

The City in the Constitutional Imagination*

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Introduction

People today live in urban societies. A century ago, one in every ten people in the world resided in cities or towns, whereas it is now a majority. But the scale of this shift is grasped only when we take into account the dramatic increase in the world's population from around 1.5 billion in 1900 to 7.6 billion today. This apparently relentless movement from rural to urban settlement is one of the most distinctive characteristics of contemporary life. Its ever-accelerating pace is throwing up intractable problems relating to personal security, public health, access to housing, environmental sustainability, and wealth inequality, problems which have been felt most acutely in the Global South where the rate of movement has been most rapid. Devising effective policies to address them has become one of the greatest governmental challenges of our times.

These developments set the scene for Ran Hirschl's recent study. *City, State* maps the changes in detail but is mainly concerned with the impact of urbanization on the relationship between territory, people, and governmental authority. Hirschl addresses this constitutional issue through five key questions. What standing do cities currently have within national constitutions? How might their apparent lack of constitutional standing be explained? What insight is gleaned from instances of their constitutional empowerment? What are the prospects for extending the constitutional empowerment of cities? And how can we justify what he perceives as the necessary transformation of the constitutional status of megacities? His answers lead him to present a bold thesis.

Hirschl argues that modern constitutional practice has singularly failed to evolve to meet these challenges. We remain captive to ideas formulated during the emergence of the modern nation-state, a period in which 'the sovereign city' was 'subjugated by a Westphalian sovereigntist order and by the state's innate inclination to maintain jurisdictional primacy over its territory' (pp.9-10). Focusing on this failure of constitutional imagination, he argues that these inherited ideas and practices must now be overthrown. The problem is that 'we currently lack the basic conceptual

* A review of Ran Hirschl, *City, State: Constitutionalism and the Megacity* (Oxford: Oxford University Press, 2020) pp. 266. Pages references in the text are to this book.

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language and constitutional categories to capture and address this new reality' (p.10). His remedy is constitutional empowerment of the city.

Hirschl's inquiry, then, is into 'the scope, origins, and shaky normative grounds of the great constitutional silence concerning one of the most significant phenomena of our time: urban agglomeration and the rise of megacities' (p.11). He acknowledges that his proposed solution has radical implications, not least because the urban arena has become 'a potential site of popular resistance to state hegemony' and a threat to 'exclusionary national meta-narratives of collective identity and to conservative ideals of distributive justice' (p.12). Empowerment of the city, then, is designed to lay out 'embryonic pathways towards a constitutional realization of the "right to the city"' (p.15).

City, State presents a wealth of data on the rise of the world's megacities and will interest anyone concerned with the governmental challenges of contemporary urban development. But its thesis is baffling. Discounting the work of public lawyers engaged with problems of urban governance, Hirschl hoists the debate onto a more abstract plane and claims that the solution to urban problems crucially depends on this 'constitutional emancipation' of the city (p.232). If only cities could secure enhanced constitutional standing with powers of direct taxation, 'their structural dependency on big business would diminish' and the likelihood of cities adopting policies 'that cater to all their constituencies and residents' would increase (p.183).

Hirschl, I will argue, cannot make good on these claims. I advance the argument in stages. Before appraising his constitutional thesis, his account of the historical role of the city and his explanation of its economic and political standing is first reviewed. I then consider his critique of modern political order, which he characterizes as that of 'spatial statism'. Finally, I assess the constitutional arguments that lead him to assert a 'right to the city'.

The Evolving Role of the City

City, State gives us a Cook's tour of the rise of the world's megacities, commonly defined as metropolitan cities in excess of a population of 10 million. Almost half of the book is devoted to the governmental challenges presented by extending urban agglomeration, first in the 'old world'/Global North/'occident' (pp.51-102) and then in the 'new world'/Global South/'orient' (pp.103-150). This overview concludes that 'in stark contrast to the constitutional vibrancy concerning urban agglomeration and megacity autonomy in Asia and Latin America' (p.102), in the 'old world' national constitutions have tended to 'subjugate city power' (p.51).

One of the assumptions underpinning Hirschl's argument is that 'the near-absolute silence of constitutions and constitutional thinkers on city power' is attributable to 'a statist outlook embedded in modern constitutionalism' (p.18). Western constitutional orders 'continue to subordinate the local and disregard the imperative of urban autonomy' because of the state's 'latent trepidation of the big city as a site of political volatility, of potential challenge to central authority, and also even of the possibly revolutionary mass mobilization' (p.19). It is apparently for these reasons that the modern state 'conquered' the city and subverted 'urban autonomy', a strategy that has resulted in 'the vast majority of hitherto autonomous cities (at least in Europe) [being] "nationalized", enveloped by the early-modern state' (pp.19, 31).

These sweeping historical claims are not easily reconcilable with the available evidence. Consider Max Weber's magisterial study of the development of the city.¹ Weber starts by acknowledging that any account of city development depends on disciplinary perspective. The concept of 'the city' can be defined in different ways: economic, political, and legal. In economic terms, the city emerged as a commercial centre with an organized market and then becomes a centre of finance and industry. Politically, the city acquired a set of specific administrative and governmental functions, often also impressed with military responsibilities. Legally, Weber identified the city as a distinct territorial unit with special corporate standing, generally through conferral of a royal charter.

