



Bilyana Petkova\*

# Privacy and the City: How Data Shapes City Identities

<https://doi.org/10.1515/icl-2023-0027>

Received July 24, 2023; accepted November 20, 2023

**Abstract:** This article bridges comparative constitutional law with research inspired by city leadership and the opportunities that technology brings to the urban environment. It looks first to some of the causes of rapid urbanization and finds them in the pitfalls of antidiscrimination law in federations and quasi-federations such as the United States and the European Union. Short of achieving antidiscrimination based on nationality, the EU has experimented with data privacy as an identity clause that could bring social cohesion the same way purportedly freedom of speech has done in the US. In the City however, diversity replaces antidiscrimination, making cities attractive to migrants across various walks of life. The consequence for federalism is the obvious decline of top-down or vertical, state-based federalism and the rise of legal urbanism whereby cities establish loose networks of cooperation between themselves. These types of arrangements are not yet a threat to the State or the EU but might become such if cities are increasingly isolated from the political process (e.g., at the EU level) and lack legal means to assert themselves in court. City diversity and openness to different cultures in turn invites a connection to new technologies since unlike antidiscrimination that is usually strictly examined on a case-by-case level, diversity can be more readily computed. Finally, the article focuses on NYC and London initiatives to suggest a futuristic vision of city networks that instead of using social credit score like in China, deploy data trusts to populate their urban environments, shape city identities and exchange ideas for urban development.

**Keywords:** federalism; cities; data privacy; freedom of speech; data trusts

## 1 Introduction

*Such is the power, sometimes called malignant, sometimes benign, that Anastasia, the treacherous city, possesses; if for 8h a day you work as a cutter of agate, onyx, chrysoprase, your labour*

---

\*Corresponding author: Bilyana Petkova, Department of Law, Middlesex University London, London, UK, E-mail: B.Petkova@mdx.ac.uk

Open Access. © 2023 the author(s), published by De Gruyter. This work is licensed under the Creative Commons Attribution 4.0 International License.

*which gives form to desire takes from desire its form, and you believe you are enjoying Anastasia wholly when you are only its slave.*<sup>1</sup>

Will it be the people that make the place or the place that makes the people? For years, the topic of cities and urban life has occupied the attention of urban planners, sociologists and as of late – legal scholars. A crosscutting issue is the development of environmentally sustainable, livable and equitable cities that celebrate, not just accommodate diversity. With the advent of the digital revolution, technology is increasingly part and parcel of this conversation. This article is the first to focus on the interrelation of cities to technology through the prism of data privacy. In so doing, it unpacks the very notion of urban privacy or of privacy as an urban value. It further situates the ‘privacy in the city’ debate within broader policy and legal discussions on affording (larger) legal autonomy to cities under constitutional and international law. Cognizant of my own cultural limitations as a comparative US-EU legal scholar, I illustrate the theoretical and conceptual theses made in the article with examples mostly taken from the North American and European contexts with a focus on New York City and London. In that, I strive however to have the backbone argument of the article informed of global developments, including trends coming from China and echoed in the Middle East.

The urban is a fast-paced environment to live in and research about: in that vein, I am mostly concerned with teasing out an overall argument rather than with describing the latest regarding the legal and technological set-up of the controversial Toronto Quayside,<sup>2</sup> the Viennese Seestadt, the Middle Eastern project ‘Line’ or any other private or public-leaning ‘smart’ city project around the globe. Of course, I still rely on said examples with an eye for detail in order to flesh out my arguments. With that in mind, the article is an attempt to disentangle two main propositions that are as much about privacy and cities, as they are about federalism and non-discrimination. After all, to make sense of the reality we live in and provide socio-legal predictions for the future,<sup>3</sup> we need to be able to zoom in and out at the concentrated circles that are subject of this study – cities are about diversity and privacy because they are embedded in a larger thread on federalism and non-discrimination. In any event, the evident interdependence of the current world order facilitated by technology implies that to gain a better descriptive understanding and start charting a normative urban theory, one needs to look at how cities relate to

---

<sup>1</sup> Italo Calvino, *Invisible Cities* (Vintage Classics 1997) 10.

<sup>2</sup> Ira S. Rubinstein & Bilyana Petkova, ‘Governing Privacy in the Datafied City’ (2020) 47 *Fordham Urb. L. J.* 755. For present purposes, I adopt the comprehensive notion of privacy that has emerged from the case law of the two European supranational courts and of which anonymity is but one aspect.

<sup>3</sup> For Oliver W. Holmes Jr. when studying the law, ‘[t]he object of our study [...] is prediction’, reprinted in Oliver W. Holmes Jr., ‘The Path of the Law’ (1997) 110 *Harv. L. Rev.* 991.

their states, to international or regional organizations and to one another. Thus, Part I of the article introduces competitive visions of federalism.

## 2 From Non-Discrimination to Diversity and Vertical to Horizontal Federalism

In a legal sense, modern day city-states like Washington DC or Vienna as federal capitals are formally given certain special status in their respective federal constitutions implying either less or more autonomy from the federal unit depending on the federation's intent to empower the federal or give priority to one of its constitutive units. In a rather *ad hoc* manner, London has achieved about the same under British devolution. Conversely, New York, San Francisco, Seattle, Chicago, or Toronto – to name but a few examples, have *de facto* gained prominence given their economic power. Paris enjoys allure even in a legally unitary state like France.<sup>4</sup> The result is undoubtedly a growing urban-small-town-rural divide expressed not only in population terms but also in the very ethos that major urban centers propagate, ultimately finding more in common between each other than they due to their respective states. From fighting global climate change by limiting carbon dioxide emissions to regulating platforms of the sort of Airbnb and Uber, to serving as sanctuaries for refugees, big cities have come forward coordinating a response to common challenges.

Federalism, broadly understood as a principle of separation of powers and territorial decentralization both below and above the state has been an underlying mechanism of constitutionalism. With that, the first proposition I want to make in the article is that vertical federalism is somewhat in decline. Seemingly, top down or vertical power sharing within larger quasi-federated entities has lost its appeal (or at least momentum). This is so not only regarding the rise of city power within the state but also if we look at the elements of dissolution in power-sharing above the state. Recently in Europe, Brexit established a precedent shaking the constitutional foundations of the European Union, the supranational organization that has defined developments on the old continent for the past over 50 years. Scottish and Catalan separatism are easily inflammable too, showing the same trend of precariousness at the level of sovereign states that have vertical (quasi)-federated structure. Collective

---

<sup>4</sup> 'America is my country and Paris is my hometown', as the adage ascribed to Gertrud Stein goes. Richard Howard, NYTimes Book Review <<https://www.poetryfoundation.org/poets/gertrude-stein>> accessed 27 August 2023.

action problems such as health and environmental crises or disinformation campaigns might be co-existent to and sometimes ever replacing traditional military threats as the primordial *raison d'être* of international or national cooperation. But old and new collective action problems that arise in various guises are here to stay, and so is the search for viable federal solutions. The power vacuum that opens regarding vertical or top-down federative structure makes space for inter-city cooperation or horizontal federalism above the state.

