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# THE FUTURE IS URBAN: THE PROGRESSIVE RENAISSANCE OF THE CITY IN EU LAW

Maartje De Visser\*

**Abstract:** For much of the European integration process, local authorities have been on the legal margins. Yet many amongst this group, and cities in particular, consider themselves as important players in realising the Union's overarching policy objectives. This view is slowly but surely finding traction with the EU's political institutions. This article suggests that the future architecture of the European Union's (EU's) operating system will evince a rapprochement between the socio-economic clout of local authorities, notably cities, and their legal-political recognition at Union level. It further suggests that there is room for greater conceptual clarity along two lines when interrogating the future of the vertical axis of the Union's governance structure. First, the local tier should be disaggregated, with cities treated as a distinct subset of the category of subnational authorities that warrant attention in their own right. Second, the relationship between the EU and cities should be dissected further to develop a more fine-grained map of the possible ways in which both levels interact and the norms and incentives that shape those interactions. To this end, a six-fold taxonomy is developed that covers cities in their guise as (i) implementation agents; (ii) value communities; (iii) front-line decision-makers; (iv) democracy enhancers; (v) policy developers; and (vi) advocates of urban interests in EU decision-making. Finally, this article addresses the methodological implications of an urban turn in European legal scholarship.

**Keywords:** *local authorities; cities; implementation agents; value communities; local democracy; policy-making; urban interests*

## I. Introduction

In a 1991 study that undeniably belongs to the scholarly canon of European law, Joseph Weiler identified the dynamics that, he argued, had brought about a radical transformation in the relationship of the then-European Community to its Member States.<sup>1</sup> His analysis squarely centred on the *architectural* dimension of

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<sup>1</sup> Joseph Weiler, "The Transformation of Europe" (1991) 100 *Yale Law Journal* 2403.

this relationship, that is to say, the rules and norms that regulate how these two governance levels interact. In this context, Weiler remarked on several occasions that to think of the Member States as “monolithic entities”<sup>2</sup> would be “misleading in several ways — and increasingly so in an ever more complex Community”.<sup>3</sup> Indeed, the nation-state has been progressively deconstructed for the operation of the European Union’s (EU’s) institutional machinery. This has been most evident as regards the Member State institutions that partake in the horizontal distribution of competences: it is well known that judges, cabinet ministers and their bureaucracy and, more recently, parliamentarians concurrently discharge national as well as European mandates. Importantly, such “double hatting” is both legally recognised and a sociological reality, as the rich academic discourse regarding this phenomenon that spans the humanities and social sciences attests.

When it comes to the vertical anatomy of the Member States, however, the EU legal order is less developed. It was only in 1994 that a European body was set up to advance subnational interests at European level, viz., the Committee of Regions, which, as its name suggests, was primarily envisaged to cater to the needs of the regional echelon.<sup>4</sup> This tier has gradually received some degree of prominence and the Treaties for instance acknowledge regions as stakeholders in the pursuit of a European economic level-playing field.<sup>5</sup> The lowest level of national government, however, has long been on the legal margins. The general self-perception of local authorities is markedly different. Many amongst this group, and cities in particular, do not think of themselves as being on the fringe of either socio-economic life or political governance. On the contrary, their belief is that they are important in delivering the European policy agenda. This is in particular when it comes to initiatives geared towards creating a secure and sustainable living environment for individuals.<sup>6</sup> In this regard, Michèle Finck has spoken of the existence of an “insider narrative” that, as the choice of terminology suggests, is little known within European circles generally.<sup>7</sup>

This article suggests that the future architecture of the EU’s operating system will evince a rapprochement between the socio-economic clout of local authorities, more particularly cities, and their legal-political recognition at Union level, and that such a development is moreover long overdue. It further suggests that in interrogating the future of the vertical axis of the Union’s governance structure, there is room for greater conceptual clarity along two lines. First, the architectural dimension of the relationship between the EU and the subnational tier can be

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2 *Ibid.*, 2406.

3 *Ibid.*, 2430.

4 Article 13(4) of the Treaty on European Union (TEU) and arts.300, 305–307 of the Treaty on the Functioning of the European Union (TFEU).

5 Cf arts.39(2); 46(d); 91(2); 96(2); 107(3)(a) and the fifth paragraph of the preamble to the TFEU.

6 See eg the high-level panel FRA, “Panel Debate on the Role of Cities and Regions in Fundamental Rights”, organized by the EU Agency for Fundamental Rights on 11 April 2019.

7 Michèle Finck, *Subnational Authorities in EU Law* (Oxford University Press, 2017).

dissected further to develop a more fine-grained map of the ways in which both levels interact and the norms and incentives that shape those interactions. Second, the subnational tier itself should be disaggregated, particularly by distinguishing cities from regions and municipalities. These are accordingly the prime issues that this article seeks to explore.

Section II explains why cities deserve to be treated as a distinct subset of the category of subnational authorities that warrant attention in their own right and the meaning attributed to the term “city”. Against that backdrop, Section III addresses the place of cities within the European order, in law as well as in fact, at present as well as in the (near) future. A six-fold taxonomy is suggested, drawn up with reference to the views expressed in Court of Justice of the European Union (CJEU) case law and policy documents adopted by the Commission, European Parliament and cities themselves. Casting an eye to the future, Section IV considers the methodological implications of that taxonomy for legal scholarship that aims to investigate how cities conduct themselves as “European institutions” as well as for prescriptive studies that may recommend novel ways in which the Union legal order could capitalise on city power. It cautions that the tendency in EU law research to centre the analysis on case law is ill-suited for work on cities, since judgments only speak to some of the roles played by these subnational units. It instead advocates an alignment with the work done in allied scholarly fields like political science and social geography<sup>8</sup> that have, as of now, made greater strides in analysing the relations between cities and the Union, arguably precisely because they are unencumbered by the former’s circumscribed formal legal status. The conclusion briefly reflects on the value of integrating the city in the EU legal discourse.

