

Can Liberal Constitutionalism Survive the Rise of the Megacity?

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Ran Hirschl. *City, State: Constitutionalism and the Megacity*. New York: Oxford University Press, 2020.

In many parts of the European countryside, the hills are dotted with the remains of modest castles—sometimes a single turret, sometimes a fortified wall. In certain places, if you drive to a high enough point, from a single vista you might be able to glimpse half a dozen of these hilltop castles stretching along some fertile valley, a vivid reminder of a premodern civilization in which each settlement was ruled by its own minor prince. I found myself thinking frequently of these landscapes while reading Ran Hirschl's latest book, *City, State: Constitutionalism and the Megacity*. In this engaging, beautifully written, and frequently eye-opening work—winner of the Stein Rokkan Prize—Hirschl mounts a mighty attack on the centralization of power that is characteristic of the modern state. This centralization, he argues, has produced a profoundly bad deal for the world's great cities, along with the more than half the world's population that already inhabits them. To set things right, Hirschl claims, we must modify our current practices of constitutional governance to take account of the reality of urbanization—the immense size and complexity of modern cities, their economic and political power, and their indispensable function as hubs of immigration and connection, centers of human diversity, and engines of human creativity and progress.

Hirschl casts his argument as a challenge to contemporary constitutional thought and practice, which for the most part entirely ignore cities as objects of constitutional solicitude. We are “captives,” he contends, of “constitutional structures, doctrines, perceptions, and expectations that were conceived along with the modern nation-state” (9), and we must free ourselves from our “stagnant” (15) habits of thought to reimagine modern constitutions in a way that addresses the profound challenges posed by the rise and dominance of massive urban centers. In the new constitutionalism toward which Hirschl gestures, only moving beyond the “methodological nationalism” on which inherited constitutional practices have long been founded can produce the necessary “emancipation” (14) of the world's great cities.

The book, to be sure, does not shy from provocation, yet I found myself wondering at times whether Hirschl's challenge might amount to something more provocative and profound than he intends: a challenge to liberal constitutionalism itself and, thus, in the

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end, a challenge to the very liberalism that has long undergirded collective public life in much of the world. That is, if the challenges posed by “megacities” are as he contends, I wonder whether liberalism has the resources to address them. And if the answer to that question is no, then this particular historical moment, in which even long-standing liberal democracies are backsliding toward populist authoritarianism and a belligerent authoritarian leader is recklessly undermining world peace and stability, may be even more fraught with peril than we have understood.

THE RISE AND MALADIES OF THE MEGACITY

City, State opens with a deeply arresting marshaling of data. Over the last century, Hirschl explains, urbanization has been “the most significant demographic trend of our time” (1) and is likely to remain so for the next half-century or more. Whereas a century ago, only 10 percent of the world’s population lived in urban areas, this figure has recently grown to 56 percent and is projected to reach 70 percent within three decades. Concentration of populations in urban centers in the global South, which already contains the world’s twenty largest and most densely populated cities, has been even more rapid, and, astonishingly, is expected only to increase.

Despite these trends unfolding under our noses, Hirschl complains, contemporary constitutions overwhelmingly display complete indifference toward the role and status of cities. Although federalism has become increasingly popular as a form of constitutional organization, with few exceptions, such as Buenos Aires or Mexico City, the beneficiaries of constitutional policies of power dispersion are provincial in scale. Cities, in contrast, are almost universally deemed in constitutional jurisprudence to be subordinate structures, dependent on constitutionally superior levels of government for their powers, policies, and even for their very existence as legally recognized entities.

In three tightly organized and densely supported chapters, Hirschl walks the reader first through the constitutional treatment of cities in an older generation of constitutions, which generally treat them as wholly subordinate; moves to the treatment of cities in some newer constitutions that occasionally, though not systematically, grant greater constitutional recognition to urban centers; and reviews recent innovative efforts by cities unilaterally to bypass constitutionally grounded limitations on their authority by undertaking collaborative, trans-border projects with like-minded cities around the world.