Arguably, for many constitutional top-down or vertical federated entities, and certainly for the European Union, non-discrimination has been one likely candidate for budding constitutional identity and societal bond. Vertical constitutionalism-building is often premised on such a constitutional identity<sup>5</sup> or on a central tenet of the constitution that illuminates the rest of constitutional provisions and provides a socially unifying narrative for the context within which it is embedded. European law is built on the notion of non-discrimination based on nationality starting from the four freedoms as put into service for the sake of market liberalization (free movement of goods, services, people, and capital). Take the first freedom. With the seminal *Van Gend en Loos*<sup>6</sup> decision, the Court of Justice of the European Union famously departed from established international law as underpinned by state consent only to empower EU nationals to defend non-discrimination based on nationality against their own Member States. Non-discrimination between nationals of the EU Member States, varying as the number of said Member States might be, has also elevated the freedom of movement of people in the EU to a particular form of citizenship. Non-discrimination based on EU nationality stretches all the way up to a fundamental human right enshrined in the EU Charter of Fundamental Rights. Further, to foster linguistic diversity amongst its citizens but also in view of demonstrating the non-discrimination between EU member states and their citizens, the European institutions are expending year after year little fortunes for maintaining translation services in all of the current 24 official languages of the EU spoken in its 27 current member states. The post-war peace on the old continent, relatively high living standards, sophisticated institutional legal mechanisms, and a common currency did not however spare the EU from its continuous existential crisis culminating in the unprecedented departure from the project of a key Member State (the United Kingdom).

In Europe however, long before the EU, non-discrimination based on nationality for a counted if growing number of merchants was attempted for centuries through intercity trade agreements, with the Hanseatic League of Cities standing out. Perhaps

---

5 Gary G. Jacobsohn, *Constitutional Identity* (Harvard University Press 2010); Bilyana Petkova, 'Privacy as Europe's First Amendment' (2019) 25 Eur. L. J. 140.

6 Case C-26/62, *Van Gend & Loos v. Netherlands Inland Revenue Administration* [1963].

it should come as no surprise then that intercity trade was, and I argue, is still at the heart of European integration. Let's not forget that the EU foundational case – *Van Gend en Loos* – was a private company founded in Antwerp, the second biggest port in Europe. With the advent of the railway, it later relocated to Utrecht, the second biggest city in the Netherlands and headquarters to the Dutch railways at the time the case was brought before the European Court. Recent research shows that much like the pattern established with *Van Gend en Loos*, to this day the bulk of preliminary references – the instrument of European law through which usually national lower court judges allow EU nationals to claim non-discrimination rights based on the four freedoms under EU law, come from the EU's major urban hubs.

In the United States – perhaps the most powerful and influential in legal terms vertical federation for the past century – heterogeneity and race certainly played a role in flaring up a civil war. Ever since, the US Supreme Court in *Brown v. Board of Education*<sup>7</sup> and the executive – through what Bruce Ackerman calls Super Statutes<sup>8</sup> – have tried to desegregate American society and enforce non-discrimination based on race and with consecutive immigration waves, non-discrimination based on national traits more generally. The most famous footnote in American legal history – footnote four in *United States v. Caroline Products Co*<sup>9</sup> set the tone for non-discrimination protected by law, in the words of the Supreme Court, against 'discreet and insular' minorities. Freedom of movement of people between the federated states or the right to travel in the US has also been given constitutional status under American law, albeit one with tainted legacy in view of the *Slaughterhouse* cases.<sup>10</sup> The relative shortcomings of the US busing policies of the past all the way up to present day violent police confrontations lead us to believe that non-discrimination has not fared well in the American vertical federalism context. The pride and glory, but also engine of American prosperity remain a handful of urban powerhouses. As demonstrated at further length below, non-discrimination based on EU nationality has proven a hard nut to crack in the EU too. In many ways, with the help of the Court of Justice of the European Union (CJEU), the EU has abandoned its initial drive toward non-discrimination between the EU Member States as a leading factor in constitutional identity-building. I argue that freedom of speech (including self-censure) became the preferred sociological tool to deal with difference in the US whereas data privacy came to the fore in the EU.

Non-discrimination is perhaps not a particularly new and not necessarily a European or American concern only; and it is one that has not proven easy to handle

---

7 *Brown v. Board of Education*, [1954] 347 US 483.

8 Bruce Ackerman, *We the People, Volume 1: Foundations* (Harvard University Press 1993).

9 *United States v. Caroline Products Co*, [1938] 304 US 144.

10 *Slaughterhouse Cases*, [1872] 83 US 36.

well in socio-legal terms in other national contexts, federated or centralized. With violence against women and the Black Lives Matter movement (and the gay rights movement before) taking on increased importance worldwide, in colloquial parlance the term racism and its derivatives started having a wider purchase. The term now encompasses physical features, skin color, clothes worn, language, speech accent, body ornamentation, behavior, cultural mores, ethnicity, nationality, religion, class and caste, in fact virtually every aspect of life. Some see racism as inherent in human nature and such a capacious understanding of non-discrimination as risking to render the goal of over-discriminating too ambitious and perhaps even meaningless. It clearly goes out of scope for this article to trace and analyze such discussions. Importantly however, I argue that non-discrimination has failed where it has promised to achieve in legal terms on the level of vertical or top-down federalism be that in a state or a supranational organization, either through social protest escalating to the grant of legal protections to certain groups or through a more consensus-oriented negotiations. It suffices to say that perhaps if non-discrimination has failed where it has promised to achieve in law on the level of vertical or top-down federalism, there might be space opening for horizontal federalism to fill in the gap.