## II. Cities as Special Species of Subnational Authorities

In thinking about the internal territorial structure of the Member States, the term “subnational authorities” is a useful functional moniker to denote all echelons and entities that wield some form of government authority below the central level. The Treaties propound a bifurcated approach towards such authorities, simply distinguishing between regions and local government.<sup>9</sup> The former have gradually emerged as the most prominent territorial units in Union law and policy. This in turn explains why much of the legal scholarship devoted to the subnational level

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8 See eg Carlo Panara and Michael R Varney (eds), *Local Government in Europe — The “Fourth Level” in the EU Multi-Layered System of Governance* (Routledge, 2015); Christian Schwab, Geert Bouckaert and Sabine Kuhlmann (eds), *The Future of Local Government in Europe — Lessons from Research and Practice in 31 Countries* (Nomos, 2017); Paul Knox and Steven Pinch, *Urban Social Geography — An Introduction* (Routledge, 6th ed., 2010); Saskia Sassen, “The Global City: Introducing a Concept” (2005) *XI Brown Journal of World Affairs* 27.

9 Article 4(2) of the TEU, art.5(3) of the TEU and art.300(3) of the TFEU.

privileges regions and related territorial entities.<sup>10</sup> This prioritisation is buttressed by the significant heterogeneity in the design and functioning of subnational authorities that is amplified when one moves from the regional to the local tier.<sup>11</sup> And yet, viewed through a forward-looking lens, there are good reasons to nurture more EU legal research that squarely focuses on local government, and more particularly the place of cities within the Union's multi-level structure. Europe's history is one in which cities have played a starring role: from the *polis* in ancient Greece where the first experiments with notions of democratic governance took place to the Italian port cities and their counterparts further north united in the Hanseatic League that devised elaborate transnational trading regimes in mediaeval times to Paris as the epicenter of the French Revolution that transformed the face of the continent.

In more contemporary times, rates of urbanisation have risen markedly. In 1950, before the plans for the European Coal and Steel Community were drawn up, the ratio of city dwellers and those residing in rural areas was more or less equal.<sup>12</sup> By the time that negotiations were underway for the Maastricht Treaty, the former outnumbered the latter. Today, Europe's urban population has grown to 360 million, who account for 74 per cent of the region's total number inhabitants. United Nations (UN) studies predict that this share will rise further still to reach almost 84 per cent by 2050.<sup>13</sup>

As the modern paradigm for human settlement, cities are presented with major governance opportunities as well as challenges. Cities are vital engines of economic growth and creators of jobs.<sup>14</sup> The cohabitation of large numbers of individuals in a relatively small area also allows cities to realise more energy-efficient modes of transport, service provision, housing and the like. On a related note, some have argued that the city administration is better equipped than the national government to address major global problems such as climate change or immigration.<sup>15</sup> The former's proximity to the population encourages the adoption of a pragmatic, problem-solving attitude, which amongst others manifests itself in a willingness to work transnationally with other city administrations facing similar issues. At the same time, the concentration of a country's inhabitants within cities means that these are the prime sites where social inequality is most pronounced, where the need to provide for individuals' basic needs seems most pressing, and where the effects of pollution are felt most keenly.

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10 Eg Stephen Weatherill and Ulf Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing, 2005); Finck, *Subnational Authorities in EU Law* (n.7).

11 By way of example, Portugal's local tier comprises parishes, municipalities and districts, while local government in Ireland is made up of county and city councils (and town councils before 2012). This level also includes cities that serve as national capitals, with concomitant status and influence, while cities in (quasi-)federalised states may enjoy a constitutionally guaranteed status as region or state.

12 UN DESA, *Growth of the World's Urban and Rural Population, 1920–2000* (New York, 1969).

13 UN DESA, *2019 Revision of World Population Prospects* (New York, 2019).

14 Commission, "Cities of Tomorrow — Challenges, Visions, Ways Forward" (Final Report) October 2011.

15 Most famously: Benjamin Barber, *If Mayors Ruled the World: Dysfunctional Nations, Rising Cities* (Yale University Press, 2013).

Since the entry into force of the Treaty of Lisbon, primary EU law recognises the importance of the local tier from both a subsidiarity (art.5 of the Treaty on European Union (TEU)) and national identity (art.4(2) of the TEU) perspective. While cities are not explicitly referenced, in the decade or so since then, the Union's political institutions have come to terms with the reality of a future in which the urban neither can nor should remain at the legal-political periphery. The high watermark to date has been the launch of an Urban Agenda for the EU in 2016 aimed at enhancing cities' ability to address many of the socio-economic issues just mentioned.<sup>16</sup> Where the Treaty provisions cast the local as deserving of protection from EU overreach, the Urban Agenda conceptualises cities as active participants in "a new form of multilevel and multi-stakeholder cooperation" in the design and delivery of the Union's objectives. International developments affirm the desirability of this conceptualisation. In particular, Goal 11 of the UN's Sustainable Developments Goals (SDG) commits countries to making cities "inclusive, safe, resilient and sustainable" by 2030. There is a host of Union measures to support the realisation of the corresponding SDG indicators within the EU Member States, including the availability of generous amounts of European funding for innovative sustainable urban development.<sup>17</sup>

Cities, then, matter. But what exactly counts as such, and who decides? There is presently no single definition that is accepted as valid across disciplinary domains or national contexts.<sup>18</sup> As a matter of state design, the determination of which territorial units qualify as a "city" comes within the constitutional autonomy of the Member States.<sup>19</sup> While the number of residents is a widely applied measure, the thresholds are not uniform across countries, and some also recognise a settlement's right to use the moniker on different grounds, such as the historical incident of having been granted a charter of city rights, which was often predicated on power rather than size. Legally speaking, the Union cannot insist that the varying national definitions are supplanted by a harmonised EU understanding. At the same time, this means that conducting cross-country analyses to measure or improve the functioning of cities in an internally coherent manner becomes a fraught exercise. As long as local government was viewed with benign indifference, this was not overly problematic. The policy shift in favour of cities has, however, necessitated a change in approach. At Union level, the Commission has taken the lead and, in collaboration with the OECD, fashioned a new methodology to disaggregate the local level into cities,

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16 EU Ministers responsible for Urban Matters, "Urban Agenda for the EU — Pact of Amsterdam" (30 May 2016). See also <[ec.europa.eu/futurium/en/node/1829](http://ec.europa.eu/futurium/en/node/1829)> (visited 31 July 2020).

