VIRGINIA LAW REVIEW ONLINE

VOLUME 104 JANUARY 2018 58–73

ESSAY

WHEN WHITE SUPREMACISTS INVADE A CITY

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In August 2017, hundreds of white supremacists came to Charlottesville, Virginia, ostensibly to protest the city council's decision to remove a statue of Robert E. Lee. This Essay argues that Charlottesville's vulnerability in the face of white supremacist invasions is a feature of all cities' liminal status in American law. Municipal corporations neither enjoy the full power of the state nor the rights accorded individuals and private corporations. Among other limitations, state law restricts Charlottesville's authority to remove Confederate war memorials or to regulate firearms. So too, our current constitutional doctrine does not easily permit cities to assert First Amendment rights against state-mandated local government speech. Nor can cities readily assert a collective civil or constitutional right to be free from violence and intimidation. The lack of either municipal power or municipal rights means that a city faced with the symbolic and physical "takeover" of its downtown by heavily armed aggressors has limited legal resources with which to respond.

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> *"That we have fallen into the habit of treating the city as a mere jurisdictional entity, subject to the whims of the state, is unnecessary. And it means that the next time the white supremacists come to town, the city will still not have the tools to defend itself."*

INTRODUCTION

CHARLOTTESVILLE is a small university town. It has a population of approximately 47,000 residents; it occupies a territory of about 10 square miles.[1] The Charlottesville "downtown" is about eight square blocks. The city has a part-time city council and mayor, a professional city manager, a city attorney and an assistant city attorney. The Charlottesville police department has 127 officers.[2] There is one high school, one synagogue, and the largest employer in town is by far the University of Virginia.

When white supremacists, neo-Nazis, and Ku Klux Klan members targeted Charlottesville in August 2017, they did so in part because the city council had voted to remove a statue of Robert E. Lee that was erected in 1924 as a symbol and reassertion of the authority and power of the Old South, in a town that is 19% African-American and overwhelmingly politically liberal.[3] The statue sits in what used to be Lee Park, until the name was changed to Emancipation Park more recently.[4]

The Unite the Right rally was promoted as a direct challenge to the idea of Charlottesville itself—a relatively socially progressive community seeking to reconcile with its apartheid past. The white supremacists came with torches and marched at night to heighten the sense of foreboding and fear that they intended to foster.[5] The marchers

[1] 2016 Charlottesville QuickFacts, U.S. Census Bureau, https://perma.cc/SP7U-4VQE.

[2] Charlottesville Police Dep't, 2016 Annual Report 2 (2016), https://perma.cc/KC2M-PCJ6.

[3] 2016 Charlottesville QuickFacts, supra note 1; Chris Suarez, Charlottesville City Council Votes to Remove Statue from Lee Park, The Daily Progress (Feb. 6, 2017), https://perma.cc/2TJN-WPGC.

[4] Jacey Fortin, The Statue at the Center of Charlottesville's Storm, N.Y. Times (Aug. 13, 2017), https://www.nytimes.com/2017/08/13/us/charlottesville-rally-protest-statue.html.

[5] See Joe Heim, Recounting a Day of Rage, Hate, Violence and Death, Wash. Post (Aug. 14, 2017), https://perma.cc/8VJU-U64N. See also Complaint at 46, Sines v. Kessler, No. 3:17-cv-00072 (W.D. Va. Oct. 12, 2017) [hereinafter Sines Complaint]; Complaint at 30,

also carried guns, and even more elaborate weaponry—shields, mace, helmets, body armor, clubs, and flag poles.[6] The Unite the Right rally was not a march per se; it was an armed invasion, well-coordinated and planned, and intended to be a visible manifestation of force and occupation. It was, according to the organizers' own rhetoric, an effort to assert territorial claims, to undermine the feelings of safety and security felt by Charlottesville residents.[7] The protestors chanted "Jews will not replace us," and more generically, "You will not replace us."[8] And they promised to keep coming back to Charlottesville—a promise they kept by returning again with a smaller group on October 7, 2017.[9]

What is the proper response of a city to this kind of ongoing threat? It is not entirely clear—at least as a legal matter. Of course, there are practical ways to deploy police to more effectively ensure public safety. Better rules of engagement can be adopted and those who act violently can be arrested.