Cities and urban life offer an attractive alternative to non-discrimination, one that might go parallel or perhaps even compete with the top-down constitutional understanding of a federal unit and constitutive states. Can the free movement of goods, capital, services, and labour be organized along the lines of horizontal federalism with cosmopolitan or global cities serving as gatekeepers? And what if Benjamin Barber took the basic tenets of EU law and US federalism to write a second volume on 'How Should Mayors Rule the World'?<sup>11</sup> The potential for such horizontal federal reordering on a global scale is facilitated by technology as geographical proximity does still play a role but no longer such a decisive role as it used to. We witness capital investments versatile enough to move across borders on the internet, and the provision of services has now a digital component that rivals the physical. But what of non-discrimination? The project of post-war integration on the old continent started off with canvassing an economic union premised on the creation of a common market. Years after that, EU's motto became 'United in Diversity'. Throughout modernity, favouring diversity understood as openness to all kinds of people, across gender, race, nationality, and sexual orientation has however long been given an economic rationale outside of Europe too. Diversity does not equal non-discrimination in law but diversity is what magnetizes cities. As Sarah Schulman has it, 'the daily affirmation that people from other experiences are real makes

---

<sup>11</sup> Benjamin R. Barber, *If Mayors Ruled the World: Dysfunctional Nations, Rising Cities* (Yale University Press 2013).

innovative solutions and experiments possible. In this way, cities have historically provided acceptance, opportunity, and place to create ideas contributing to freedom'.<sup>12</sup> Short of a non-discrimination rationale, the promise of the big city is non-less substantial.

For a modern sociologist, Saskia Sassen, a world, or a global city is an urban agglomeration where 'the location of transnational firms' command functions and related activities play an important role in the global economic order'.<sup>13</sup> Trade is no doubt connected to the rise of Ancient Athens, then Rome, Florence of the Medici, not unlike in more recent times present-day London, New York, and Hong Kong. The emphasis on the concentration of financial capital as a defining feature of a cosmopolitan or global city has been challenged in the work of Richard Florida, another contemporary sociologist. Florida wrote the 'Rise of the Creative Class'<sup>14</sup> arguing that the key to urban success is managing to create a vibrant 'people climate' that attracts talented, highly skilled, diverse workers – what yet another famed urban sociologist, Jane Jacobs, calls human capital.<sup>15</sup> For Florida human capital rather than financial capital is both the defining feature of a global city and the decisive factor for its economic growth and social progress. On that account, luring big (tech) companies with tax breaks and/or other deregulatory mechanisms, a practice said to be persistent for big cities, is arguably not or no longer an effective public policy. Capital and human capital are certainly not mutually exclusive, but it seems like Richard Florida was up to something when he was writing back in the 70s about the emergence of a new social class of creatives and its importance to society. Fast forward to 2021 when within the framework of the Organization for Economic and Social Development (OECD) the introduction of a global minimum corporate tax rate that countries can use to protect their tax base signifies first steps are being taken to limit competition over corporate income tax.<sup>16</sup> In that regard, if in the past policies and to the extent possible – municipal law was oriented first and foremost toward attracting multinationals through tax concessions, it seems like the focus should be shifting now toward attracting talented and well-educated working force.

Legal academics have entered the fray of urbanism slightly later. Mindful of the sociological emphasis on the human element, in what is perhaps the most advanced

---

12 Sarah Schulman, *The Gentrification of The Mind: Witness to a Lost Imagination* (University of California Press 2012).

13 Saskia Sassen, *The Global City* (Princeton University Press 2001) 5.

14 Richard Florida, *The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community and Everyday Life* (New York: Basic Books 2003).

15 Jane Jacobs, *The Death and Life of Great American Cities* (New York: Vintage Books 1961) 59.

16 OECD Press Release, 130 Countries and jurisdictions join bold new framework for international tax reform, July 1, 2021 <[HTTPS://WWW.OECD.ORG/NEWSROOM/130-COUNTRIES-AND-JURISDICTIONS-JOIN-BOLEW-NEW-FRAMEWORK-FOR-INTERNATIONAL-TAX-REFORM.HTM](https://www.oecd.org/newsroom/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm)> accessed 28 August 2023.

legal account of urbanism to date, Richard Schragger is countering the conventional wisdom in US legal academia that cities are unable to have redistributive powers.<sup>17</sup> Especially on the cusp and during the Trump administration, in the US federal and state pre-emption of progressive legislation pedaled by large blue states or blue cities in red states was decried by scholars like Heather Gerken<sup>18</sup> and Richard Briffault.<sup>19</sup> Further, Ran Hirschl's insistence on constitutional recognition and prerogatives for cities on a global scale is premised on the changed demographics of large urban centers that are often left democratically underrepresented by law.<sup>20</sup> Another strand of policymakers and academics like Judith Resnik<sup>21</sup> in her early work and perhaps Nestor Davidson and Helmut Aust more recently, also see a potential for the international law recognition of cities – perhaps a step in the direction of horizontal federalism. Is a vision of constitutional recognition for the City consistent with counterbalancing the perceived decline or threat to vertical federalism? Next, I analyze the future of federalism in the context of global cities, putting into relief vertical and horizontal solutions as possible parallel or competitive models.

### 3 Federalism and Urbanism: Friends or Foes? The Role of the Judiciary

Is top-down federalism in decline? In previous work that this section summarizes and extensively compliments, I have theorized top-down or vertical federalism as a power-sharing mechanism within larger quasi-federated entities such as the European Union and in decentralized states like the United Kingdom, Spain, and Italy, showing that seemingly an essential element of constitutionalism – the federal – might have lost much of its appeal (or at least momentum).<sup>22</sup> I have juxtaposed this

---

17 Richard Schragger, *City Power: Urban Governance in a Global Age* (Oxford University Press 2016).

18 Heather K. Gerken, 'A New Progressive Federalism' (2012) 38 *Democracy*.

19 Richard Briffault et al., *Am. Constitution Soc'y for Law & Policy, The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond* (2017) 1, <[https://www.acslaw.org/wp-content/uploads/2017/09/ACS\\_Issue\\_Brief\\_-\\_Preemption\\_0.pdf](https://www.acslaw.org/wp-content/uploads/2017/09/ACS_Issue_Brief_-_Preemption_0.pdf)> accessed 28 August 2023 ('States have adopted statutes that threaten to withhold funding and expose cities to private liability in preemption conflicts as well as enacted laws that seek to impose personal civil penalties – and in some instances, even potential criminal liability – on mayors, city council members, police chiefs and other local officials who defy state legislation.').

20 Ran Hirschl, *City, State: Constitutionalism And The Megacity* (Oxford University Press 2020).

21 Judith Resnik et al., 'Ratifying Kyoto at the Local Level: Sovereignty, Federalism, and Translocal Organizations of Government Actors (TOGAs)' (2008) 50 *Ariz. L. Rev.* 709.

22 Bilyana Petkova, 'Federalism in 2030', in Christoph Bezemek (ed.), *Constitutionalism 2030* (Hart Publishing 2022); Bilyana Petkova, 'Privacy and the City: Toward Progressive Urban



trend with rapid urbanization and the establishing of loose cooperation networks among cities (legal urbanism). Here I add on new insights to my previous findings on federal power-sharing by relying on examples from the docket of the Israeli Supreme Court that are helpful in showing what could be the proper role of the judiciary regarding cities. Ultimately, the section demonstrates that top-down federalism faces a challenge by legal urbanism that can be best met by affording judicial recognition not to the states, but to the rising role of big urban centers. The judiciary could play a similarly federalist-friendly role of granting cities standing in the EU context.