17 See European Commission, "Goal 11. Make Cities and Human Settlements Inclusive, Safe, Resilient and Sustainable" <[ec.europa.eu/sustainable-development/goal11\\_en#eu-actions](http://ec.europa.eu/sustainable-development/goal11_en#eu-actions)> (visited 31 July 2020).

18 See eg John B Parr, "Spatial Definitions of the City: Four Perspectives" (2007) 44(2) *Urban Studies* 38; Sassen, "The Global City: Introducing a Concept" (n.8); Gerald E Frug, "The City as a Legal Concept" (1979) 93 *Harvard Law Review* 1057.

19 But note the European Charter of Local Self-Government of the Council of Europe, committing signatories to accord sufficient independence and autonomy to local authorities. For further detail, see Giovanni Boggero, *Constitutional Principles of Local Self-Government in Europe* (Brill, 2018).

towns and suburbs and rural areas.<sup>20</sup> The principal organising criterion is the degree of urbanisation, which is determined by a novel statistical technique: the entire national territory is carved up into cells of 1 km<sup>2</sup> after which the population density in each grid cell is assessed. Using this approach, a city is taken to denote a spatial area with a minimum population of 50,000 living within a contiguous set of grid cells that have a density of at least 1,500 inhabitants per km<sup>2</sup>. This definition, and those of other types of local authority, was aimed at facilitating data collection and evaluation. In 2017, the population-threshold-cum-density definition officially became part of secondary EU law when the European Parliament and Council amended the regulation establishing a common classification of territorial units for statistics, known as NUTS.<sup>21</sup> The amendment consisted of a subdivision of the lowest NUTS tier, with the distinction between cities, towns and suburbs, and rural areas — all defined as per the Commission’s methodology — becoming a recognised typology.<sup>22</sup>

A few observations are warranted about the EU’s city definition, which will also be applied in the remainder of this article. It helpfully goes beyond the traditional vectors of total population size or land area, which raise difficult questions about a city’s outer boundaries. The focus on density draws attention to the consequences that this condition produces, which in turn offer a more cogent justification than size alone for setting cities apart from other local authorities: the stark manifestation in cities of the socio-economic challenges and opportunities mentioned earlier. This reasoning tracks the well-established approach in social geography, according to which cities are seen as spaces embodying high economic complexity, high demographic diversity and high socio-economic impact precisely because of the agglomeration of a large number of individuals in a small area.<sup>23</sup>

Next, the city category has itself been subject to further segmentation, including by the protagonists. By way of example, membership of the EUROCITIES network is open only to “major metropolitan cities”, understood as referring to “an important regional centre with an international dimension, usually having a population of at least 250,000 inhabitants”. Relatedly, the term global or megacities is becoming popular,<sup>24</sup> especially in discussions on urbanisation trends in Africa and Asia. The EU definition would be able to accommodate internal partitions of the city

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20 See Lewis Dijkstra and Hugo Poelman, “Cities in Europe — The New OECD-EC Definition” [2013] *Regional Focus* 1.

21 Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the Establishment of a Common Classification of Territorial Units for Statistics (NUTS) [2003] OJ L154/1.

22 Regulation (EU) 2017/2391 of the European Parliament and of the Council of 12 December 2017 [2017] OJ L350/1. See also European Commission, Cities in Europe the New OECD-EC Definition <ec.europa.eu/eurostat/web/cities/spatial-units> (visited 31 July 2020).

23 Cf Richard Florida, *The Rise of the Creative Class* (Basic Books, 2002); Sassen, “The Global City: Introducing a Concept” (n.8).

24 See eg Xu Jiang and Anthony Yeh (eds), *Governance and Planning of Mega-City Regions: An International Comparative Perspective* (Routledge, 2010); Ran Hirschl, *City, State: Constitutionalism and the Megacity* (Oxford University Press, 2020).

category without much difficulty, simply by adjustments to the overall population and density thresholds. While possible, such a move is, however, unlikely. On the one hand, Union efforts to treat cities as being in a class of their own are still in their infancy and could be harmed by simultaneously carving up this newly identified (from an EU perspective) territorial grouping. On the other hand, the degree of internal variation among European cities is markedly smaller than that among cities in other parts of the world, thereby reducing the imperative to formally recognise different subclasses.

Finally, as we have seen, the articulation of a harmonised understanding of the city at EU level was primarily borne out of statistical needs. It was not envisaged as an autonomous concept with distinct legal value in the same way that the CJEU or European legislature has conceived of a “national court”<sup>25</sup> or “national data protection authority”.<sup>26</sup> However, the Commission in particular also uses the population-threshold-cum-density definition in policy documents related to the Urban Agenda that have a more prescriptive slant.<sup>27</sup> This is arguably unsurprising and likely to happen more frequently going forward. It is difficult to imagine how this Agenda, including relevant dimensions of the SDG, can be effectively operationalised without clarifying the meaning of “urban” and “city” and the Commission understandably feels comfortable with using the outcome of its prior concerted attempt at defining these notions in an objective and neutral fashion. One can surmise that the European legislature and CJEU may follow suit and align their understanding of “city” with the Commission’s definition when deliberating the role (to be) played by this subnational authority within the EU legal order.

In sum, this section has suggested that the city can be conceived as a distinct EU stakeholder at the local tier and that the term “city” is on its way to becoming a term of art within EU law, co-existing alongside yet de-coupled from national definitions of this spatial unit. The question is thus not whether cities will be part of the Union’s future, but how they may contribute to its evolution. That is accordingly the topic of the next section.

### III. Relations between Cities and the EU

This section proposes a six-fold taxonomy that captures the range of possible roles that cities play vis-à-vis the EU. These roles should not be seen as hermetically sealed: while their inner cores are distinct, the performance of one role can shape

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25 See eg Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] ECR I-4961, [23].

26 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data [2016] OJ L119/1, art.51-9.