The trajectory of city development worldwide obviously also varies according to particular economic, geographical, political and cultural conditions. Even so, certain patterns do emerge. Weber explains, for example, that their special political functions and legal powers were never strongly developed in the orient and, indeed, that the opposite was the case. China is exemplary, and here the city was invariably the 'official seat of imperial agencies'.² But even European cities with self-governing constitutions commonly remained dependent on 'lord protectors' or other powerful officials 'who exercised varying degrees of authority within the walls'.³ The burghers of the city undoubtedly had special privileges, but they were also impressed with specific duties by the prince or emperor. And their self-governing rights were a consequence of the city being recognized as a 'status association' of 'notables', that is, of landed patrician families who had been able to monopolize urban administration.⁴

With respect to England, Weber notes that the crown was the decisive element in shaping English urban development, so that whatever autonomy in fiscal administration cities managed to

¹ Max Weber, *Economy and Society* G. Roth and C. Wittich ed. (Berkeley: University of California Press, 1978), 1212-1372.

² Weber, *ibid.* 1228-9.

³ Weber, *ibid.* 1237.

⁴ Weber, *ibid.* 1267.

get 'confirms the superior position of the crown'.⁵ These cities were 'corporately organized state institutions for definite purposes, which could not exceed the privileges outlined in the charter' and in 'the administration of which the Privy Council continuously interfered'.⁶ Not only were they dependent on the consent of the crown for powers of taxation, it was not self-evident that they held extensive local government functions; in England, 'most of the new administrative tasks fell on other types of communities'.⁷

Nor was England such an outlier in European development. Weber explains that throughout history the central authorities had been commonly involved in regulating and restricting the powers of cities. That cities in France and across Central Europe had been 'transformed into almost purely state organs'⁸ by the seventeenth century does not in itself signify that the 'sovereign' city was 'subjugated' or that 'autonomous' cities were 'conquered'. The relationship had always been more intricate. Cities may have acquired self-governing powers, but commonly these powers had been conferred by a higher authority that maintained oversight. One might even say that city status exemplified the principle of 'self-government at the king's command'.⁹ But that is to focus on legal status. Beyond the legal, in political and economic contexts we see that the city (the *burh*) always existed in an integral relation to its surrounding area. As Maitland noted: 'The shire maintains the burh; the burh defends the shire'.¹⁰ And in his classic account of an England that from the earliest times was 'much governed', the city was never 'a self-sufficient organism'; it was a 'subordinate member' of the nation and as such 'far more often the bearers of duties than of rights'.¹¹

The intricacy of these developments has been extensively studied by constitutional historians in ways that belie Hirschl's claim about 'the silence of public law' in the face of 'the tremendous interest in cities throughout much of the human sciences' (p.19). Such studies radically qualify his account of city development. Just as the form of the modern state is not as monolithic as Hirschl implies, so too is the standing of cities within those political arrangements equally varied.¹²

⁵ Weber, *ibid.* 1276-7.

⁶ Weber, *ibid.* 1325, 1326.

⁷ Weber, *ibid.* 1328.

⁸ Weber, *ibid.* 1328.

⁹ A. B. White, *Self-Government at the King's Command: A Study in the Beginnings of English Democracy* (Minneapolis: University of Minnesota Press, 1937)

¹⁰ F.W. Maitland, *Township and Borough* (Cambridge: Cambridge University Press, 1898), 37.

¹¹ F. Pollock and F.W. Maitland, *The History of English Law before the time of Edward I* (Cambridge: Cambridge University Press, 2nd edn. 1898), vol.1, 688.

¹² This subject has also been analysed by historical sociologists. For an overview of that work see Thomas Ertman, *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe* (Cambridge: Cambridge University Press, 1997), 1-34.

In the modern era of industrialization and urbanization, governing arrangements are transformed but again it is too simple to suggest that this was a power grab by ‘the state’.¹³ Some of the great medieval cities lost both economic influence and political status when industrialization took place elsewhere, such as when the great industrial centres of Glasgow, Manchester, Berlin and the Ruhr conurbation emerged. Yet the standing of these modern cities owes nothing to any medieval claim of self-government. In the modern era, land ownership, the basis of wealth in the middle ages, also lost its special political significance as property became a fungible commodity whose value depended more on location than on its intrinsic fertility. The main reason for any apparent loss of autonomy, however, is not ‘subjugation’. It is that *form* is surpassed by *process*.

In modernity, the city as a discrete unit of government was overwhelmed by relentless processes of urbanization that transform the entire society. The urban society that Hirschl recognizes to be a defining feature of the contemporary world and which is signified by the rise of the megacity is one in which all sharp distinctions between urban and rural, town and country, have been eroded. Urban society is all-encompassing, evolving as a series of intersecting centre-periphery networks in which all land use is determined by urbanizing demands. The countryside is consumed by suburban and commuter settlements formed as peripheries of major centres. What remains is allocated to intensive agricultural enterprises organized to meet the needs of urban populations. And much of the residual rural spaces become officially-designated as green belts, areas of outstanding natural beauty, nature reserves, sites of special scientific interest, or national parks, that is, as areas with state-sanctioned protection in recognition of the fact that we are living in an urban society driven by processes that would otherwise destroy those environments. The entity that Hirschl seeks to emancipate – the city as a discrete unit of government – no longer exists.