The role of cosmopolitan cities in a federal or a local constellation of actors is rarely studied separately since from a constitutional standpoint, it falls in between the cracks of federalism and localism/regionalism. A new strand of legal scholarship, international in nature, has emerged to fill in the gap. Urban law scholarship<sup>23</sup> is rich on insights about cities' internal struggles about say, short-term rentals or the law of sidewalks.<sup>24</sup> If from a federal standpoint, the study of cities is seen to decry the lack of constitutional recognition for the city, the comparative study of cities' facing of similar problems by legal urbanists can be complimentary rather than rivalry. Empirical examples of cities' growing role as global actors demonstrate city networks in the shared economy, human rights, and the environment.<sup>25</sup> Such networks are however yet to develop horizontal legal mechanisms that go beyond soft law convergence and best practices. Federalism and legal urbanism are still friends, not foes, however, the current status quo seems fragile. Cities do not have what is known as active (to raise a claim in court) or passive legal standing (to be respondent in court) under EU law.<sup>26</sup> They can't participate in the proceedings as a third party (*amici curia*) either. Such is reserved to the Member States as constitutive units in the EU project. Likewise, cities are not involved in the so-called ordinary legislative procedure under EU law for which Member States participate in the Council on a par with the EU Parliament whenever the EU Commission suggests a piece of legislation within the remit of EU powers. Sidestepped from the EU political process and deprived of standing to recur to the European courts, cities have started coordinating common actions within and beyond the EU. Examples of city networks.

The crisis of federalism is embedded within a larger crisis – that of constitutionalism. On the one hand, constitutionalism as governance by people and rules is

---

Cosmopolitanism' in Erica Arban (ed.), *Cities in Federal Constitutional Theory* (Oxford University Press 2022).

<sup>23</sup> See 'Urban Law Center' (*Urban Law Center.org*) <<https://www.urbanlawcenter.org>> accessed 28 August 2023.

<sup>24</sup> Michael Polack, 'Sidewalk Government', *Mich. L. Rev.*, forthcoming.

<sup>25</sup> *Supra* (n 22), 'Federalism in 2030'.

<sup>26</sup> Fernanda Nicola, 'Invisible Cities in Europe' (2012) 35 *Fordham Intern. L. J.* examining earlier cases where cities could have been granted standing through a doctrinal change.

challenged by different visions of the algorithmic society, and the idea that technology rather than law should govern.<sup>27</sup> Parallel to that, within the larger public law debates for some time now constitutional lawyers on both sides of the Atlantic have been signaling the worrying trends of constitutional democracy's very decay. The experience of 'constitutional rot'<sup>28</sup> in the US in the face of former president Trump's challenge of democratic elections is compared to the rise of populism and the many crises of the rule of law in the European Union that enthusiastic academics did not hesitate to propel into an entire field.<sup>29</sup> And while attempts have been made to extrapolate from the United Kingdom's parliamentary sovereignty model to procure the end of rights-based constitutionalism<sup>30</sup> once and for all, other accounts describing the many facets of democratic dysfunction worldwide including but not limited to the European and the US context try to salvage what is arguably constitutionalism's backbone – judicial review.<sup>31</sup> Judicial review, to be sure, also in its US guise, has been taken as the culprit for a lot of the constitutional malaise. Discussions about institutional reform of the US Supreme Court have been underway. However, besides the perennial theoretical debate about the role of courts in a democracy going back to Bickel,<sup>32</sup> from a US perspective reforming the judiciary in the sense of scrapping life-long judicial tenures and possibly rethinking the appointment process is hardly one that goes as far as to part with courts altogether. Rosalind Dixon is adamant that:

... judicial implications will almost always be appropriate if they help respond to an urgent and systemic threat to the democratic minimum core; and may be legitimate as a response to risks of democratic blind spots and burdens of inertia, but only if they enjoy stronger legal(ist) support, or there is a risk of irreversible harm to individual rights.<sup>33</sup>

According to the theory of responsive judicial review that Dixon espouses, stripping cities of power through gerrymandering and redistricting in the U.S. could be seen as a frontal attack on the democratic core in as much as it effectively results in

---

27 For a primer on this debate, see Roger Brownsword, *Law's Imperfect Empire* (OUP, forthcoming).

28 Jack Balkin, 'Constitutional Crisis and Constitutional Rot' (2017) 77 Maryland L. Rev. 147.

29 For some valuable contributions to that debate, see Herwig Hofmann, 'Sealed, Stamped and Delivered: The Publication of the Polish Constitutional Court's Judgment on EU Law Primacy as Notification of Intent to Withdraw under Art. 50 TEU?' (*VerfBlog*, 13 October 2021) <<https://verfassungsblog.de/sealed-stamped-and-delivered/>> accessed 28 August 2023.

30 Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2022).

31 Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age*, (Oxford University Press 2023).

32 Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1962).

33 Rosalind Dixon, *supra* (n 31), at p. 64.

tempering with fair elections. Should Donald Trump stand as a candidate in the next US presidential elections, the issue will likely resurface. By the same token, in refusing to give federal constitutional recognition to cities in the American context and by denying cities any standing under European law, courts show irresponsiveness to the political burdens of inertia that at least in the EU law case could have been avoided by elevating cities in the European law-making process through consecutive treaty amendments.

A recent example of European cities acting together to gain court recognition is the joint open letter written by 10 cities and addressed to the Court of Justice of the European Union to express a desire to regulate housing and rentals at the local level. The 10 cities span a network beyond the European Union that included an Ukrainian city. Amsterdam, Barcelona, Berlin, Bordeaux, Brussels, Krakow, Munich, Paris, Valencia, and Vienna published the open letter as a joint press release. The context was a case before the CJEU where one of the questions was about whether Airbnb should have an obligation to disclose rental data to the local governments or not.<sup>34</sup> The cities jointly argued that they: ‘must protect the public interest and eliminate the adverse effects of short-term holiday rental in various ways. (...) Therefore (local) governments should have the possibility to introduce their own regulations depending on the local situation. For this, [the cities] need strong legal obligations for platforms to cooperate with [them] in registration schemes and in supplying rental data per house that is advertised on their platforms.’ As cities do not have a direct route to connect to EU law, the letter remained purely declaratory.