27 Eg Commission and UN-Habitat, “The State of European Cities 2016 — Cities Leading the Way to a Better Future” (Staff Working Document, 2016).

or shade into another. This is a consequence of the article's aim to push for a more complete breakdown of the patterns of interaction between the EU and Europe's cities that is grounded in the empirical reality of city governance. To be clear, the taxonomy below should accordingly not be understood as permanent or exhaustive: the dynamism of cities means that new roles may emerge alongside or be carved out from those identified. Further, when it comes to the actual performance of a particular role, we should expect some internal heterogeneity due to differences in how the 27 national legal orders treat cities as well as variation in cities' economic, political and cultural clout, which are in turn partially determined by historical incidence. Finally, we should not lose sight of the fact that some of the roles better lend themselves, or even require, formalisation and legalisation, while the performance of others can be undergirded by looser, more policy-based arrangements.

### A. *Cities as implementation agents*

This is a conventional view of the EU city, according to which cities are thought of as the units responsible for the "last mile" in making EU rules a practical reality. The Union plays the part of principal that sets the rules, parameters and deliverables, while cities expected to play the part of trusted agents that must ultimately execute those policies and realise the desired objectives on a daily basis. Prominent examples of the domains in which cities perform this role include the four freedoms, the cohesion policy, the European structural and investment funds, social policy, and climate and energy instruments.

The obligations incumbent on cities as implementation agents find their ultimate legal basis in the Treaties themselves. Article 4(3) of the TEU imposes a duty of loyal cooperation on State authorities, which is stated to require a constructive and proactive attitude in "carrying out the tasks which flow from the Treaties". Even though this provision only mentions "the State" in abstract terms, as decentralised components thereof cities must be counted among the addressees.<sup>28</sup>

One of the earliest and most important judgments that speaks to the duties of cities is *Fratelli Costanzo*, handed down in 1989 (more than three decades after the then-European Economic Community (EEC) Treaty had entered into force!).<sup>29</sup> In this case the Court clarified that the obligation incumbent on national courts to give effect to EU law in the face of conflicting national law applies *mutatis mutandis* to "all organs of the administration, including decentralized authorities such as municipalities".<sup>30</sup> Cities, understood as per the Commission's more recent

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28 Cf Case 45/87 *Commission v Ireland (Dundalk)* [1988] ECR 4929, [12]; Case C-188/89 *A Foster v British Gas plc* [1990] ECR I-3313, [20].

29 Case 103/88 *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR I-1839, [31].

30 The Court of Justice of European Union (CJEU) was not asked, and accordingly did not offer, any reflections on the different types of subnational authorities, but simply referred to "municipalities" as this was the terminology used by the referring court in the preliminary reference.

definition, are clearly included: the CJEU's concern in *Costanzo* was to rope in all subnational entities with executive responsibilities at national level, regardless of their national designation or status, to amplify the *effet utile* of European law.

Following *Costanzo*, cities must ascertain whether national legislation is incompatible with Union law, duly taking into account any judgments by the Court. In the event of a clash, they must engage in EU-conform interpretation, failing which they must disregard that national legislation and apply the applicable directly effective provisions of Union law instead.<sup>31</sup> Failure to heed these legal commandments can result in the Commission bringing infringement proceedings against the State or entice individuals to initiate an action for state liability in the national court, which can order the city authorities to bear the costs attendant on their breach of Union law.<sup>32</sup>

When it comes to the day-to-day application of Union law, then, cities are treated in a fashion similar to national courts. An important difference, however, is that there is no procedure that cities can use to obtain guidance regarding the correct application and meaning of the Union rules that they must uphold, akin to art.267 of the Treaty on the Functioning of the European Union (TFEU) which enables national courts to certify such questions to the European Court of Justice.

It could be said that this case law and more broadly art.4(3) of the TEU that forges a bond of loyalty between the highest (ie the Union) and lowest (ie cities) tiers of governance. Even when the latter enjoy significant autonomy as a matter of domestic constitutional law, however, it is ultimately still the State as such that remains responsible for the proper observance of Union law. This is a vestige of the original monolithic conception of the Member State in European thinking, which has become increasingly fictionalised yet is unlikely to be revised for reasons of political sensitivity.

Of the six roles discussed in this section that of implementation agent is the only one played by every European city: whether a city performs any or all of the other roles will largely be dependent on its own willingness and suitability to do so.

### ***B. Cities as value-communities***

The second role takes as its starting point the city as the quintessential type of human settlement, providing the physical setting for daily encounters with a diverse mix of other people. This understanding ties in with modern ideas about the importance of social interaction and feelings of inclusiveness as instrumental to human well-being as well as for the creation of liveable communities.<sup>33</sup> Translated to an EU setting, the preamble to the TEU reminds us that the EU is envisaged to help realise an “ever closer union among the peoples of Europe” that is rooted in

31 See also Case C-224/97 *Erich Ciola v Land Vorarlberg* [1990] ECR I-2517, [29]–[34].

32 See Case C-243/09 *Günter Fuß v Stadt Halle* [2010] ECR I-12167, [61]; Case C-424/97 *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, [31]–[32].

33 Eg Melanie Davern et al, “How Do We Create Livable Cities?” (*The Conversation*, 7 December 2015).

a collective past and imbued with a shared set of values, the most fundamental of which are listed in art.2 of the TEU. In the pursuit thereof, cities are potentially attractive allies to disseminate awareness of and personal identification with the more emotive features of the European enterprise, above and beyond their use as implementation agents to realise the tangible benefits of an internal market. Over the years, several soft power initiatives have been rolled out that aim to do just that.