In an urban society, ‘the city’ of Hirschl’s book, like the city of Italo Calvino’s avant-garde novel, is a figment of the imagination.¹⁴ Hirschl complains that the city has attracted the attention of philosophers and political theorists (e.g., Plato, Machiavelli, Rousseau, Emerson) but is ‘mostly absent from core constitutional discussions’ (p.20). But why? One reason is that these philosophers are either theorists of a pre-modern world or Romantics extolling the values of nature against the corrupt ways of the city. Constitutional lawyers, by contrast, are obliged to engage with the world in which they actually live.

¹³ Ertman, *ibid*, 24: ‘Th[e] divergence in the pattern of *local government* found during the first period of life of those European polities which survived into the 18th century was of immense significance for the future course of European political development’ (emphasis in original).

¹⁴ Italo Calvino, *Invisible Cities* trans. W. Weaver (London: Secker & Warburg, 1974). Hirschl claims (p.234) that the novel ‘provided continuous poetic inspiration’ and in ‘a deep, symbolic way, its title reflects the main theme of this book’.

Any constitutional lawyer concerned about urban issues must start by reflecting on the modern phenomenon of urbanization and here the weakness of Hirschl's historical narrative is quickly exposed. Today's megacities most closely fit Weber's account of the historical status of the oriental city: across the world, the megacity is invariably the 'official seat of imperial agencies'. Such a claim has been made throughout modern history about the dominant role of certain capital cities, including London's overweening influence in Great Britain and Paris's status in France: as Alexis de Tocqueville observed in his reflections on the 1848 revolution, 'whoever reigns in Paris controls France'.¹⁵ Today, anyone examining the position of Greater Tokyo (population: 38 million) in Japan, of metropolitan Seoul (population: 26 million), or of Buenos Aires, containing a third of Argentina's population, would surely agree.

The claim that the modern state conquered the sovereign city must be radically qualified. In certain respects, it would even make more sense to assert the opposite: that the city subjugated the state. But modern developments are more complex than any linear narrative can capture. The megacity that has emerged dominates not as a sovereign entity but as a centralized hub within an integrated and globally networked economy that rapidly shapes and reshapes contemporary urban society. What, then, are the political implications?

Spatial Statism

Hirschl calls the process by which 'autonomous' cities were 'nationalized' by the emerging modern state 'spatial statism'. He contends that 'public law, through its spatial ordering, partakes in sustaining the centrality of a state-oriented locus and focus of sovereign control of its territory in the face of competing forces, real or perceived' (p. 34).¹⁶ It is difficult to know what to make of this statement. Public law concerns the activity of governing and in the modern world this activity presupposes the idea of the state. Though quoting me on this, Hirschl misunderstands my meaning. He refers to the state as 'a potent actor' and 'a key player' (p.35), but in the juridical argument I make 'the state' is not an actor. It is the idea that must be presupposed to conceive political authority through the dimensions of territory, people and governing apparatus.¹⁷ In his use of 'the state', Hirschl evidently means only governing apparatus, indeed only 'central government'. And as Jean Bodin explained long ago, there is a 'great difference between the state

¹⁵ Alexis de Tocqueville, *Recollections* trans. G. Lawrence (Garden City, NY: Anchor Books, 1971), 90.

¹⁶ See also Ran Hirschl and Ayelet Shachar, 'Foreword: Spatial Statism' (2019) 17 *Int. J. of Const. Law* 387-438.

¹⁷ Martin Loughlin, 'The State: *conditio sine qua non*' (2018) 16 *Int. J. of Const. Law* 1156-63.

and the government of the state' and the maintenance of this distinction is essential 'if a man will not cast himself headlong into an infinite labyrinth of errors'.¹⁸

Hirschl asserts that 'core aspects of "classical" public law remain largely statist' and there 'remains a strong statist grip over zoning and land policy, takings, public works, and infrastructure investment' (pp.34-5). This appears to be a criticism, but if he means that central government maintains active oversight of the powers vested in local authorities to regulate land development and provide public services, this is a pervasive feature of the modern dynamic of urbanization. In his classic study of the challenges involved in seeking to effect resource redistribution in an urban system, David Harvey explains that the urban system operates in 'a permanent state of differential disequilibrium (by which I mean that different parts of it are approaching equilibrium at different rates)'.¹⁹ Within the urban system, market equilibrium only exists as a feature of an economist's imagination; in the real world, the workings of urban processes are constantly generating a series of sub-optimal outcomes which require continuous official oversight and extensive regulation.

From this perspective, 'the city' is a constantly shifting pyramid of land values whose shape is determined not just by differences between use value and exchange value, but also by public decisions about the regulation of development, the provision of infrastructure, and the allocation of jurisdictional responsibilities.²⁰ In the context of growing economic demand within an urban system, imposing limits on the city's outward expansion has the effect of uplifting all land values within its boundary. Allocating a specific area as a favoured location for future development is likely to dramatically increase land values on those designated sites. Providing infrastructure, such as building new roads, schools and sewage disposal facilities, also has major consequences for land values, both positive and negative, on surrounding sites. These are all illustrations of what have been called 'spillover effects' or 'externality impacts', which are major drivers of urban policy development. It is precisely because of the prevalence of externality impacts of public decision-making that any well-designed land use regime must reject Hirschl's model of 'self-governing municipalities' and establish an extensive system of control and accountability that makes provision for central oversight.