In many cases, urban autonomy becomes touchstone for non-discrimination,<sup>35</sup> especially since non-discrimination law on its own does not seem to be doing all the work of reconciling differences in heterogeneous societies. Two Israeli cases illustrate the point on the role of the judiciary in granting autonomy to cities and even neighborhood within cities. In the first, the primarily secular population of Tel Aviv asserted permission for businesses in the city to stay open on Sabbath (unlike in the rest of the country);<sup>36</sup> in the second, the highest court allowed predominantly Orthodox Jewish neighbourhoods within a city close to Jerusalem to impose religious-based pork-trading bans not in place throughout the whole city.<sup>37</sup> Further work needs to examine examples of legal reasoning when it comes to autonomy, non-discrimination, and doctrinal approaches to preemption/division of powers seeking to unravel whether and in which cases the grant of more autonomy to a city

---

<sup>34</sup> Case C-390/18 *Airbnb Ireland* ECLI:EU:C:2019:1112. See also Opinion of A. G. Szpunar ECLI:EU:C:2019:336.

<sup>35</sup> See *General Association of Merchants and Self-Employed Persons v. Minister of Interior* FH HCJ3660/17 [2017] and *Solodkin v. Beit Shemesh Municipality* [2004].

<sup>36</sup> *Ibid*, General Association.

<sup>37</sup> *Supra* (n 35), *Solodkin*.

counterintuitively strengthens federal (or central) power and under what circumstances it could undermine it.

It has been argued that next to autonomy rooted in historical and cultural factors, the principle of subsidiarity serves as a mechanism for democratic reconciliation of societal differences.<sup>38</sup> In the EU legal order, as a general principle of law subsidiarity serves democratic purposes. However, the way subsidiarity has been enshrined in positive EU law perpetuates the old dichotomy between European and Member State competences, leaving out from the constitutional construct cities – where most of the European population lives today. There is a certain power-sharing vacuum that opens because of the failure of vertical federalism to account for demographically robust cities. Such cities (and urban networks) grow in prominence on a global stage posing new challenges to constitutionalism and international law. If federalism and legal urbanism are to remain friends, courts ought to preserve the minimum democratic core by allowing cities legal standing.

## 4 Diversity

Why are cities in both Europe and the US so overflowing and why is the urban environment so attractive? What ‘discrimination’ means in the EU context is slightly different than what it means in the US context, and that is underscored by reference to EU cases on differential treatment across Member States, which has slight echoes in Dormant Commerce Clause and right to travel jurisprudence in the United States, but is very different from the heartland of 14th Amendment doctrine.<sup>39</sup> Be that as it may, the limits of anti-discrimination law I discuss in their respective contexts show the challenges of state-based federalism that lead to a turn to diversity found in cities. As Sandra Wachter and her co-authors show in passing, in Europe the contextual analysis on antidiscrimination cases that the CJEU has applied led to inconsistent case law.<sup>40</sup> More to the point, the Court has not ruled in favour of applicants seeking to show multi-sectional discrimination (when two or more traits are considered together) and has not allowed for nationality discrimination to be reviewed under the EU Racial Equality Directive. In the controlling case, *Maniero*,<sup>41</sup> the claimant

---

<sup>38</sup> Nick Barber, *The United Kingdom Constitution* (Oxford University Press 2021).

<sup>39</sup> I am grateful to my peer-reviewer for this clarification.

<sup>40</sup> Sandra Wachter, Brent Mittelstadt, and Chris Russell, ‘Why Fairness Cannot Be Automated: Bridging the Gap Between EU Non-Discrimination Law and AI’ (2021) 41 *Computer Law & Security Review* 105567.

<sup>41</sup> Case C-457/17, *Heiko Jonny Maniero v. Studienstiftung des deutschen Volkes e. V.*, [2018] ECLI:EU:C:2018:912.

unsuccessfully alleged indirect discrimination when his educational qualifications obtained in another EU country outside Germany were not considered equivalent for the application of a grant. Similarly, in *Jyske Finans*,<sup>42</sup> the Court did not agree with the challenge of a Danish law that had extra requirements for non-Danish Europeans to obtain loans in Denmark. The restrictive interpretation in these cases comes both as a deterrent to future applicants and at a stark contrast to the court's expansive interpretation in data privacy cases. In previous work I have discussed privacy and freedom of speech as identity-formation clauses in the EU and the US. Privacy and freedom of speech have become centerstage and what I call identity clauses, displacing non-discrimination.<sup>43</sup> Instead of coalescing around non-discrimination, heterogenous societies in the US and the EU have managed differences through such identity-formation clauses. Notwithstanding the lack of non-discrimination, cities' celebration of diversity makes them an alternative and a magnet for migrants across ethnicity, race, nationality, and gender. As Benjamin Barber noted:

...let cities, the most networked and interconnected of our political associations, defined above all by cooperation and pragmatism, by creativity and multi-culture, do what states cannot.<sup>44</sup>

Highly controlled, Chinese cities manage diversity by selecting its inhabitants based on social credit score schemes and subject city dwellers to surveillance based on a central city brain.<sup>45</sup> Such type of management is against basic notions of human rights and freedoms. Is another way of managing city diversity possible? New York has been a pioneer in materializing a different strand of diversity policies for its resident population. Recently, the city adopted a fist of its kind nationwide AI Bill that would allow for fair employment policies and sourcing a diverse workforce. The bill bans the use of AI technology for recruiting, hiring and promotion without first subjecting the technology to audit.<sup>46</sup> The law aims to avoid bias and is applicable to NYC residents. Pre-employment assessment tools are widely used and with the new legislation will be only available to employers that conduct bias audits. The Bill introduces a rather broad definition covering automated employment decision tools

---

42 Case C-668/15, *Jyske Finans A/S v. Ligebehandlingsnævnet, acting on behalf of Ismar Huskic*, [2017] ECR I-278.

43 *Supra* (n 5), Privacy as Europe's First Amendment.

44 *Supra* (n 11), at p 4.

45 Valentin Weber, 'China's smart cities and the future of geopolitics' <<https://lseideas.medium.com/chinas-smart-cities-and-the-future-of-geopolitics-fe883ea2110a>> accessed on 3 June 2023.