But the city's vulnerability is more profound, even if more difficult to address. This vulnerability is a function of the city's—all cities'—liminal status in American law. Cities are state actors, but without the real power of the state. Constitutionally and legislatively subordinate to state legislatures, cities cannot effectively self-govern in important ways.

City of Charlottesville v. Penn. Light Foot Militia, No. 3:17-cv-00078-GEC (Va. Cir. Ct. Oct. 27, 2017) [hereinafter Penn. Light Foot Militia Complaint].

[6] See Sines Complaint, supra note 5, at 2; William J. Antholis, Two Blocks from the Culture War, The Miller Center (Aug. 13, 2017), https://perma.cc/7T65-KEGX; Paul Duggan, Militiamen Came to Charlottesville as Neutral First Amendment Protectors, Commander Says, Wash. Post (Aug. 13, 2017), https://perma.cc/HV2E-KDUK; Jon Sharman, Militia Force Armed with Assault Rifles Marches Through US Town Ahead of White Nationalist Rally, The Independent (Aug. 12, 2017), https://perma.cc/82WV-2K6S.

[7] Natasha Bertrand, Here's What We Know About the 'Pro-White' Organizer of 'Unite the Right,' Who Was Chased out of His Own Press Conference, Business Insider (Aug. 14, 2017), http://www.businessinsider.com/who-is-jason-kessler-unite-the-right-charlottesville-2017-8 ("We're trying to show that folks can stand up for white people. The political correctness has gotten way out of control, and the only way to fight back against it has been to stand up for our own interests.");Vincent Law, The 'Unite the Right' Rally Is Going to Be a Turning Point for White Identity in America, AltRight.com (Aug. 5, 2017), https://perma.cc/JF4R-3UBS.

[8] Sines Complaint, supra note 5, at 20; Heim, supra note 5.

[9] Henry Graff, Richard Spencer Plans Return to Charlottesville, NBC 29 WVIR-TV (Oct. 25, 2017, 6:18 PM), http://www.nbc29.com/story/36573304/richard-spencer-plans-return-to-charlottesville; Matt Stevens, White Nationalists Reappear in Charlottesville in Torch-Lit Protest, N.Y. Times (Oct. 8, 2017), https://nyti.ms/2y2qM1d.

Cities only exercise "state" power derivatively and that exercise is often and easily overridden.

At the same time, however, cities generally do not enjoy constitutional or civil rights. The city is on the "public" side of the public/private distinction in American law, which means that the city cannot be legally understood to be a victim of powerful private exercisers of violent force.

In other words, American cities are betwixt and between—they enjoy neither power nor rights. The city of Charlottesville is only nominally the state—the Virginia General Assembly exercises virtually plenary power over what it can and cannot do. Yet the city—unlike other corporate or associational entities—is also not a full-fledged rights-bearer. Under current doctrine, a city *qua* city cannot readily invoke the First Amendment to protect its decision to remove Confederate monuments, nor can it readily assert a collective constitutional or civil right to be free from fear and intimidation. The city has few rights, but also enjoys limited powers.

There is nothing in the nature of cities or local governments to require this state of affairs, as commentators have regularly observed.[10] Municipal corporations could assert rights against the state without threatening the state's authority; private corporations regularly assert such rights. Similarly, the city could be granted more extensive powers by the state. Again, private corporations have significant authority to govern themselves even while being subject to the state's general laws.

That cities are limited in their legal capacity is mostly a matter of judicial habit. But this habit has consequences. Unable to exercise the full power of the state but also denied the rights enjoyed by individuals and other corporate bodies, the city finds itself unable to respond to existential threats.

I. THE CITY'S POWER

The foundational reality for cities in America is that any power they exercise is—as a legal matter—derivative. Citizens and elected officials in Charlottesville debate what the city can do in response to invading

[10] See Gerald E. Frug, City Making: Building Communities Without Building Walls 3–4 (1999); Richard Schragger, City Power: Urban Governance in a Global Age 1–2 (2016). For a specific argument, see Kathleen S. Morris, The Case for Local Constitutional Enforcement, 47 Harv. C.R.-C.L. L. Rev. 1, 1 (2012).

paramilitary, neo-Nazi forces. But the answer is not a great deal, for one major reason: much of the power and authority to act is lodged not in city officials but in state officials, namely in the Virginia General Assembly.