The city of Hirschl's constitutional imagination must evidently be a real place, i.e. a territorially bounded governmental unit with a legal identity. The problem is that the economic

¹⁸ Jean Bodin, *The Six Bookes of a Commonweale* [1576] trans. R. Knolles 1606, ed. K.D. McRae (Cambridge, MA: Harvard University Press, 1962), 199, 249-250.

¹⁹ David Harvey, *Social Justice and the City* (Oxford: Blackwell, 1973), 56.

²⁰ The seminal report on the land value issue is: Uthwatt, *Report of the Expert Committee on Compensation and Betterment* (London: HMSO, 1942). See further Peter Hall (ed.), *Land Values* (London: Sweet & Maxwell, 1965); Donald G. Hagman and Dean J. Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensation* (Chicago: American Society of Planning Officials, 1978).

processes of dynamic urbanization do not respect these legal units and political boundaries. Consider, for example, the first metropolis of the modern world. The immense urban problems that nineteenth century London experienced entirely overwhelmed governmental capacity. The City of London Corporation could indeed make a pitch to be a self-governing authority, but its square mile covered only a tiny proportion of a rapidly extending conurbation and any claim to its autonomy would merely exacerbate the governmental challenges presented by rampant urbanization. Beyond the City, London was governed by a medieval patchwork of parish vestries, later supplemented by the establishment of metropolitan-wide authorities, first the Metropolitan Board of Works in 1855 and then the London County Council in 1889. The latter covered the built-up area that existed in the mid-nineteenth century and immediately found that urban sprawl was extending far beyond its boundaries. This system of local government was not reformed until the 1960s when the Greater London Council was established with jurisdiction over an area of around 700 square miles. Abolished in 1985 and resurrected in a new form in 2000 as the Greater London Authority, this metropolitan authority is just one institution among a complex network of bodies responsible for governmental functions within an extensive metropolitan conurbation that covers most of south-east England.²¹

This problem of continuous urban expansion in the face of the fragmentation of governmental authorities within the conurbation is common to all the world's megacities.²² Many disputes have arisen concerning the efficacy of existing governing structures, the overlapping and competing powers of local institutions, mechanisms for co-operation, methods of accountability, and the extent of central controls over local decision-making.²³ Pace Hirschl, the challenges for metropolitan government, including intensely contested proposed reorganization of existing local institutional arrangements in the face of local democratically-expressed objections and the

²¹ W.A. Robson, *The Government and Misgovernment of London* (London, 2nd edn, 1948); John Davis, *Reforming London: The London Government Problem, 1855-1900* (Oxford: Clarendon Press, 1988); Tony Travers, *The Politics of London: Governing an Ungovernable City* (Basingstoke: Palgrave Macmillan, 2004).

²² For an early pioneering study see W.A. Robson and D.E. Regan, eds., *Great Cities of the World: Their Government, Politics and Planning* (London: Allen and Unwin, 3rd edn. 1972), a study of twenty-seven major cities.

²³ Consider, as a further illustration, New York City. The City of New York is a powerful local authority, but New York's metropolitan area extends far beyond the City, straddling three states and containing twenty-three counties and hundreds of authorities. At just under \$100bn, the City has a huge budget, but it remains heavily dependent on a range of special metropolitan-wide authorities for the provision of the metropolitan area's infrastructure. One of these is the Port of New York Authority, a public corporation jointly owned by two states, which is responsible for most of the transportation infrastructure of the region. The Authority's role extends way beyond its seaports to include the three major airports (JFK, La Guardia, Newark), the bus terminal, the PATH rail system, and all of New York's bridges and tunnels. Its \$7bn plus budget is financed entirely from its own funds, derived from tolls, fares and rents from its extensive landholdings, which include its headquarters site at the World Trade Center. It is therefore not obvious that giving the City constitutional standing, whatever that might mean, will to do much to resolve the complexities of governing the metropolitan area of New York. For an account of related problems with respect to the position of the city of Toronto in Canada see: J. Barry Cullingworth, *Urban and Regional Planning in Canada* [1987] (London: Routledge, 2014), ch.8.

consequential problems for co-ordination, efficiency and accountability, have been extensively studied by public lawyers. It is unclear where, within such an elaborate network of city and metropolitan authorities, we are to look for Hirschl's 'city'. But wherever it is situated, it is doubtful that any single entity could acquire a purposeful sense of autonomy within such a network, not just from central government but also from many other governmental authorities and special purpose bodies with responsibilities for the effective functioning of the metropolis.²⁴ Failing accurately to depict contemporary governmental arrangements, the hierarchical image that the concept of 'spatial statism' conveys is unlikely to lead us to any solution.

Constitutionalizing the City

Hirschl argues that cities' lack of constitutional standing has severely impaired their ability to respond effectively to the urban challenges of our times. This is caused by a deficit of constitutional thinking about them, attributable to 'a statist outlook embedded in modern constitutionalism' that has come to shape a predominant 'methodological nationalism' (p.18). Leaving to one side his claim that 'the state' subjugated the city and his apparent belief that 'the city' constitutes a coherent unit capable of attending to the governmental needs of a great metropolis, we turn to his constitutional critique and proposed remedy.