A classic example is the European Capitals of Culture programme that had its inaugural run in 1985 and seeks to cultivate a sense of belonging to a common cultural area which should foster mutual understanding and intercultural dialogue among Europe's citizens.<sup>34</sup> A 2010 stocktaking report found that this programme had made a positive impact, but not yet exhausted its "[enormous] potential as a tool for ... the development of a sense of European identity".<sup>35</sup> The evaluation criteria were subsequently sharpened and applicant cities must now demonstrate "the scope and quality of activities highlighting European integration and current European themes".<sup>36</sup> More recently, the European Parliament has proposed to instrumentalise cities to strengthen Union citizenship. Its 2018 resolution outlines several progressive initiatives, including having cities conduct "awareness-raising campaigns on EU citizens' rights".<sup>37</sup>

Taken together, this suggests that cities *qua* value communities not only promote European socio-cultural affinities, but may also contribute to actualising a European demos in more general terms. The successive crises that have beset Europe this decade (financial, humanitarian, rule of law and most recently public health-related) confirm the need for city-oriented policies geared towards a shared value base, while at the same time raising serious questions about the impact thereof in a climate low on trust and transnational solidarity.<sup>38</sup>

### C. *Cities as front-line decision-makers*

As part of the lowest government tier, cities may take decisions that trigger questions about the scope and meaning of EU law that culminate in judicial proceedings before the CJEU. This happens typically in situations that cities believe (should) fall outside the scope of EU law or where the application of EU law is deemed to produce unintended consequences. When acting in this capacity, cities actively

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34 Decision 445/2014/EU of the European Parliament and of the Council of 16 April 2014 Establishing a Union Action for the European Capitals of Culture for the Years 2020 to 2033 (as amended) [2014] OJ L132/1, art.2(1)(a) and recital 6.

35 Commission, "European Capitals of Culture: The Road to Success — From 1985 to 2010" (Office for Official Publications of the EC, 2009) p.4.

36 Decision 445/2014/EU, art.5(2)(b)–5(2)(d).

37 European Parliament, "Role of Cities in the Institutional Framework of the Union" (2017/2037(INI)) para.23.

38 Cf Adrienne Yong's contribution to this Special Issue, "The Future of EU Citizenship during the Crisis: Is There a Role for Fundamental Rights Protection?"

partake in answering novel questions of EU law or push back to protect their power to govern, with the CJEU as their principal interlocutor.<sup>39</sup>

As Finck has observed, because the Court is willing to adjudicate the compatibility of rules created by subnational authorities like cities, such rules “have the same potential as those of a Member State to influence the substantive development of EU law”.<sup>40</sup> How this happens can be neatly seen in the well-known *Omega* case: the German city of Bonn had decided to prohibit laser tag games on the ground that these were an affront to human dignity, in the absence of regional or national legislation regulating this matter. A local gaming hall consequently found itself impaired from accepting delivery of new laser tag game equipment from a British supplier. In a celebrated ruling, the CJEU held that protection of national constitutional rights could justify restrictions of the fundamental market freedoms.<sup>41</sup> By virtue of the *erga omnes* effect of the Court’s judgments, the policy decision by one European city could thus shape EU law for the benefit of all Member States and their subnational authorities.

To be clear, however, when cities’ promulgation of local norms brushes up against the demands of EU law, as established by the Court, the outcome is not always to the former’s liking. A relatively recent example is offered by a joint open letter by ten European cities in the wake of an Opinion by the Advocate General (AG) suggesting that Airbnb should be seen as a digital information provider that could accordingly rely on the Treaty-derived freedom to provide services across the Union, with the implication that it would be largely exempted from complying with local rules regarding the renting out of properties. The signatory cities contended that such a finding disregarded the importance of leaving front-line decision-making power with them: “We think that cities are best placed to understand their residents’ needs. They have always been allowed to organize local activities through urban planning or housing measures. The AG seems to imply that this will no longer be possible in the future when it comes to Internet giants.”<sup>42</sup> This vocal riposte evinces glocalism in action, with notably larger cities willing to stand up for themselves in the face of powerful European economic imperatives. Be that as it may, their view ultimately did not prevail, as the Court instead followed the reasoning suggested by its AG.<sup>43</sup>

The CJEU’s ability to effectively overrule city policies considered to be at odds with the demands of European law and the adversarial setting in which such

39 Eg Case 29/69 *Erich Stauder v City of Ulm* [1969] ECR 419; Case 293/83 *Françoise Gravier v City of Liège* [1985] ECR 593; Case C-137/09 *Marc Michel Josemans v Burgemeester van Maastricht* [2010] ECR I-13019; Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECR I-7213.

40 Finck, *Subnational Authorities in EU Law* (n.7) 114.

41 Case C-36/02 *Omega Spielhallen und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

42 Press Release, “Cities Alarmed about European Protection of Holiday Rentals” (20 June 2019) <[www.amsterdam.nl/bestuur-organisatie/college/wethouder/laurensivens/persberichten/press-release-cities-alarmed-about/](http://www.amsterdam.nl/bestuur-organisatie/college/wethouder/laurensivens/persberichten/press-release-cities-alarmed-about/)> (visited 31 July 2020).

43 Case C-390/18 *Criminal proceedings against X (Airbnb Ireland)* ECLI:EU:C:2019:1112.

matters are resolved mean that interactions pursuant to this role are infused with more conflictual elements as compared to the other roles. This also makes the front-line decision-making role qualitatively different from that of implementation agent, which sees cities working dutifully to give effect to European legislation and case law in run-of-the-mill-type situations.

It should be noted that the framework governing proceedings in Luxembourg does not provide cities with a right to make direct written or oral representations. This is done by the government agent of the Member State in question, who may lack the knowledge or incentive to put up the strongest defense of the city policy under review.<sup>44</sup> This explains the recourse to an open letter in the Airbnb matter as well as concerted efforts among cities to organise themselves to make their voice heard during EU policy and law-making processes, as detailed in subsection F.

#### D. *Cities as democracy-enhancers*

Cities are also spaces where democratic practices take shape and where the distance between public power and citizens is meaningfully shorter than for higher levels of government, opening up the prospect of greater civic engagement. City squares, plazas and streets are places where individual and social expressions manifest themselves. In recognition thereof, political sociologists,<sup>45</sup> international policy-makers<sup>46</sup> and cities themselves<sup>47</sup> have begun to speak of a presumptive “right to the city” that aims to create political agency for city inhabitants, including in pursuit of a spatially just distribution of resources. This ties in with contemporary calls to move beyond representative forms of democracy, and the concomitant belief that cities are particularly well-suited to deliver a more inclusive and participatory democratic experience for citizens.<sup>48</sup> In an early contribution to this debate, Frug has spoken of the important “public freedom” that is realised when individuals can partake in “the basic societal decisions that structure their lives” as an argument to strengthen cities’ political and legal clout.<sup>49</sup>

Within the EU, there are signs that evince this view of cities as favoured repositories of democracy to be tapped into to alleviate the Union’s much maligned democratic deficit. Since the Treaty of Maastricht, EU citizens residing in a Member

44 In “Invisible Cities in Europe” (2017) 35 *Fordham International Law Journal* 1282, Fernanda Nicola further argues that the CJEU should address how its rulings impact on the distribution of competences and resources between the central level and cities in.