Cities are weak legal creatures, and cities in Virginia are particularly so. Virginia is a so-called "Dillon's Rule" jurisdiction.[11] Formulated by jurist John Dillon in 1868, Dillon's rule requires that all exercises of city power be traced back to a specific legislative grant of authority.[12] Dillon's Rule is often contrasted with "home rule" jurisdictions, in which cities enjoy a broader initial grant of authority and are able to act without specific authorization. The practical differences between Dillon's Rule and home rule jurisdictions, however, can be slight—a difference of emphasis more than outcome—because even in states with home rule, legislatures can normally override municipal laws with conventional legislation. States do so with increasing regularity.[13]

Two Virginia state laws are relevant in Charlottesville's case. The first is the Commonwealth's "open carry" statute, which permits individuals to carry weapons openly on their person except under limited circumstances.[14] Virginia's open carry law complicates the city's ability to regulate and control armed protestors. At the August 12 Unite the Right rally, hundreds of protestors (and a few counter-protestors) marched through the city brandishing their semi-automatic weapons.[15] Many protestors were associated with various non-state "militias" that had mustered from different parts of the country—mostly out-of-state. The militia members were in many cases uniformed—some wore helmets, body armor, and carried military-style backpacks and other

[11] Commonwealth v. Cty. Bd. of Arlington Cty., 232 S.E.2d 30, 40–41 (Va. 1977).

[12] City of Clinton v. Cedar Rapids and Mo. River R.R. Co., 24 Iowa 455, 475 (1868).

[13] See Richard Schragger, The Attack on American Cities, ___ Tex. L. Rev. ___ (forthcoming 2018) (manuscript at 2–3), https://ssrn.com/abstract=3026142.

[14] In Virginia, the open carrying of certain handguns is prohibited in specific populous cities and counties. See Va. Code Ann. § 18.2-287.4 (2014). Virginia law also states that the prohibition against carrying a concealed weapon "shall not apply to a person who has a valid concealed handgun permit." Id. § 18.2-308.01. The Virginia statute regarding firearm reciprocity states: "A valid concealed handgun or concealed weapon permit or license issued by another state shall authorize the holder of such permit or license who is at least 21 years of age to carry a concealed handgun in the Commonwealth." Id. § 18.2-308.014.

[15] Frances Robles, As White Nationalist in Charlottesville Fired, Police 'Never Moved,' N.Y. Times (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/us/charlottesville-protest-police.html.

paraphernalia. For that reason, they were sometimes mistaken for police or national guardsmen.[16]

Arms and the First Amendment create a combustible combination.[17] Jurisdictions have regularly restricted the items that protestors can carry in public places during First-Amendment-protected activities.[18] But in Virginia, local governments are preempted by state law from regulating almost any aspect of firearms ownership and use absent explicit state authorization.[19] The Charlottesville police were constrained in restricting the carrying of guns by Virginia's laws.[20] If the city had the authority, it would undoubtedly have adopted much more restrictive gun laws than the Commonwealth. But the city does not have that power.

So too if it had the authority, the city would have removed the Robert E. Lee statue that provided the excuse for the armed protestors to march in the first place.[21] But here too state law governs local decisions. Virginia law authorizes localities to erect war memorials to certain wars (including the "War Between the States") and then bars their removal.[22] This "statue statute" was amended in 1997 to include cities within its ambit.[23] A currently contested question is whether the law applies to Charlottesville's Confederate monuments, which were constructed before 1997. A Charlottesville circuit court has ruled that it does, while a different circuit court, the Governor, and the Commonwealth's Attorney

[16] Penn. Light Foot Militia Complaint, supra note 5, at 21–22; see also Joanna Walters, Mistaken for the Military: The Gear Carried by the Charlottesville Militia, The Guardian (Aug. 15, 2017), https://perma.cc/4UMR-WLZD.

[17] See Kendall Burchard, Your 'Little Friend' Doesn't Say 'Hello': Putting the First Amendment Before the Second in Public Protests, 104 Va. L. Rev. Online 30, 31–32 (2018).

[18] Emily Alpert Reyes, L.A. Bans Pepper Spray, Baseball Bats, Weapons and Other Items at Protests, L.A. Times (Oct. 31, 2017), https://perma.cc/3UAU-ZXAQ.

[19] See Va. Code Ann. § 15.2-915 (2014). The Virginia legislature has not regulated the possession of rifles at rallies and protests, but maybe they should. See Martin London, Why States Should Ban Guns From Political Rallies, Time (Aug. 22, 2017), https://perma.cc/P68L-9KAZ.