Hirschl's critique of modern constitutions is that (i) they are technical instruments deployed by the authoritarian impulses of central powers (ii) to impose an 'administrative ordering of nature and society' that (iii) reflects 'self-confidence about scientific and technical progress' on (iv) 'a prostate civil society that lacks the capacity to resist these plans'.²⁵ He does not say this directly. Instead, he asserts that modern constitutions 'reflect a "seeing like a state" vision of the territories they govern' (pp. 18-19), these being the four basic criteria that James C. Scott presents as indices of 'seeing like a state'. Hirschl's critique is founded on a radical claim about the imperialism of modern constitutions. His complaint about 'the great constitutional silence' (p.16) that has accompanied the growth of cities is that modern constitutions have deliberately ignored cities as part of a conscious strategy to weaken sources of local power. Where is the evidence?

²⁴ For an illustration of some of these complexities arising in less favourable economic conditions see Kim Phillips-Fein, *Fear City: New York's Fiscal Crisis and the Rise of Austerity Politics* (New York: Metropolitan, 2017). More recently, Hirschl notes (p.185) that in 2019 Seattle City Council withdrew a proposal to adopt a special business tax to fund affordable housing schemes after Amazon threatened to reconsider its development proposals there. Quite how affording the City constitutional standing would affect that remains unclear: it seems instead to illustrate the need for co-ordinated action, probably on national lines.

²⁵ These are the four basic elements of what Scott treats as indicative of 'seeing like a state' in high-modern statecraft: James C. Scott, *Seeing Like A State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998), 4-5.

Hirschl admits that most constitutions implicitly acknowledge the existence of cities but ‘they almost always do so in the context of administrative assignment of local government competences’ and only nine constitutions refer to ‘self-governing municipalities’ (p. 36). He concludes that most ‘old world’ constitutions ‘treat cities ... as creatures of the state, fully submerged within a Westphalian constitutional framework’ (p. 36). There is ‘an absolute “no” to local autonomy vis-à-vis the national constitutional order’ (p. 48). It is difficult to see how it could be otherwise. The city of constitutional discourse must be a territorial unit, that unit must have a legal status, and that status must either have been acquired through a state’s constitution or by governmental powers conferred under it. How, other than by forming a new state, as Singapore did when breaking from the Federation of Malaya, might the city ever claim autonomy from ‘the national constitutional order’?

Cities, Hirschl argues, ‘have been overlooked, mistreated, and systematically constrained in the constitutional domain’ (p. 52). The resulting ‘normative problems’ are said to include ‘deficiencies in democracy, subsidiarity, and stakeholding’, while continuing urbanization exposes ‘a critical gap within constitutions between the rights they guarantee (social, economic, and other equity-enhancing rights) and their power to make good on these guarantees’ (p.9). But it is not at all obvious that those deficiencies, to the extent that they exist, can be attributed to the city’s lack of constitutional standing. Any gap between constitutional rights and actual reform seems more likely to stem from the limitations of constitutional rhetoric. After all, whether local authorities are formally treated as having general competence powers or are dependent on grants of powers of itself tells us little about their actual standing as self-governing institutions.²⁶

The city’s lack of constitutional standing in the ‘old world’ is contrasted with the ‘new world’ which has apparently ‘become a living laboratory for novel constitutional thinking’ (p.104). It is on these new world innovations that Hirschl’s thesis is mainly based. But on examination, what these initiatives have achieved turns out to be both orthodox and modest.

For instance, Chapter VIII of Japan’s 1947 constitution includes the ‘principle of local autonomy’. Yet this is hardly different to the provision of a conventional statutory framework for local government. Although Tokyo is able to raise most of its revenues from local taxation, this is because it is both a city and a prefecture (pp.105-6). South Korea’s constitution creates five orders of sub-national units. But Seoul’s special standing comes from legislation rather than the constitution and its powers rest not just on its legal and fiscal autonomy but on ‘unflagging support

²⁶ This is the distinction between Dillon’s rule and the Cooley doctrine in the USA: see Hirschl, 54-55. It is analogous to the distinction between ultra vires and general competence power that has pervaded debates in English local government: see W.A. Robson, *The Development of Local Government* (London: Allen & Unwin, 1931), 206-211; Herman Finer, *English Local Government* (London: Methuen, 4th edn. 1950), 196; Localism Act 2011, chap. I.

from the central government' (p.108). China's 1982 constitution establishes four 'centrally administered municipalities', gives them a status equivalent to provinces and 'stipulates that these province-level megacities are held directly accountable for and controlled by the central government' (p.113), hardly a model of autonomy from central government. The 74th amendment to the Indian constitution in 1993 empowers state legislatures to give local authorities powers to enable them 'to function as institutions of self-government'. But Hirschl concedes that this amendment has had a minimal impact (pp.121-2); it is, in any case, an example of constitutional empowerment of state, rather than local, government.

One commonly adopted constitutional reform is to upgrade the status of the capital city from a local government unit to that of a federal province. But even that orthodox reform, as the cases of Argentina and Mexico illustrate (pp.133-9), does not necessarily lead to improved urban conditions. Following its upgrading in Mexico's 2016 constitutional reform, for example, in 2018 the President, anxious about Mexico City's dominance, initiated a decentralization plan to move over thirty governmental agencies out of the capital (p.140). It is this concern, rather than that of constitutional empowerment of the megacity, that becomes a recurrent theme. Kenya's 2010 constitutional reforms, designed to strengthen local government autonomy, ended up bolstering 'Kenya's historically disenfranchised hinterlands at the expense of the city of Nairobi' (p.143). This led to the weakening of the city's municipal services and ultimately to the government's decision in 2020 to 'manage the city directly as the national government affair' (p.144). Similar moves to weaken the power of capital cities have been taken in Egypt and Bangladesh (pp. 144-8).