45 Originally coined by French philosopher Henri Lefebvre in his *Le Droit à la ville* (Anthropos, 1968), revived and adapted by David Harvey in his “The Right to the City” (2003) 27 *International Journal of Urban and Regional Research* 939.

46 See notably UN Habitat III, “Policy Paper I — The Right to the City and Cities for All” (2017) UN Doc A/CONF.226/PC.3/14.

47 United Cities and Local Governments, “Global Charter — Agenda for Human Rights in the City” (2012).

48 Eg Clive Barnett, “What Do Cities Have to Do with Democracy?” (2014) 38 *International Journal of Urban Regional Research* 1625.

49 Frug, “The City as a Legal Concept” (n.18).

State other than their own enjoy the rights to stand and vote in local elections.<sup>50</sup> In practice, these often are elections for city administrations, given prevailing urbanisation rates in Europe. Beyond the ballot box, several European citizens' initiatives have been developed through cooperation among cities in different Member States.<sup>51</sup> Among the European institutions, the Parliament has explicitly endorsed a role for cities as "potential fora for public debate" with legitimising potential for the Union's multi-level governance system.<sup>52</sup> To better equip cities for this role, it has proposed the appointment of special councilors for European affairs tasked with organising regular discussions during which city dwellers can provide input on EU affairs, including ideas regarding "the future of the Union".<sup>53</sup>

While the Commission has so far declined to endorse this recommendation, its reasoning reveals implicit support for the underlying idea of cities as conduits for popular input into EU-level decision-making. It pointed to the Urban Agenda as already providing a platform for cities to shape EU policy,<sup>54</sup> implicitly assuming that cities will conduct their own participatory processes in anticipation of doing so. This may, but need not be the case. In any event, the modern fixation with creating spaces for civic participation, also in established national democracies, suggests that the EU would do well to cultivate its relationship with cities qua democracy-boosters going forward.

### *E. Cities as policy developers*

This role is the reverse of that of implementation agent. When acting as policy developers, cities are at the vanguard, taking the initiative in formulating desired strategic objectives or designing implementation schemes. For the most part, cities have done so to further social justice writ large. An early example that pre-dates the start of European integration is the town-twinning programme, conceived shortly after World War II by mayors to foster friendship and mutual understanding between towns that had been divided by the armed conflict. At the behest of the European Parliament, the then EEC financially endorsed this programme in 1989 and today, the Commission's Education and Culture Directorate-General has an annual budget of almost six million Euro to assist in the delivery of town-twinning actions.<sup>55</sup>

More contemporaneously, the Urban Agenda and other Union measures geared towards delivering the UN's sustainable cities goal incorporate policy

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50 Article 20(2)(b) of the TFEU.

51 See art.11(4) of the TEU, art.24(2) of the TFEU and Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European Citizens' Initiative [2019] OJ L130/55.

52 European Parliament, "Role of Cities in the Institutional Framework of the Union" (n.37) para.24.

53 *Ibid.*, para.25.

54 Commission, "Follow up to the European Parliament non-legislative resolution of 3 July on the role of cities in the institutional framework of the Union" (2018) 4.

55 The legal basis is provided by Council Regulation (EU) No 390/2014 of 14 April 2014 Establishing the "Europe for Citizens" Programme for the Period 2014–2020 [2014] OJ L115/3, art.3(2)(a).

innovation at city level in their regulatory toolbox. This is best manifested in the Urban Innovations Actions plan through which cities can secure financial and other resources to trial-run creative solutions to address the principal urban challenges.<sup>56</sup>

Paraphrasing Justice Brandeis' famous observation, cities *qua* policy-makers self-consciously choose to behave as laboratories that can "try novel social and economic experiments without risk to the rest of the [Union]".<sup>57</sup> A corollary is that city-EU interactions only account for part of the behaviours captured by this role. On the one hand, the sequencing means that the EU is not involved in the initial stage of policy formation. On the other hand, there is no expectation that every single city initiative is embraced by the EU and migrated to the Union level. In fact, an equally if not more dominant type of relationship associated with the policy-development role is that *among* cities in different countries. This is manifested most clearly in the mushrooming of networks of local authorities that claim agenda-setting power. Prominent examples include the Council of European Municipalities and Regions (CEMR), Eurocities and ICLEI — Local Governments for Sustainability.

While the policy-making role of cities is pre-legal in important respects, it merits inclusion in legal scholarship. First, doing so helps one better understand the rationale of those EU policies that have their origins in city-led initiatives and the dynamics that influence their evolution. To return to the town-twinning example: even after the Union stepped in, cities (through CERM) continue to play a part in shaping the content of the relevant European legal instruments, with the Commission asking for their feedback on the objectives and award criteria for its twinning grants. Relatedly, through these and other grants, the Union is contributing to the financial emancipation of cities from the national government.<sup>58</sup> This may invite reflections on the design of vertical power-sharing arrangements in the various domestic constitutional orders as a result of this economic Europeanisation. Second, cities' participation in policy networks can shape the performance of their other roles that are more firmly embedded in EU law. Such networks offer fora for cities to exchange views on how European rules should be understood and applied, which could improve their performance as implementation agents or provide the impetus for soft resistance. European city networks also provide a convenient platform to set policy preferences to advance an urban agenda during the EU's decision-making process, which brings us to the final role.

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56 UIA, "Identify and Test Innovative Solutions for Sustainable Urban Development" <[www.uia-initiative.eu/en](http://www.uia-initiative.eu/en)> (visited 31 July 2020). The legal basis is provided by Regulation (EU) No 1301/2013 of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund [2013] OJ L347/289, art.8.