[20] See Hunton & Williams, Independent Review of the 2017 Protest Events in Charlottesville, Virginia, Final Report, at 156–57 (Dec. 1, 2017), https://www.hunton.com/images/content/3/4/v2/34613/final-report-ada-compliant-ready.pdf.

[21] Suarez, supra note 3; Payne v. City of Charlottesville, No. CL 17-145, 2017 Va. Cir. LEXIS 323 at *1 (Oct. 3, 2017) (ruling on demurrer).

[22] Va. Code Ann. § 15.2-1812 (2012).

[23] 1997 Va. Acts, ch. 587, at 1114.

General have all asserted that it does not.[24] Charlottesville's statue of Robert E. Lee was erected in 1924, at the same time that the city created the park in which the statue sits.

There is a strong argument for applying the statute only going forward. In a Dillon's Rule state, localities only have the powers expressly granted, and the predecessor statute to the 1997 version never granted authority to cities to build Confederate war memorials in the first place. Early versions of the war memorial statute—going back to 1904—expressly authorized counties to erect war memorials and restricted their ability to remove them.[25] When the Lee statue was built, Charlottesville must have been acting under a different grant of authority, and one that never contained a restriction on removal. In 1924, Virginia cities enjoyed a general grant of authority to build, maintain, and beautify parks—a provision that would arguably include putting up statuary.[26] Telling Charlottesville that it is stuck with the monuments it erected in the early part of the twentieth century under a grant to beautify its parks seems like the imposition of a restriction that was not contemplated at the time.

Whether the statute applies only going forward or also to previously erected monuments, however, the point remains the same: the legislature exercises unquestioned control over a city's decision to erect or remove a war memorial wherever it stands. The statuary in local parks, along local avenues, and in town squares is a matter of state authorization and restriction, at least going forward. The General Assembly could clarify its authorization at any time to permit local governments to remove Confederate monuments. It has instead attempted to do the opposite—passing a 2016 law that the Governor vetoed that would have made clear that the current statute applies retroactively.[27]

[24] See Amanda Lineberry, Payne v. City of Charlottesville and the Dillon's Rule Rationale for Removal, 104 Va. L. Rev. Online 45, 47–48 (2018); see also Richard Schragger, Opinion, Is Charlottesville's Robert E. Lee Statue Illegal?, Richmond Times-Dispatch (Aug. 30, 2017), https://perma.cc/F6AK-QZ83.

[25] Lineberry, supra note 24, at 49.

[26] Id. at 46–47.

[27] The proposed amendment eliminated the key conditional, prospective phrase ("[i]f such are erected") and in its place added "the provisions of this subsection shall apply to all such monuments and memorials regardless of when erected" attempting to apply the war memorial statute retroactively. H.B. 587, 2016 Gen. Assemb., 2016 Sess. (Va. 2016) (proposed amendment); see also Governor's Veto of H.B. 587, 2016 Gen. Assemb., 2016 Sess. (Va. 2016).

Why adopt such a restraint on local authority? It is not entirely clear. A predecessor version of the war memorial statute applied only to Confederate monuments, authorizing their erection and forbidding their removal.[28] Perhaps the General Assembly was worried that some in the community would find the valorization of Confederate soldiers and generals ill-timed or insulting—after all, the Confederates were traitors to the Union. And African-American residents of these places might have different views as to the appropriate memorialization of such men.

Perhaps the legislature thought that future generations might look less kindly on these old generals, or might simply decide to commemorate something else, as memories dimmed and tastes changed. Like many Confederate memorials throughout the South, Charlottesville's Lee statue was erected in what was originally a whites-only park, as a symbol of racial supremacy during Jim Crow.[29] Its purpose and message was to reassert white southern identity and celebrate a distinctly southern nationalism.[30]

If one asks what sorts of government tasks should be allocated to what level of government, decisions regarding statuary in a local park would seem to be best made by local communities. Why does the state-wide political community care whether Charlottesville has a Lee statue in the middle of now-Emancipation Park? If we begin with a presumption of subsidiarity—a principle that governmental tasks should be allocated to the most decentralized level of government that is competent to perform those tasks[31]—then one needs a rationale for regulating at the state level. The usual rationales for centralized regulation in any given case are the presence of externalities, the need for uniformity, and a concern about pathologies in the local political process that result in majoritarian oppression.