South Africa's 1996 constitutional reform, which included provisions to strengthen local government and curb provincial power, seem to have greater potential, with Hirschl noting that the reform 'has been effective in allowing cities to provide improved services to their residents' (pp.128-131). But this is a devolutionary settlement not dissimilar to that attempted in Kenya, not a reform to bolster the megacity. There is, then, a paucity of evidence to vindicate Hirschl's general conclusion that 'much of the innovative constitutional thinking concerning megacity governance emanates from the new world of constitutionalism, in particular from Asia, Latin America, and parts of Africa' (p. 149).

This leaves us with something of a gulf between what is actually going on in the government of the world's megacities and Hirschl's constitutional claim. Evidence from the 'new world', ranging from South Korea and China to Mexico and Kenya, seems rather to vindicate his original accusation that modern constitutions are technologies deployed by central powers to bolster their rule. Obligated to change tack, Hirschl advances the more recondite argument that city empowerment is necessary because of some 'deeper symbolic facet' of constitutions:

From a normative and poetic standpoint, constitutions, constitutional institutions, and constitutional jurisprudence do more than allocating competences, powers, and rights. Taken together, they define and signal who we are as a political community, what moral and political ideals we cherish and strive for, and how we wish for others to reflect upon our polity. Neither administrative law, nor municipal law—two domains of public law that are commonly drawn upon to govern cities—can lay claim to such elevated legal *and* symbolic status in a given polity’s legal hierarchy. Thus, akin to any other instances of major constitutional void—large-scale underrepresentation and democracy deficit, inadequate government institutions, or outdated hierarchies—a principled remedy to cities’ constitutional nonexistence is not to address the matter via legal byroads, but rather through public law’s main highway: constitutional law. (p.16)

This throws a different light on Hirschl’s thesis. Modern constitutions are only treated as the technical instruments deployed by the authoritarian impulses of central powers by those who lack imagination. He now acknowledges that public lawyers do regularly deal with issues of metropolitan government but, focused as they are on the duties, powers, and jurisdictional allocation of public authorities, their work is marked by a failure of imagination. Stuck on the ‘byroads’ they fail to grasp the constitutional significance of the legal issues with which they deal. But the ‘constitution’ to which he now appeals is not the text. The constitutional challenge is, in the words of Alexander Bickel, to discern the meaning left by ‘the sediment of history ... in the thought and vision of the philosophers and poets’.²⁷ In a volte face, Hirschl’s constitution is no longer the tool of central powers; it is an imaginary, total, and invisible constitution of liberal legal philosophy. The constitution now expresses the set of ‘ideals we cherish and strive for’.²⁸

The Right to the City

Hirschl notes that some cities have responded to ‘the largely uncontested “seeing like state” underpinnings of contemporary political membership regimes’ by adopting ‘right to the city’ charters (p.152). This follows the publication in 2005 of a *World Charter on the Right to the City*, an

²⁷ Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 2nd edn. 1986), 236.

²⁸ This manoeuvre considerably complicates his task. Hirschl complains that despite the recent ‘renaissance of comparative constitutional law’ no comparative study has examined the subject ‘from the standpoint of city-state relations’ (p.29). He then seeks to fill that gap through a study of constitutional texts. We have reason to doubt that the constitutions of, say, Canada, China, Russia and the United States provide a common unit of comparative analysis able to offer insight into city-state relations in those very different political regimes. But once it is suggested that constitutions do not just allocate competences but also signal ‘who we are as a political community’ (p.16), the comparative study becomes an altogether different type of undertaking. To the extent that it is achievable, this type of comparative study of city-state relations must involve a cross-disciplinary investigation into the legal, political and economic aspects of these relations rather than the formal study of constitutions presented in *City, State*. Hirschl advocates this in theory (see Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014), ch. 4) but does not apply it in practice.

unofficial declaration agreed mainly at the initiative of Latin American civil society movements. Defining ‘the right to the city’ as ‘the equitable usufruct of cities within the principles of sustainability, democracy, equity, and social justice’, the Charter invites municipal authorities to sign up to its principles.²⁹ In the totalizing style characteristic of such documents, the Charter claims that the right includes ‘all the civil, political, economic, social, cultural and environmental rights which are already regulated in the international human rights treaties’.³⁰ But the Charter does at least acknowledge the interdependent nature of the urbanizing process, stating that there must be a correlation of ‘rights and their necessary counterpart of duties’ in both ‘the city and its rural surroundings’ to ensure a ‘just distribution of the benefits and responsibilities resulting from the urbanization process’.³¹

These Charter principles have been adopted by a relatively small number of municipalities – Hirschl offers Montréal, Mexico City and Gwangju as illustrations – but only as symbolic declarations rather than statements with legal impact. Adoption of the Charter is intended to signal an openness to diversity, identity, and inclusion and to provide the basis of involvement, both domestically and internationally, in co-operative networks relating to environmental sustainability, housing rights and the alleviation of poverty. Such policy objectives clearly have merit, but how do such declarations and the initiatives they spawn affect the constitutional status of the city? Hirschl acknowledges that ‘from a formal legal standpoint’ the precise meaning of the right to the city ‘remains nebulous at best’. He nevertheless maintains that it can be ‘a useful legal concept’ (p.158).