46 Roy Maurer, 'New York City to Require Bias Audits of AI-Type HR Technology' <<https://www.shrm.org/resourcesandtools/hr-topics/technology/pages/new-york-city-require-bias-audits-ai-hr-technology.aspx>> accessed on 3 June 2023.

as ‘any computational process, derived from machine learning, statistical modelling, data analytics, or artificial intelligence,’ that scores, classifies or otherwise makes a recommendation regarding candidates and is used to assist or replace an employer’s decision-making process. The technology will need to have been audited for bias no more than one year before its use and a summary of the audit’s results need to be made publicly available on the employer’s website. Employers that fail to comply may be subject to a fine of up to \$500 for a first violation and then penalized by fines between \$500 and \$1500 daily for each subsequent violation.<sup>47</sup> Job candidates are also given explanations about the workings of AI tools and employees may also request an ‘alternative process or accommodation’ instead of being assessed by the technology. The measure comes after years of discussions and deliberation, and after the adoption of privacy agreements for the public sector that the city eventually signed as citywide ordinances.<sup>48</sup> As discussed in the last section, in the future data trusts can be deployed to arrange for intercity employment mobility. Until then, NYC leadership on avoiding disparate impact and promoting diversity by putting in place accountability mechanisms for AI seems a clear example of city leadership *writ large*.

New York has also led the way in litigating against including a citizenship question in the national census. Along with other major US cities and several states, New York has been at the forefront of banning the introduction of the controversial citizenship question. Had New York and the other litigants lost and if the privacy of New Yorkers had gotten compromised, it could have aggravated the situation of the migrant populations of many New Yorkers. Therefore, the protracted litigation has had a symbolic significance and eventually scored a victory for New York that made sure the diversity of its inhabitants would not be restricted.<sup>49</sup>

Another area in which NYC tried to led by example on diversity is by giving the opportunity to New Yorkers to vote in local elections. Until 2021 only a handful of small towns have included migrants in their polities. In 2022 however, NYC announced the enfranchisement of resident migrants in local elections. However, the measure was quickly struck down in the state supreme court, revealing familiar tensions between NYC and the state of New York.<sup>50</sup> By giving the right to vote in local elections, cities ensure that their changing demographics are possibly reflected in city governance. Under European law, Europeans can stand for and elect local officials in all local elections beyond cities. Interestingly after Brexit, the UK preserved that right for resident migrants of London and other localities. The UK runs a policy that introduces

---

47 Ibid.

48 Supra (n 2).

49 Ibid.

50 Jeffery C. Mays, ‘New York City’s Noncitizen Voting Law Is Struck Down’ <<https://www.nytimes.com/2022/06/27/nyregion/noncitizen-voting-ruling-nyc.html>> accessed on 4 June 2023.

different rules for migrants that come from the Commonwealth and for EU citizens. Both categories of noncitizens are eligible to vote in local elections under certain conditions.<sup>51</sup>

Often however, the trope of ‘voting with your feet’ rings true for places like London and NYC. Both attract with job opportunities and high living standard. To that effect, London has been a primer for environmental policies that ensure quality of life. It established zero emission zones that subject motor vehicles to further restrictions beyond these already in force for low emission and ultra-low emissions zones throughout London. The hope is that the policies will radically improve air quality while encouraging the use of public transit next to walking and cycling. The goal is that by 2050 London will become a zero-carbon city.<sup>52</sup> Thus, low emission zones are charging zones across the central part of the city for vehicles that do not meet high emission standards. Ultra-low emission zones in turn are charging zones that establish a daily fee for vehicles that do not meet emission standards for air pollution. Finally, zero emission zones preview charges for vehicles that are not operating with zero pollutant exhaust. To meet the 2050 target, the Mayor’s goal is for all new taxis as of 2018 and all private hire vehicles as of 2023, as well as all buses from 2025 to be zero emissions. The vision of Sadiq Khan, the current mayor of London is meant to lead the way for other cities that could replicate London’s efforts internationally. According to the plan, London is divided into different zones.<sup>53</sup> Outside of the so-called central activity zone, car clubs are envisaged in lieu of private car parking. Similarly, in the central activity zone the aim is to enhance public transportation by opening new lines of the Tube, such as the recently opened Elizabeth line. Further, the Mayor of London anticipates supporting the boroughs that are supposed to develop their local plans for encouraging walking, cycling and the use of public transport. Through enhanced collaboration between the boroughs and the TfL, the Transport for London agency, London is to see so-called Healthy Routes, which may include cycle parking and 20 mile per hour limits.<sup>54</sup>

London’s pledge comes as the continuation of the climate summit in Paris when 400 mayors signed the Compact of Mayors committing cities to radically reduce greenhouse gas emissions and acting as a significant push toward the signing of the Paris Agreement between states. As Sheila Foster and Chiara Pappalardo write:

---

51 See ‘Local Voting Rights for EU citizens Living in the UK’ (*gov.uk*, 17 June 2021) <<https://www.gov.uk/government/publications/local-voting-rights-for-eu-citizens-living-in-the-uk/local-voting-rights-for-eu-citizens-living-in-the-uk>> accessed on 4 June 2023.

52 ‘Zero Emission Zones’ (*tfl.gov.uk*) <<https://tfl.gov.uk/info-for/boroughs-and-communities/zero-emission-zones>> accessed on 4 June 2023.

53 Greater London Authority ‘Mayor’s Transport Strategy’ <<https://www.london.gov.uk/sites/default/files/mayors-transport-strategy-2018.pdf>> accessed 4 June 2023.

54 Ibid.

Worldwide, cities are responsible for as much as 75 percent of greenhouse gas emissions. Residents of just 100 cities account for 20 percent of humanity's overall carbon footprint. In many countries, a small number of large and affluent cities drive a significant share of national emissions. This suggests that the concerted action by a small number of local mayors and governments has the potential to significantly reduce national carbon footprints.<sup>55</sup>

London's effort for environmental policies that would improve the quality of life of London residents but also hopefully inspire other cities should be read against this background.

## 5 Outlook for the Future: Urban Privacy

But what of data privacy? For Vint Cerf, the Google executive, 'It's the industrial revolution and the growth of urban concentrations that led to a sense of anonymity.'<sup>56</sup> What springs to mind for the privacy law scholar is that the very beginnings of the right to privacy cast as a 'right to be left alone' that Louis Brandeis and Samuel Warren defended in an influential law review article<sup>57</sup> as far back as the 19th century has been attacked as an elite value of the bourgeoisie. The bourgeoisie are those who live in the borough, the affluent middle class that was first confronted with the invasive technology of the day – then simply paparazzi's photo camera. In an anecdotal legal history sense then, concern for data privacy and the attempt to forge legal protections for it stems from the city. The second proposition that I explore throughout the article is that short of reaching (or overpromising) an ideal of non-discrimination, metropolitan and global cities flourish on diversity offering to professionals and the creative class a sense of refuge and liberation through privacy. Privacy does not mean lack of interaction, however, but in Helen Nissenbaum's understanding<sup>58</sup> it is the contextual flow of information and sharing practices. Privacy in the city allows an effort to manage the boundaries between people from different walks of life and the strangers they encounter in urban settings. It is perhaps this sense of urban privacy that converts the city into a veritable magnet. Online interaction is however already offering an internet version of the urban

---

55 Sheila Foster and Chiara Pappalardo, 'Local Initiatives' in Michael Gerrard, Jody Freeman, and Michael Burger (eds.), *Global Climate Change and US Law* (3rd edition American Bar Association 2023) p. 361.