[28] See 1904 Va. Acts, ch. 29, at 62.

[29] Mark Jacob, How a Former Chicago Office Boy Built Charlottesville's Gen. Lee Statue, Chi. Trib. (Aug. 18, 2017), http://www.chicagotribune.com/news/history/ct-charlottesville-robert-e-lee-statue-chicago-20170818-story.html ("The deed for McIntire Park described it as 'a public park and playground for the white people of the City of Charlottesville.'").

[30] S. Poverty L. Ctr., Whose Heritage? Public Symbols of the Confederacy 15, 35 (April 21, 2016), https://perma.cc/2W6G-6CKM.

[31] Markus Jachtenfuchs & Nico Krisch, Subsidiarity in Global Governance, 79 Law & Contemp. Probs. 1, 1 (2016) ("Subsidiarity is typically understood as a presumption for local-level decisionmaking, which allows for the centralization of powers only for particular, good reasons.").

The first two are very weak in the case of Confederate statues, unless the psychic pain of the removal of the Lee statue is so great to residents living in other parts of the state that it overrides any local psychic pain of leaving it standing. Whether externalities should include psychic harms is itself an important question—most centralized regulation is justified when local regulation imposes material costs on outsiders, as when a local government adopts too lax pollution controls. Uniformity too seems unnecessary in this instance; that rationale usually applies to regulatory ordinances that impose costs on cross-border activities. That a city has or does not have a Confederate monument makes little difference in any particular cross-border enterprise.

That leaves oppression—the worry that local majorities are somehow targeting local minorities for differential (and unfavorable) treatment. Certainly there are members of the Charlottesville community who would prefer to see the Lee statue remain. But is this really the kind of majoritarian oppression we are worried about when we regulate centrally? Again, the psychic harms of removal might be real, but do they really demand the assertion of state authority over local decision-making about statues in parks?

Defenders of a general state ban on the removal of war memorials could argue that such a ban protects veterans from being dishonored by local anti-war or anti-veteran factions. But the chances of such dishonor seem slim. Veterans are likely to be well-represented in the local political process; anti-memorial groups are much more likely to lose local political fights—especially if those who oppose the memorials are a traditionally discrete and insular minority. African-American citizens may be more likely to oppose Confederate monuments—but they are generally outvoted. It is worth noting that in an initial vote, Charlottesville's city council rejected a proposal to remove the Lee statue.[32]

Those who think that local war memorials are properly the province of state law likely would find that any action that locals take with which they disagree is grounds for centralized regulation. So too with regard to open carry laws. For those who believe in strong gun rights, local restrictions are anathema, even if local communities might be better suited to consider the conditions under which guns might be

[32] Council of the City of Charlottesville, Council Chambers Minutes, at 12 (Jan. 17, 2017), https://perma.cc/T6LU-VX8P.

productively regulated. Urban places, for example, might have very different concerns about gun use than rural ones. A sensible decentralization would likely obtain if these policies were not so ideologically fraught.

Unfortunately, a sensible division of labor is not generally the norm. Debates tend to focus on the substantive policy rather than on who should be tasked with adopting it. The location for the regulation of guns and statues is not based on principled decisions about where authority should reside, but is rather a political decision about what outcomes certain groups desire. Once local governments across the country began to take down Confederate monuments, state legislatures (mostly in the former Confederacy) began to restrict or consider restricting local power.[33] That is no surprise.

II. THE CITY'S RIGHTS

That the city is subject to state power is unremarkable—all individuals and corporate bodies are subject to state law. But the city is subordinate in a second way. Unlike individuals and corporations, the city does not generally enjoy countervailing property or constitutional rights. Even though Charlottesville is not the state, it is the "state." It is conceptually difficult for the city to assert rights against the state or private rights-bearers.

The relative thinness of a municipality's corporate rights is a function of the rise of the public/private distinction in the nineteenth century. Almost a generation ago, legal scholars Gerald Frug and Hendrik Hartog described how the municipal corporation lost its corporate privileges and became an arm of the state, while the private business corporation attained property and constitutional rights.[34] Both the municipal corporation and the business corporation were and are creatures of the

[33] See Alabama Memorial Preservation Act of 2017, 2017 Ala. Laws 354 (Alabama, the most recently passed restriction); see also Ga. Code Ann. § 50-3-1(b)(1) (2013) (Georgia); N.C. Gen. Stat. § 100-2.1(b) (2015) (North Carolina); S.C. Code Ann. § 10-1-165 (2009) (South Carolina).