57 *New State Ice Co v Liebmann*, 285 US 262 (1932).

58 Cf Nico van der Heiden, "A Multi-Level Governance Analysis of Urban Foreign Policy: The Role of the EU in City-to-City Cooperation" in H Reynaert, K Steyvers and E van Bever (eds), *The Road to Europe: Main Street or Backward Alley for Local Governments in Europe?* (Vanden Broele, 2011).

### ***F. Cities as advocates of urban interests in EU decision-making***

Cities can finally aim to shape the formation of European legislation and policies from within through participation in the official decision-making process.<sup>59</sup> When doing so, their interlocutors are the Union's lawmaking institutions and in particular the Commission given its role in initiating and drafting proposals for new EU laws. While cities can also shape Union substantive law through the adoption of local norms that may subsequently be judicially sanctioned validated as detailed under C, this tends to be *ad hoc*, more reactive and often the result of unilateral action by a single city. In contrast, in their capacity as advocates for urban interests, cities act proactively and in concert, while the overt policy-making context means that they are only one among many stakeholders involved.

Cities have long sought to advance their interests during EU decision-making processes. They first did so through their own networks. CEMR, mentioned above, is a prominent example. Created in 1951, it is the oldest and broadest grouping of local governments, with more than 100,000 members from across Europe. Its principal aim is to “influence European legislation, in particular by ensuring the consultation of local and regional authorities”.<sup>60</sup> EUROCITIES is a more recent example. Founded in 1986, it brings together Europe's larger cities with a view to improving the application of the subsidiarity principle by “shap[ing] the opinions of Brussels stakeholders and ultimately shift the focus of EU legislation in a way which allows city governments to tackle strategic challenges at local level”.<sup>61</sup>

The European political institutions, for their part, have become more serious about the need to consult cities in the lead-up to the exercise of their legislative competences. In the early 1990s, the Committee of the Regions was created to represent the subnational level in its entirety, with its composition drawn from “regional and local bodies”.<sup>62</sup> Treaty revisions have progressively expanded the fields in which it has a right to be consulted. With the adoption of the 2016 Urban Agenda, the role of cities as advocates has become more institutionally embedded. It aims to systematically involve cities in the review of existing and design of new policies with an urban dimension.<sup>63</sup> This is done through partnering city networks, online feedback portals targeted at cities and a biennial “Cities Forum”.<sup>64</sup>

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59 On this role see also Josephine van Zeben, “Local Governments as Subjects and Objects of EU Law: Legitimate Limits?” in Samo Bardutzky and Elaine Fahey (eds), *Framing the Subjects and Objects of Contemporary EU Law* (Edward Elgar, 2017); Weatherill and Bernitz, *The Role of Regions and Sub-National Actors in Europe* (n.10).

60 Cf CEMR Statute, art.3(1)(d) and 3(2).

61 “About” section on its website.

62 Article 300(3) of the TFEU (emphasis added).

63 EU Ministers responsible for Urban Matters, “Urban Agenda for the EU — Pact of Amsterdam” (n.16) para.5.1.

64 For a full overview, see <[ec.europa.eu/regional\\_policy/en/conferences/cities\\_forum\\_pt/](http://ec.europa.eu/regional_policy/en/conferences/cities_forum_pt/)> (visited 31 July 2020).

From the Union's perspective, including salient urban experiences early in the policymaking process means a stronger empirical basis for new rules. It should also improve the correct implementation of new EU norms by generating awareness about their existence and content among those responsible for executing much of it. From the perspective of cities, successfully championing their needs should buttress the ease and willingness with which they play their part as implementation agents.

At present, the Union-steered engagement with cities in the policy process is still a work in progress, in part due to this being a relatively recent development. In an early stock-taking report on the implementation of the Urban Agenda, the Commission noted that "many cities have demonstrated their ability to contribute in a meaningful way to EU policy-making", but acknowledged that "not all cities can invest time and resources" in this regard and that it would need to expend further efforts to "raise awareness and foster engagement of cities".<sup>65</sup> The Commission's willingness to do so, taken together with the work of transnational city networks to make the urban voice heard, are strong indicators that the advocacy role should come into its own in the years ahead.

#### IV. Integrating the Urban into the EU Legal Discourse

This penultimate section addresses the design of legal inquiries into the manifold capacities in which cities, as a distinct subset of the local governance tier, encounter EU law and engage the Union institutions. Due to space constraints, this methodological discussion is pegged at the level of the principles and parameters that should be considered to arrive at a solid understanding of the city's future within the Union legal sphere.

##### A. *Selecting relevant legal sources: beyond court-centricity*

When it comes to selecting the sources of law to examine the role of cities in the European legal space, three guiding principles should be observed. These are formulated with due regard to the actors that have so far taken the lead in shaping the city-EU relationship, viz., the Union's political institutions and cities themselves, acting unilaterally or through associations.

Scholars in EU law have long been fixated on the CJEU and how its case law has driven European integration. Although there are pertinent judgments that speak to or otherwise illustrate the position occupied by cities within the EU legal order, it is clear that these cover only part of what cities can or should do. With reference to the taxonomy in Section III, case law will be useful when cities act as implementation agents or front-line decision-makers, but unlikely to yield much insight, if any,

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<sup>65</sup> Commission, "Report on the Urban Agenda for the EU" COM (2017) 657, Final 5.

into when and how they act in any of the other capacities. Even for the two roles just mentioned, one will come away with a partial understanding of the Union-city architecture due to the reactive nature of litigation. A fuller account requires a careful examination of pertinent legislative instruments. By way of example, the EU's backing of town-twinning is provided in a Regulation establishing a "Europe for Citizens" programme<sup>66</sup> and the process governing the selection and deliverables of the Capitals of Culture can be found in a Decision of the European Parliament and Council.<sup>67</sup> The first guideline, then, is to move away from court-centric approaches to ones focused on the work done by the Union's lawmaking institutions. Non-judicial texts offer the richest source material for the study of the developing European mandate of cities and should be duly recognised as such.