To assess this claim we might try to make sense of this resonant phrase. The idea of ‘the right to the city’ derives from a work published in 1968 by the French Marxist sociologist, Henri Lefebvre.³² Lefebvre did not conceive ‘the right to the city’ as an extension of existing liberal-democratic rights to basic needs. It was an oppositional demand embedded within a revolutionary argument. Some have subsequently tried to operationalize this right as a claim against central government, as happened in campaigns in the favelas of Brazil cities to regularize informal settlements. It is this progressive potential that Hirschl seeks to harness. For Lefebvre, however, this converts the revolutionary struggle into a legal strategy that, at best, can only yield modest reforms that marginally alter the balance of antagonistic interests of property owners and urban inhabitants. His ‘right to the city’, by contrast, is not a claim for constitutional recognition. It is a

²⁹ Habitat International Coalition, *World Charter on the Right to the City*, art.I(2): <https://www.hic-net.org/document/world-charter-for-the-right-to-the-city/>

³⁰ Ibid.

³¹ Ibid. Preamble.

³² Henri Lefebvre. *The Right to the City* in his *Writings on Cities* trans. and ed. Eleonore Kofman and Elizabeth Lebas, (Oxford: Blackwell, 1996), Pt.II; translation of *Le droit à la ville* (Paris: Anthropos, 1968).

demand that directly confronts the entire apparatus of the state and the capitalist mode of production it sustains. The right to the city is the key element of a radical programme that envisages the withering away of the state and the formation a collectively organized self-governing socialist society.

Lefebvre's claim to self-government is presented as 'the right to the city' because the city is the place in which contemporary capitalist processes are most fully developed and where their contradictions are now most conspicuously exposed. The right to the city is a strategic intervention in a struggle between exchange values (property as accumulation) and use values (property as lived space). Seeing the city as the expression of the primacy of exchange values, Lefebvre presents the right to the city as the clarion call to reclaim urban space by asserting the primacy of use values. The prevailing system of property rights promotes the expropriation of urban space, while the right to the city is a demand for the re-appropriation of that space by the city's inhabitants.³³ The right to the city requires a fundamental re-ordering of ideas about who 'owns' the city and asserts the right of its inhabitants to assume collective control over the allocation and production of urban space.

The right to the city is a call to demolish the (capitalist) city and cultivate the urban.³⁴ Lefebvre adopts this formulation because he treats 'the urban' as a phenomenon that is not purely the product of capitalist processes. Recognizing that the city existed before capitalism he invokes the urban as a space that holds the potential for a multiplicity of meaningful interactions between people to be realized. The right to the city, then, is not a call to restore the (ostensible) autonomy of the medieval city but to realize the possibilities of urban life in the future as the space of deliberation, co-operation, and shared use.

The megacity for which Hirschl seeks enhanced constitutional standing is for Lefebvre the epitome of high-modern capitalism. It is that which must be overcome, not that which needs strengthening by constitutional protection. One can understand why civil society movements to advance the interests of the vulnerable inhabitants of megacities might invoke this right as a rhetorical manoeuvre. It is altogether less obvious that such a claim in legal form as a constitutional right could ever deliver progressive outcomes.

³³ Lefebvre, *ibid.* 174: 'The right to the city manifests itself as a superior form of rights: right to freedom, to individualization in socialization, to habitat and to inhabit. The right to the *oeuvre*, to participation and *appropriation* (clearly distinct from the right to property), are implied in the right to the city.'

³⁴ Lefebvre, *ibid.* 103: 'We should perhaps here introduce a distinction between the *city*, a present and immediate reality, a practico-material and architectural fact, and the *urban*, a social reality made up of relations which are to be conceived of, constructed or reconstructed by thought.' That Lefebvre's claim extends beyond the city as place is emphasized by David Harvey, 'The Right to the City' (2008) 53 *New Left Review* 23-40, 28: 'The right to the city had to mean the right to command the whole urban process, which was increasingly dominating the countryside through phenomena ranging from agribusiness to second homes and rural tourism.'

Hirschl does sketch a range of proposals to alleviate existing urban problems. These include the need to address the political underrepresentation of urban voters, to enhance the fiscal capacity of cities, to address intra-metropolitan inequalities, and to institutionalize a principle of subsidiarity (pp. 176-229). Having worked on such matters during the first twenty years of my academic life, these are all too familiar issues.³⁵ That they remain such persistent problems is not attributable to a lack of data or deficiencies in social research methodologies. Simplistically, one might say that it comes down to a failure of political will. But in reality the problems are so intense because they express many intractable governmental dilemmas: local democracy versus metropolitan-wide representative schemes, unitary versus federated urban systems, efficiency versus equity, participatory versus technocratic decision-making, conservation versus innovation, amenity versus utility, individual rights versus collective good. Many proposals have been touted that advocate one side of these dilemmas over the other without compelling solutions ever being realized. What has never yet been suggested is that these problems might be resolved with the proposals Hirschl outlines ‘as embryonic pathways towards a constitutional realization of the right to the city’ (p. 232).

Hirschl asserts that ‘until cities achieve constitutional emancipation, they will continue to find themselves severely hampered in their ability to face the growing economic, social, spatial, political, and identity concerns and aspirations of city dwellers in the modern world’ (p. 232). He does not explain quite how this constitutional status is to be accorded. More importantly, neither does he explain how, once that status is conferred, these manifold problems and aspirations will be resolved.