[34] Hendrik Hartog, Public Property and Private Power: The Corporation of the City of New York in American Law, 1730–1870, at 223 (1983); Gerald E. Frug, The City as a Legal Concept, 93 Harv. L. Rev. 1057, 1065–66 (1980); see also Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 659–60 (1819) (dividing private corporations—which are founded by individual contributions of property—from public corporations—which are founded by the government without individual contributions).

state—the powers of all subordinate corporate bodies are derived from the legislature. And yet the distinction between public and private corporations means that the former are almost wholly beholden to state power, while the latter can assert the rights that all individuals enjoy against state encroachment.

One important implication of the private/public distinction is that the city cannot immediately assert a First Amendment right to speak on its own behalf.[35] Certainly war memorials, Confederate statues, and the names of parks and streets are expressive. But these acts of expression are—in the parlance of the First Amendment—"government speech"[36]—and cities, being subordinate governments, cannot readily argue that the city's free-speech rights are being violated when the state refuses to let them decide what to say. Private corporations enjoy expansive First Amendment rights.[37] But courts have treated the municipal corporation as differently situated *vis a vis* state speech restrictions, even if the logic of the distinction is undertheorized.[38]

Recently, Professors Chip Lupu and Robert Tuttle argued that a First Amendment right could be asserted by city residents on the theory that

[35] For a discussion of municipal speech, see David Fagundes, State Actors as First Amendment Speakers, 100 Nw. U. L. Rev. 1637, 1641 (2006).

[36] Id. ("Courts and commentators alike have long dismissed the notion that the Speech Clause could serve as a source of constitutional protection for government speech.").

[37] See, e.g., Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 319 (2010) (finding that the government may regulate corporate speech through "disclaimer and disclosure requirements, but it may not suppress that speech altogether"); First Nat'l Bank v. Bellotti, 435 U.S. 765, 784 (1978) (taking expansive view of corporation speech rights).

[38] See, e.g., Anderson v. City of Boston, 380 N.E.2d 628, 635–37 (Mass. 1978) (holding that Boston had no First Amendment right to disregard the state's campaign finance statute restricting the city's use of monies in a referendum campaign); City of Boston v. Anderson, 439 U.S. 1060 (1979) (dismissed for want of substantial federal question). For a discussion, see David J. Barron, The Promise of Tribe's City: Self-Government, the Constitution, and a New Urban Age, 42 Tulsa L. Rev. 811, 819–23 (2007) (describing Boston's argument that it should be entitled to the same speech protections as private corporations). It should be noted that though the Supreme Court has not directly addressed a state restriction on municipal political speech since *Anderson* (and did not do so in that case), the Court has held that municipal political advocacy is government speech, immune from challenges by dissenting taxpayers. See Walker v. Texas Div., Sons of Confederate Veterans, 135 S. Ct. 2239, 2246 (2015) (insulating municipal government speech from challenge by dissenting taxpayers); Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009) (same). For an early theory of municipal speech rights, see Mark G. Yudof, When Governments Speak: Toward a Theory of Government Expression and the First Amendment, 57 Tex. L. Rev. 863, 870 (1979). For a discussion of municipal speech rights, see *Mosdos Chofetz Chaim, Inc. v. Vill. of Wesley Hills*, 701 F. Supp. 2d 568, 598–99 (S.D.N.Y. 2010).

the city's removal decision implicates core free speech concerns.[39] They argue that in blocking the removal of Confederate monuments, the state is putting a thumb on the speech scale—in this case in favor of a white supremacist message that is anathema to the local community.[40] The privileging of a particular viewpoint by the state violates the Charlottesville *citizens'* First Amendment rights by making it impossible for them to decide what they as a community want to say.

That "[e]ach political community—federal, state, and local—should have presumptive political autonomy to decide whom to venerate"[41] (as Lupu and Tuttle write) seems correct to me. Principles of democratic self-government and subsidiarity support that contention.

Nevertheless, the public/private distinction is a barrier to the assertion of the city's First Amendment rights. As Lupu and Tuttle concede, the state is entitled "to choose and broadcast its own message, even if the message is obnoxious to a number of its people."[42] Governments speak all the time. For the most part, what they say is a matter of politics and not a matter of constitutional law.