The second guideline is both an extension and a qualification of the first: many of the instruments adopted by Europe's political institutions have a soft law character, which means that one should systematically look beyond regulations, directives and decisions when studying cities. The vibrancy of soft law as regards the Union-city relationship is due to the EU's inchoate recognition of the city as regulatory partner and the scope of its competences. Notably when behaving as value communities or devising new initiatives, cities tend to operate in areas in which the Union can only act in a supportive or coordinating capacity.<sup>68</sup> This makes the adoption of non-binding instruments all but inevitable. In addition, we have seen that cities have progressively organised themselves into sophisticated networks that are increasingly active across several of the roles, especially the development of new policies and promotion of local interests during EU decision-making processes. The framework governing the functioning of these networks and their output all have a soft law character as well, thus confirming the central position that this type of norm should occupy in city-EU inquiries.

The third guideline is a comprehensive understanding of the position that cities occupy or may eventually take on within the Union legal order requires that national law is examined alongside European sources. Member States all have their own approaches to the organisation of local government that must be carefully studied, as the legal, economic and human capacity available to cities primarily remains largely a matter for national law. The materials to be canvassed in this regard range from the constitution to statutes to ministerial guidelines. Attention to these sources will help scholars make reasonable claims about why and how certain cities excel in the performance of the roles identified earlier and why others lag behind. This holds true especially for those roles that assume space for independent thinking and manoeuvre on the part of cities, including in areas where the EU has not (yet) supplanted national lawmaking powers.

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66 Council Regulation (EU) No 390/2014 (n.55).

67 Decision 445/2014/EU (n.36).

68 Cf art.6 of the TFEU.

### ***B. Modes of inquiry: embracing methodological inclusivity***

For mainstream scholars of EU law, the core aims to be pursued in studying cities should be to first, advance our understanding of the clout that cities possess vis-à-vis their legal superiors (both the nation-state and the EU) and their inhabitants; and second, to reflect on whether and how city power could be harnessed for the good of the Union's bedrock objectives as set out in art.2 of the TEU. Explorations along these lines are most likely to generate useful insights when a bottom-up approach is adopted. Taking Europe's cities as the point of departure better corresponds to the actual way in which their relationship with EU institutions is unfolding. Doing so will also naturally induce us to connect the insider narrative of cities as meaningful stakeholders in their own right with the orthodox account in which cities are simply subsumed within the otherwise insipid category of subnational authorities. It is equally important to take an empirically oriented approach that duly considers the varied lived experiences across Europe's cities. The uniform city definition propounded by the Commission should not blind us to the internal heterogeneity that exists within this class. This reality cautions against the suitability of using a single city as a simple proxy to figure out how the relationship between cities and the EU is configured, identify challenges or uncover good practices worthy of emulation or upscaling. In a related vein, the need for empiricism is confirmed by the dynamism that characterises the roles performed by cities, which is particularly evident when they act as policy developers or advocates of the local interest. As we have seen, these moreover are the roles that are becoming increasingly important.

Related to this is the value of moving beyond lego-centric research. We have seen that the Treaties include several provisions that speak to the relationship between the Union and cities and that these are increasingly complemented by secondary EU law and judgments. These can be profitably analysed, not least given the current dearth of work focused on these legal texts. Yet these only tell part of the story of the interaction between the highest and lowest governance levels in Europe. To appreciate why certain cities emerge as policy leaders or network nodes, to assess the impact of city concerns on EU policy-making, or to exploit the promise of cities as European value communities, engagement with other disciplines is necessary. This begs the question which other branches of the social sciences a legal researcher law ought to engage with. In this regard, I venture to suggest a degree of methodological eclecticism: rather than attempting to find a one-size-fits-all approach, the research method chosen should be informed by and tailored to the role to be explored. By way of example, those interested in for "cities as value communities" may find inspiration in anthropology and social geography; whereas those intent on exploring "cities as policy developers" may wish to consider international relations literature. In a related vein, while these paragraphs may appear to place a premium on qualitative research and small-N studies, there could also be room for quantitative large-N studies going forward, especially in relation to roles that many if not all European cities are called on to perform.

## V. Concluding Thoughts

Cities are on the move, proverbially speaking. While unlikely to regain the authority and autonomy that they possessed before the birth of the Nation State, cities are once again becoming a force to be reckoned with. The Union for its part has begun to recognise the modern-day renaissance of the city as a potentially attractive development that it can capitalise on for its own strategic purposes. Against this backdrop, this article has interrogated the positioning of cities within the Union's legal architecture and calls on others to also take up the baton. Seen from the perspective of the Union's multi-level governance structure, there is a twofold value in studying cities and urban power.

First, doing so will help EU legal scholars recalibrate their understanding of the power of the Member States, or more accurately: the central level thereof, in a European setting. This is has become salient in view of the persistent and progressive enfranchisement of cities, spurred on by self-directed transnational networking and by EU-led efforts to engage cities as direct dialogic partners under its new Urban Agenda. The upshot could very well be the empowerment of cities vis-à-vis their national governments, somewhat akin to the well-documented Europeanisation process that has taken place among (lower-tier) national judges.<sup>69</sup>

Second, mainstreaming cities could further benefit the scholarly dialogue on the operationalisation of EU regulatory ideals. Obvious topics in this regard are the implementation of the subsidiarity principle and the realisation of the Union's better regulation ideals of simplified and more evidence-based rulemaking. In a similar vein, but from a longer-term perspective, a clever approach to harnessing city power could enable the Union to position cities as instruments to buttress its social legitimacy in the eyes of Europe's citizens.<sup>70</sup>

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69 Eg Urszula Jaremba and Juan Mayoral, "The Europeanization of National Judiciaries: Definitions, Indicators and Mechanisms" (2019) 26 *Journal of European Public Policy* 386.

70 Cf also Armin von Bogdandy's argument that there is a need to nurture citizens' trust in Europe: "Ways to Frame the European Rule of Law: *Rechtsgemeinschaft*, Trust, Revolution, and Kantian Peace" (2018) 14 *European Constitutional Law Review* 675.