Instead of a reasoned case, we have a series of speculative assertions. Cities need constitutional empowerment because, lacking it, ‘city leaders are pushed to align their policies with broader state interests and/or with big business and private sector resources’ (p.170). If cities obtain this status and acquire direct taxation powers ‘their structural dependency on big business would diminish’ making it more likely that ‘cities adopt policies that cater to all their constituencies and residents across the spectrum of wealth and income’ (p.183). Such empowerment ‘*is likely* to give metropolitan centres an enhanced capacity to address climate change effectively’ and ‘*could* support policy-making independence of city authorities’ allowing them to ‘bypass national government complacency’ (p. 196: emphases supplied). A constitutional standing ‘conducive to city action can go a long way in allowing megacities to govern more justly and effectively’ (p. 197).

³⁵ See, e.g., Martin Loughlin, *Local Government in the Modern State* (London: Sweet & Maxwell, 1986); Martin Loughlin, *Legality and Locality: The Role of Law in Central-Local Government Relations* (Oxford: Clarendon Press, 1996).

This is not policy analysis. It is a series of unsubstantiated declarations that could just as easily be invoked to bolster the claims of any institution – schools, housing associations, conservation groups, development corporations – for greater autonomy. Just give us freedom of action and plentiful resources and we can guarantee that the lot of our members will be improved. Who could object to that?

Conclusion

We are living in an age of constitutionalism. Over the last three decades, most of the world's constitutions have been newly adopted or radically amended. At the same time, the judiciary has dramatically extended its powers of constitutional review. Spearheaded by a rights revolution and bolstered by innovative theories of liberal jurists promoting the constitution as an idealized expression of abstract principles and universal values, this movement has transformed the constitution from an instrument of public decision-making into nothing less than a symbolic representation of collective social identity.³⁶ Constitutional studies have, not surprisingly, gone through a remarkable renaissance. *City, State* must be seen in this context. Extending constitutional analysis beyond not just classical individual rights but also beyond reformist social and economic rights, its argument rebukes constitutional scholars for ignoring the status of the megacity. Seeking to fill that gap, it asserts a novel type of constitutional right, the 'right to the city'. It makes a pitch to be in the vanguard of the global movement of rampant constitutionalism.

That ambitious argument, I have argued, has fallen short. Hirschl launches his thesis on a skewed account of the historical development of the political role of the city, a one-sided presentation of the constitutional order of the modern state, and a failure to appreciate the impact of urbanization on the city's standing as a unit of government. Discounting the humdrum work of public lawyers on contemporary problems of metropolitan government, he proposes resolution through transformation: we must rise above the mundanities of administrative law and turn towards the horizons of constitutional theory. Yet when we do, the complexities of governing the metropolis apparently evaporate and are replaced by a series of vague assertions about the advances to be gained by conferring constitutional standing on the megacity.

Even as constitutional analysis, Hirschl's argument is puzzling. If the constitution really is an instrument devised by central powers for authoritarian purposes, how is it transformed into a vehicle of emancipation? The constitution is treated as imperialist when the city has been subjugated but somehow becomes emancipatory for the purpose of advocating 'the right to the

³⁶ For analysis see Martin Loughlin, *Against Constitutionalism* (Cambridge, MA: Harvard University Press, 2022).

city'. How does that work? In reality, constitutions are simultaneously enabling and restraining devices. It is distortive to treat them purely as disciplinary instruments in accordance with Scott's 'seeing like a state', but it is equally distortive to see them as laying down the highway to utopia.³⁷ What each extreme has in common is the desire to avoid the messy realities of politics and government. From this perspective, promoting the constitutional empowerment of the megacity looks like a mere diversion, one that replaces concept with image, analysis with vision, clarity with obscurity. 'At a time when more constitutions than ever before guarantee the right to housing', Hirschl notes, 'housing remains the least affordable human right of all' (p.192). 'This should give us pause. Why promote constitutionalization when the most pressing urban policy challenge in most parts of the world is to effect fundamental legislative reform of urban land ownership?'³⁸

City, State contributes to a growing literature that advocates the ever greater constitutionalization of social life. As a rhetorical strategy, this sounds radical. To the extent that it ignores the real governmental challenges we face in bringing about tangible social, political, and economic reform, it is anything but. Advocating constitutional empowerment of the city from below, *City, State* all too easily aligns itself with a powerful movement from above that, by seeking to strengthen the constitutional authority of global institutions, undermines the authority of the only set of governmental institutions capable of addressing the deep-seated problems that rapid urbanization presents.

³⁷ See Martin Loughlin, 'The Constitutional Imagination' (2015) 78 *Modern Law Rev.* 1-25, 11-16. Cf. Henri Lefebvre, *The Urban Revolution* trans. R. Bononno (Minneapolis: University of Minnesota Press, 2003), who argues that both extremes of an 'ideal utopia' and an 'unimaginative realism' are dangerous and claims, to my mind implausibly, that his 'urgent utopia' avoids this by remaining attentive to existing conditions and thereby is able to outline a 'possible world'.

³⁸ See, e.g., Patrick McAuslan, *Bringing the Law Back In: Essays in Land, Law and Development* (London: Routledge, 2019); Patrick McAuslan, *Land Law Reform in East Africa: Traditional or Transformative? A Critical Review of 50 Years of Land Law Reform in East Africa, 1961-2011* (London: Routledge, 2013).