Government speech motivated by animus or speech that denigrates religious or racial minorities by sending a message of disfavored status can be challenged on constitutional grounds, however.[43] Charlottesville can certainly assert that the city's Confederate monuments were motivated by animus (the Ku Klux Klan was a visible celebrant at the dedication of the Lee statue) and that those statues continue to express a message of disfavored status to the city's minority communities. More importantly, the city can argue that it does not want to be associated with

[39] Ira C. Lupu & Robert W. Tuttle, The Debate Over Confederate Monuments, Take Care (Aug. 25, 2017), https://perma.cc/XCJ3-6LL6.

[40] Id.

[41] Id.

[42] Id.

[43] See Micah Schwartzman & Nelson Tebbe, Charlottesville's Monuments Are Unconstitutional, Slate (Aug. 25, 2017), https://perma.cc/MV97-S8DW; see also, e.g., McCreary Cty. v. Am. C.L. Union, 545 U.S. 844, 875–76 (2015) (finding that government messages that favor one religion over another or religion over irreligion are suspect under the Establishment Clause); Vill. of Arlington Heights v. Metro. Hous. Dev. Auth., 429 U.S. 252, 265 (1977) (holding the Equal Protection Clause bars government actions that have a racially discriminatory purpose or intent).

those messages. It wants to be able to control its own expressive acts in accordance with the views of its own political community.[44]

The public/private distinction makes such arguments doctrinally problematic. If cities *qua* cities do not enjoy rights, then what is the basis for a claim that a city's speech is being unconstitutionally restricted? So too the public/private distinction makes it difficult for a city *qua* city to assert that private actors are threatening its peace and security. Again, the city cannot readily assert a *right* to be free from intimidation and violence, even if it is under siege from well-organized and well-supported private actors.

Consider two lawsuits arising out of the Unite the Right events. In the first, filed in federal court, members of the Charlottesville community who were injured in the protests are suing white supremacist organizers and actors for conspiring to deprive them of their constitutional rights.[45] They are using a federal statute[46]—the so-called Ku Klux Klan Act (codified at 42 U.S.C. § 1985 and § 1986)—which was intended to counter the power of private vigilante groups to prevent them from terrorizing newly-freed black slaves.[47] The Ku Klux Klan exercised de facto political and coercive power in Charlottesville and in many places in the South (and sometimes in the North)—often operating hand-in-hand with local authorities.[48] That history is a good example of how public rights can be undermined by private actors exercising something that looks like public power.

A second lawsuit has been filed in state court on behalf of the City of Charlottesville, a group of local businesses, and a number of neighborhood associations.[49] That lawsuit seeks an injunction to prevent the return of well-armed militias to the city pursuant to the Virginia

[44] For an argument along these lines, see Fagundes, supra note 35, at 1638, 1645–46; see also, e.g., Cty. of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) ("A municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual."), aff'd, 907 F. 2d 1295 (2d Cir. 1990).

[45] Sines Complaint, supra note 5, at 1–3, 88.

[46] Id. at 87, 89.

[47] Brian J. Gaj, Section 1985(2) Clause One and Its Scope, 70 Cornell L. Rev. 756, 756 (1985).

[48] S. Poverty L. Ctr., Ku Klux Klan: A History of Racism and Violence 14, 22 (6th ed. 2011), https://perma.cc/V3AZ-UNUE ("In some counties the Klan became the de facto law, an invisible government that state officials could not control.").

[49] Penn. Light Foot Militia Complaint, supra note 5.

Constitution, which states that "in all cases the military should be under strict subordination to, and governed by, the civil power."[50] The complaint also asserts that the defendant militias engaged in unlawful paramilitary activity in violation of the Virginia Code[51] and that their activities constituted a public nuisance.[52]

Both lawsuits will have to run a First Amendment gauntlet, though the allegations in the complaints together appear to establish that the Unite the Right rally participants engaged in a well-organized effort to threaten and terrorize the city's residents and commit acts of violence against them.[53] Based on the alleged facts, the protestors' exercise of constitutionally-protected free speech was incidental to the actual purpose and outcome of their gathering—to spread fear and induce violence against the local populace.