56 Google's chief internet evangelist says "privacy may actually be an anomaly" *The Verge* (20 November 2013) <<https://www.theverge.com/2013/11/20/5125922/vint-cerf-google-internet-evangelist-says-privacy-may-be-anomaly>> accessed 28 August 2023.

57 Louis Brandeis & Samuel Warren, 'The Right to Privacy' (1890) 4 Harv. L. Rev. 193.

58 Helen Nissenbaum, 'Privacy as Contextual Integrity' (2004) 79 Wash. L. Rev. 119.



ethos with social media claiming the role of a public square<sup>59</sup> whereby short of scattered on the pavement scooters or shared bikes, the urban online agora has been centered on a marketplace of ideas. A lot of social protest and congregation moved online during the pandemic demonstrating that the exercise of the right to freedom of assembly is taking a new turn.<sup>60</sup> In the emerging legal landscape familiar from the physical world legal instruments are transposed to the digital one and vice-versa.

The rapid pace of urbanization and technological development makes the question on the future of our cities pertinent. Pre-pandemic figures show that cities are expected to reach 60 % of the world's population by 2030, and 68 % by 2050.<sup>61</sup> Whatever adjustment the numbers might need with the enhancement of online interaction during the Covid-19 crisis, urbanization is here to stay regardless of if people choose to remain in the city or bring along city ethos and investments to the countryside. Cities have traditionally attracted with high-paying jobs, cultural activities, improved services and generally, better lifestyle opportunities. But who is to enjoy city life? So far, designers and urban thinkers like Richard Sennett<sup>62</sup> have badly tried to connect, in Sennett's terminology – the *ville* with the *cit *, in other words the built environment to the civic fabric of a city, that is, its inhabitants. The idea that 'city' means 'two different things – one a physical place, the other a mentality compiled from perceptions, behaviors and beliefs' gets further complicated by the digital revolution. Non-legal urban thinkers like Sassen, Sennett and Jacobs are opposing the drive of large finance or construction land developers to standardize the *ville* with shopping malls, high-rise buildings, and gated communities. Law-makers on the local level will do well to heed the warning and respond with land law and zoning regulations that avoid the entrenchment of a monoculture. The standardized built environment is a sign of a closed city and conducive of such monoculture; it invites less and less organic interaction between communities and isolates the *ville* from the *cit *.

Datafication is now adding yet a third layer to the *ville-cit * dichotomy: that of urban intelligence. How does and how should the digital and the datafied city relate

---

59 Robert C. Post, 'Data Privacy and Dignitary Privacy: Google Spain, the Right To Be Forgotten, and the Construction of the Public Sphere' (2018) 67 Duke L. J., 981–1072.

60 Jessica Murray, 'Climate strikes continue online: "We want to keep the momentum going"' *The Guardian* (22 April 2020) <<https://www.theguardian.com/environment/2020/apr/22/climate-strikes-continue-online-we-want-to-keep-the-momentum-going>> accessed 1 September 2023. See also Emily Sherwin, 'Coronavirus in Russia: Anti-government protests go online' *DW* (27 April 2020), <<https://www.dw.com/en/coronavirus-in-russia-anti-government-protests-go-online/a-53257638>> accessed 1 September 2023.

61 UN Department of Economic and Social Affairs, 'World Urbanization Prospects: The 2018 Revision' (2019).

62 Richard Sennett, *Building and Dwelling: Ethics For The City* (Yale University Press 2018).

to the built *ville* and the lived *cit e*? For Dan Doctoroff, the chief executive of urban innovation firm Sidewalk Labs and former deputy mayor of New York City under the Bloomberg administration, the aim is no less but to ‘replicat[e] the digital experience in physical space’.<sup>63</sup> On this account, urban prediction analytics ranging from inferences about where people are coming from or going to can enable city administrators to experiment with and improve traffic flows whereas performance-based zoning algorithms that predict, say, noise or pollution levels could replace community or municipal decision-making on a residential building going commercial or the other way around. It means personalization in real time. Cities are said to have become testbeds or living labs for technologic experiments. Predictive analytics is also used in policing for the prevention of crime. Anti-discrimination law could play centerstage for the development of urban intelligence and maybe artificial intelligence beyond the city but at least in the first attempt for a comprehensive AI legislation<sup>64</sup> (in the US legal jargon – an omnibus bill), the EU has opted to model its proposed AI regulation on the European General Data Protection Regulation.<sup>65</sup> Although the two are certainly not exclusive, if anti-discrimination law is generally giving way to data protection law watered down on the ground to an endless documenting of data collection practices and providing explanations without real bite, does this mean that the ubiquitous collection of data about all aspects of city-living and the near-constant monitoring of public spaces now erodes the famed anonymity of urban life? In the US, is an interpretation of the Fourth Amendment capable of rendering protections beyond the home? Does the technopolis threaten the ‘marvel of balance’<sup>66</sup> between wanted and unwanted interaction with other people and government officials (especially local law enforcement), without which the diversity and tolerance of city life become untenable?

The technology that Cerf helped built has in his own words, made it ‘increasingly difficult for us to achieve privacy.’<sup>67</sup> Technology is used for city dwellers to be chosen based on their social credit score in China. But credit scores are also habitually generated in the US and the UK for a multitude of purposes ranging from mortgage to education loans. And tellingly, the GDPR, probably the most legally comprehensive privacy and data protection-oriented statutory framework worldwide confers rights

---

63 Dan Doctoroff cited in Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Public Affairs New York 2019).

64 Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM/2021/206 final, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>> accessed 1 September 2023.

65 See Council Regulation, 2016/679, 2016 O.J. (L 119) (EU).

66 Jane Jacobs, *supra* (n 15).

67 Vint Cerf, *supra* (n 56).

to ‘data subjects’ implying that data is the sovereign. If datafication is therefore an inevitable consequence of the digital revolution and the ultimate ruler to which we are all subjected,<sup>68</sup> and if urban privacy is perhaps acquiring a new set of meanings, what should be the legal institutes that protect and share personal and non-personal data between cities?

