rolled them away on flatbed trucks.").

[187] *See* O'Donoghue, *supra* note 104 and accompanying text.

desire, and costly litigation ensued.[188] This is not to imply that action taken in line with the desires of the majority forecloses the potential for litigation. Instead, the New Orleans process, or lack thereof, illustrates that it behooves legislatures to avoid constructing a system where litigation is a private citizen's only recourse to make heard the views of the majority.

One must balance the desire for responsiveness with the desire to protect against the "mischiefs of faction." One must also balance the desire for local government innovation with the desire for uniformity. The best policy response is to adopt an approach that acknowledges each consideration as legitimate, to weigh some considerations more heavily than others, and aim to strike a balance.

B. RECOMMENDED MODEL APPROACH

Using the Kentucky statute as a loose framework, the model statute should first create an administrative agency to oversee monument protection.[189] Ideally, such an agency would serve as an expert decision-making body that is fair, impartial, and more insulated from political pressures than a legislative body would be.[190]

Next, the statute should provide a four-step process for persons or organizations to petition for specific monuments to be

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[188] *See e.g.*, Monumental Task Comm., Inc. v. Foxx, 240 F. Supp. 3d 487, 490 (E.D. La. 2017) ("On December 17, 2015, the [New Orleans] City Council affirmatively voted to remove the monuments, and the ordinance was signed into law. Plaintiffs filed suit on the same day seeking a preliminary injunction to enjoin the City from relocating the monuments.").

[189] *See, e.g.*, KY. REV. STAT. ANN. §§ 171.780–.788 (West 2018); N.C. GEN. STAT. § 100-2.1 (2018); Tennessee Heritage Protection Act of 2016, TENN. CODE ANN. § 4-1-412 (2018). Importantly, the statute must "clearly define those activities of executive agencies which are rule-making or legislative, and require agencies to comply with specific procedures as a precondition to the validity and enforceability of rules." Anne K. Pecora, *The Model State Administrative Procedure Act: Planned Restraint on the Consolidation of Power by Executive Branches of State Governments*, 32 VILL. L. REV. 451, 467–68 (1987).

[190] *See In re* Am. Waste & Pollution Control Co., 581 So. 2d 738, 741–42 (La. Ct. App. 1991) ("When acting as adjudicators, administrative officers should conduct themselves as judges do . . . .[T]hey must realize the importance of the positions of public trust they hold and endeavor, however difficult, to avoid any appearance of partiality or prejudgment of matters either pending or to be pending before them."). *But see* Henry P. Monaghan, *First Amendment "Due Process*," 83 HARV. L. REV. 518, 523 (1970) ("Administrative bodies, particularly at a state level, are rarely so insulated; indeed, they are often seen primarily as political organs.").

designated as protected. The first of these four steps, like Kentucky's designation process, should allow any person or organization to "nominate" a monument for protection under the statute.[191] Second, upon the state agency's receipt of a petition, the locality in which the monument lies and the locality's residents should be given notice. This notice would allow the locality ample time to assess the propriety of the proposed designation and to respond to citizen support or opposition.

Third, the locality should respond to the state agency with its agreement or disagreement with the "protected designation" and its accompanying reasons. Consistent with respect for local autonomy and desires for innovation, the locality should make its decision however it sees fit, as long as the public is given appropriate time to voice its views. Localities are thereby given authority on the front end, allowing them to realize the benefits of civic involvement and responsiveness to citizens, while avoiding the feeling that the locality had no say in the protected status of a monument.

Fourth, upon the locality's consent, the state agency should have the power to afford or deny designation of the monument by majority vote. If the locality consents to designation and the state agency refuses to do so, this refusal can be overcome by three-fourths vote of the locality's legislative branch. If the locality disagrees with the designation and does not give its consent, that is the end of the matter. Allowing a state agency to overrule the locality's negative decision would bring about the very same danger of entirely disallowing local governments to have a say in the matter.[192]

Once a monument is designated as protected, the process for removal should mirror the four-step process for designation: (1) a person or organization can petition for removal of the monument; (2) notice should be given to the locality and its citizens; (3) the locality should then vote for or against removal; and (4) the state agency should vote for or against removal by majority vote, allowing refusal of removal to be overridden by a three-fourths

[191] *See* Procedure for Kentucky Military Heritage Nomination, Designation, and Rescission, 202 KY. ADMIN. REGS. 8:030 (2018) ("A person or organization may nominate . . . an object as a military heritage object by submitting a 'Military Heritage Commission Historic Military Sites and Objects Application for Registration' form to the Historic Military Sites Preservation Coordinator at the Kentucky Heritage Council.").

[192] *See supra* note 179 and accompanying text.

vote of the locality's legislative branch. The clarity of the process in and of itself will help allay concerns of those on either side of the removal debate, in addition to offering the previously-discussed policy benefits.

VI. CONCLUSION

This Note suggests a model statutory approach for states to use to protect and remove Confederate monuments. Importantly, the model approach provides for meaningful political involvement at both the state and local level. The engagement of the local government at each relevant stage seeks to create a process that is responsive to the concerns of the local citizenry, allows for political innovation by localities, and, accordingly, fosters local civic involvement. At the same time, the existence of the state agency acts to protect against the mischiefs of faction in ensuring an orderly, transparent process and, further, acknowledges the statewide implications of any actions taken concerning Confederate monuments. In this way, the model approach balances the benefits of devolution against the downsides of more local control and encourages parties on either side of the debate to pursue their goals via orderly political avenues, in lieu of extralegal actions performed "under the cover of darkness."[193]

[193] *See Fondos*, *supra* note 92 (explaining why the Baltimore Mayor Catherine Pugh had certain Confederate monuments removed "under the cover of darkness").