Those acts represent a moment when the state lost control of a central feature of its "stateness." As the city's complaint observes "[t]he establishment of private armies is inconsistent with a well-ordered society and enjoys no claim to protection under the law."[54] Without the capacity to control private paramilitary groups, Charlottesville revealed itself to be a vulnerable party, unable to meet its basic obligation to defend its citizens from violence. In the lawsuit to which it is a party, Charlottesville invokes state power. It seeks to reassert its monopoly on violence by clothing itself in the Commonwealth's authority to control the militias.

That the city cannot readily join the first lawsuit and has to seek a judicial decree to enforce the state's basic obligation in the second is telling. On the one hand, the city lacks an injury to a cognizable constitutional right—the city *qua* city enjoys no such rights. On the other hand, the city appears to have limited power to counter the non-state exercise of coercive force. The city's duty "to protect public safety was undercut"[55] by the militias, which acted as if they were the police and military. The city's capacity to protect its citizens was also undercut by the Commonwealth of Virginia, which is the ultimate repository of

[50] Va. Const. art. I, § 13; Penn. Light Foot Militia Complaint, supra note 5, at 1.

[51] Penn. Light Foot Militia Complaint, supra note 5, at 74.

[52] Id. at 76.

[53] See id. at 26–27.

[54] Id. at 1.

[55] Id. at 4.

the monopoly on force and failed effectively to assert it. In the state's absence, the city has limited capacity to act on its own.

The two complaints are remarkable documents. They reveal a set of interlocking organizations and leaders intent on asserting territorial domination—at least for a short time—over a small university town. The white supremacists mock the mayor, threaten civilians with violence, and make plans for repeated invasions. The purposes and goals of the Unite the Right rally are asserted in military terms—the enemy is the city.[56] The city itself is under siege—physically and mentally—a "takeover" of space that is symbolic of the larger assertion of white supremacy and religious superiority.

More disturbing, however, is the city's seeming impotence in the face of these threats. The city's weakness is not in the main a function of its politics or administration (though important questions have been raised about the city's preparation and response to the events of August 11–12[57]). Whatever the city administration did or failed to do on those days, the city's legal and constitutional vulnerability remains the same. Limited in its exercise of power and rights, the city can only urge the state to grant it powers or to assert state power on the city's behalf.

CONCLUSION

We should worry about this state of affairs, both in the immediate aftermath of white supremacist invasions and more generally. The city is vulnerable in that it is subordinate to the state, which can and does limit the city's authority significantly.[58] The city is also vulnerable because it is subject to domination by private actors, which can and do imperil the city's safety, security, and economic stability. We treat cities as if they are exercising state power, but municipal corporations exercise significantly less power than do their private counterparts, as Gerald Frug argued more than twenty-five years ago.[59]

Nevertheless, we demand a great deal from the city—and from sub-state governments of all kinds. Local governments in the United States

[56] See id. at 47–48; Sines Complaint, supra note 5, at 20.

[57] John Domen, Charlottesville Citizens Vent, Criticize Leaders at Community Recovery Town Hall, WTOP (Aug. 28, 2017), https://perma.cc/6VA3-CN3X; see Hunton & Williams, supra note 20, at 4–8.

[58] Schragger, supra note 13.

[59] Frug, supra note 34, at 1065–66.

are charged with effectuating the "police power": regulating for the health, safety, and morals of the populace. Cities are asked to foster economic development, provide basic services, respond to environmental, public health and other crises, and adopt effective rules and regulations that are responsive to citizens' needs and desires. These broad responsibilities often come with limited capacity, as the legislature tends to be stingy in its grants of authority or regularly preempts local laws with which it disagrees.

In the case of Charlottesville, state laws limiting the ability of the city to regulate guns or remove controversial war memorials have hampered the city's efforts to respond to the white supremacist threat. At the same time, the absence of clear and unambiguous municipal rights—a right to local self-expression or a right to live without fear—means that the city cannot readily assert claims on its citizens' behalf when the state is unresponsive or when private actors threaten the city's well-being.

To be sure, the city's well-being is not a legal concept. The city is a jurisdiction, a government, and a state actor for purposes of constitutional doctrine. It is also a place with a history and a people, however. It is an association, a polity, and a community. The law could treat Charlottesville as a substantive rights-holder; it could recognize the existence of municipal powers derived from the locally-governed. That we have fallen into the habit of treating the city as a mere jurisdictional entity, subject to the whims of the state, is unnecessary. And it means that the next time the white supremacists come to town, the city will still not have the tools to defend itself.