There inevitably will be a drive, and one that is not necessarily reprimandable, to ‘copy and paste’ in a modified version and adapted to local conditions, the perceived success of a neighborhood, a single building or maybe a set of buildings, a crossing, a bridge or a park from one city to another. Plans to transform the Oxford Circus Road junction in London into car-free piazzas with trees and street furniture for seating outside were recently announced by the Westminster City Council. The city council in central London is planning to create with this a ‘rival to Times Square’ but obviously taking Times Square as its model and a starting point.<sup>69</sup> There might be the same drive to ‘transfer’ or recreate the *cit *, that know-how or the very human capital that has made a given city prominent. Working jointly with the London-wide agency, Transport for London (TfL), the Hammersmith and Fulham Council employed leading engineers who have worked on the Golden Gate Bridge in California in order to renovate London’s Hammersmith Bridge – one of the city’s landmarks that was closed for pedestrians and cyclists during the pandemic and reopened again in July 2021.<sup>70</sup> In fact, perhaps one of the earliest and the greatest documented intercity knowledge transfers that exemplifies the link between *vill*e and *cit * – the Roman aqueduct – has reached not only cities but has gradually tricked down to smaller towns and villages alike. As the visitor reads on a plaque in the Museum of London, ‘The Romans knew that a clean body and fresh water made for better health. They encouraged the Britons to adopt the habit of bathing.’ Some experiments that unfold first in big urban centers are certainly not necessarily tied to the City alone and can have spillover effects beyond. For example, compulsory registration of land title originated in central London at the end of the 19th century but was later extended to the rest of the city and beyond, with the result being that by the end of the 20th century it gradually covered the whole country. One way of looking at the future of law and society in the digital age is to see cities as harbingers of the world to come. NYC and London become models for the way data privacy plays or should play out in cities built from the internet up vis- -vis cities like them that try to integrate technology into their centuries-old built environment.

<sup>68</sup> Frank Pasquale, *New Laws of Robotics*, Harvard University Press (Harvard University Press 2020).

<sup>69</sup> Lizzie Crook, ‘Transformation of the Oxford Circle into pedestrianised piazzas will “create a rival to Times Square”’ *Dezeen* (23 June 2021) <<https://www.dezeen.com/2021/06/23/oxford-circus-car-free-pedestrian-piazzas-competition/>> accessed 1 September 2023.

<sup>70</sup> ‘Hammersmith Bridge’ (*Hammersmith & Fulham*) <<https://www.lbhf.gov.uk/transport-and-roads/hammersmith-bridge-all-you-need-know-and-latest-updates>> accessed 28 August 2023.

The third layer, that of a datafied city, is essential for both scenarios. In the wake of different constitutional and statutory law frameworks that make international data transfers overly bureaucratic and burdensome, the potential of Urban Data Trusts (UDT) to connect cities comes to the fore.<sup>71</sup> Data trusts are intended to create a fiduciary relationship between a trustee and a beneficiary, such that the former is under a duty to act for the benefit of the latter according to the particular terms of the trust. The trustees are exercising independent judgment as to which uses uphold the interests of the trust beneficiaries. Compared to the rigidity of either private or public data controllers (to use again the terminology of the GDPR), data trusts are a flexible legal instrument that can thereby provide individuals with a range of choices that reflect their own values and needs. In the US, a few cities have proactively partnered with universities to develop trust-based infrastructures for managing sharing economy data in the public interest. Data flows play (or could play) a major part in improving the urban environment worldwide. Data trusts on an international scale could steward the exchange of personal data concerning credit score ratings that help secure housing to migrant populations; they could allow trade of know-how between cities that deal with congestion problems or the gentrification of neighborhoods; or decide on the exchange of aggregate data for limiting the spread of a pandemic in densely populated urban areas. While it might not be helpful to think of the right to privacy or intellectual property as property rights *stricto sensu*,<sup>72</sup> certain similarities with intellectual property rights in UDT design can nonetheless be derived, eg the value that a UDT trading with another UDT can extract from real-time data could be decreasing over time much like in copyright the rights of content creators decrease over time. As brokers of data rights, the UDTs can negotiate the terms and conditions of such deals.

Imagine the following fun thought experiment – real time mobility patterns including personal and non-personal data on and around London’s Hammersmith Bridge over a period of time are held on a trust. Said trust connects with a trust in a different city, possibly on a different continent, that in close cooperation with the local government there uses the data to build a digital twin or a predictive analytics model for a new bridge and the residential area around it in the far away city. As a result of the deal, for example, dwellers in and around Hammersmith benefit from free rowing and paddleboard lessons. The value of the Hammersmith’s bridge

---

71 Jack M. Balkin & Jonathan Zittrain, ‘A Grand Bargain to Make Tech Companies Trustworthy’ *Atlantic* (3 October 2016) <<https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346/>> accessed 1 September 2023; Sylvie Delacroix & Neil D. Lawrence, ‘Bottom-up Data Trusts: disturbing the ‘one size fits all’ approach to data governance’ (2019) 9 *Int. Data Priv. Law* 236.

72 Ben McFarlane & Simon Douglas, ‘Property, Analogy and Variety’ (2021) 42 *Oxford Journal of Legal Studies* 1.

mobility snapshot picture is however decreasing over time since the west London boroughs of Hammersmith and Fulham now decide to embrace new modes of transportation on the bridge such as e-scooters. The trust however makes the ‘dated’ data available as data commons that other cities, say, in the Global South can readily access when planning their own urban strategies.

One could legitimately pose the question: isn’t encouraging trade between cities through the medium of data trusts going to lead to standardization and commodification of the same type that Jane Jacobs and others were trying to avoid? I remain optimistic and answer with a resounding no. To begin with, the attempt to adapt to the local is prevalent. Ultimately bringing together the analysis on horizontal federalism to that of urban privacy, I maintain that data will shape novel city identities.

## 6 Conclusions

This article spans long research that is inspired by city leadership and the opportunities that technology brings to the urban environment. It looks first to some of the causes of rapid urbanization and finds them in the pitfalls of antidiscrimination law in federations and quasi-federations such as the United States and the European Union. Short of antidiscrimination, the EU has experimented with data privacy as an identity clause that can bring social cohesion the same way freedom of speech has done in the US. However, diversity has replaced antidiscrimination and is what makes cities that attractive to migrants across various walks of life. The consequences for federalism are obvious decline of top-down or vertical, state-based federalism and the rise of legal urbanism whereby cities establish loose networks of cooperation between themselves. These types of arrangements are not yet a threat to the State or the EU but might become such if cities are increasingly isolated from the political process and lack legal means to assert themselves. This is why I have argued for cities to gain legal standing before the European Court of Justice. In accordance with my own limitations as a researcher, the article focuses on NYC and London’s initiatives that demonstrate diversity leadership. Finally, I offer a futuristic vision of city networks that instead of using social credit score like in China, deploy data trusts to populate their environments, shape city identities and exchange ideas for urban development.