By this point in the book, Hirschl has laid out an alarming litany of problems plaguing the modern megacity. Cities, we learn, are often underrepresented in national and provincial forums of policy making, tilting policies and resources away from pressing urban needs. Because cities typically depend for fiscal resources on higher levels of government, and are thus often underfunded, they are forced to turn frequently to the private sector to finance vital projects, driving them into maladaptive dependency on big business. Cities not only often lack the authority and resources to pursue and achieve their own goals but also frequently are charged with fulfilling commitments made at the national level, such as commitments to decent housing or environmental protection, while, at the same time, being denied the capacity and flexibility to accomplish them. In short, in the bulk of the book, Hirschl identifies—relentlessly, engagingly, and

persuasively—a host of shortcomings, common to most of the world’s constitutional systems, arising from a gross mismatch between the needs of urban areas and the policies of their host states.

WHY A CONSTITUTIONAL RESPONSE?

Having identified the problems, Hirschl turns in his final chapter to solutions, and it is here, I think, that the first signs of slippage emerge in an otherwise tightly interlocked argument. The crux of Hirschl’s position is that the difficulties now facing the world’s great cities can be addressed only at the level of constitutional, rather than ordinary, law and then only by amending constitutional texts to elevate cities to the status of constitutional subjects: “a principled remedy,” he contends, “is not to address the matter via legal byroads, but rather through public law’s main highway: constitutional law” (16). This contention raises several obvious questions. Why can the problems of cities not be addressed at the level of national or provincial policy? Why is constitutionalization required? What indeed would it mean to “constitutionalize” the “status” of cities? What specific changes to constitutional text or jurisprudence would be necessary to redress the problems Hirschl identifies, and how would they do so?

To my way of thinking, this is just where things begin to get interesting, and although the book does an admirable job of teeing up these questions, it does not go very far in answering them. To be sure, Hirschl’s main project here appears to be one of policy critique rather than constitutional theory, and I do not by any means wish to commit the sin of criticizing an author for not writing the book that the reviewer hoped to read. Accordingly, in what follows, I will describe briefly Hirschl’s justifications for demanding a constitutional response to the problems of cities and, then, inspired by his account, accept what I will treat as his invitation to explore some questions of constitutional theory that follow from the problems he so cogently identifies.

In the final chapter of *City, State*, Hirschl turns his attention to potential justifications for elevating cities to constitutional status. Throughout this discussion, he chooses not to offer any specifics about what constitutionalization would entail, although his frequent use of terms like “emancipation” and “empowerment” suggest that constitutionalization would necessarily involve granting cities some degree of autonomous decision-making authority, but questions such as in what domains, to what extent, and in what relation to national and provincial power are not addressed. I had the impression that some sort of fiscal autonomy would likely be a necessary piece of the package, although, again, details regarding what kind of fiscal autonomy, to what degree, and standing in what relation to the revenue-raising capacity of national and provincial governments are left unspecified.

But let us set these ambiguities aside to focus on the justifications supporting Hirschl’s demand for a constitutional remedy. The first of these is the seemingly chronic underrepresentation of cities in national and sub-state legislatures, the very bodies that, under present constitutional regimes, often make the policies that most deeply affect urban centers. Hirschl’s suggestion seems to be that fair legislative representation of city populations is something that can be achieved only through constitutional reform. I am unsure, however, why problems of underrepresentation cannot be addressed at the level

of ordinary legislation, and, in any case, a state in which constitutional politics have evolved far enough to support a constitutional amendment in favor of cities will, *a fortiori*, be a state in which a similar adjustment may be made through ordinary lawmaking, more quickly, and with considerably less difficulty. Moreover, municipal autonomy, which I take to be Hirschl's main demand, seems to be an alternative to achieving any particular degree of political influence within a national or provincial legislature: if a city has the authority to govern itself, it has no need to rely on its representatives in a higher-level legislature to secure the policies it desires.

Another possible justification that Hirschl offers for a constitutional-level solution invokes the co-dependency of cities and big business, a consequence, he argues, of cities' lack of fiscal autonomy. Yet, here again, it is unclear to me why this problem cannot be addressed adequately by policy changes made through ordinary legislation. The same goes for several other proffered justifications, including the urgency of fulfilling social goals regarding housing, the environment, and intra-metropolitan equalization of opportunity and resources. Indeed, in many respects, these are quintessentially the kinds of policy objectives that experience shows to be unattainable by mere assertion in a constitutional document; they require, on the contrary, significant legislative policy commitments for their effective implementation.

Another justification that Hirschl offers for constitutional solutions is what he calls "the density factor" (197). The argument appears to be that certain subpopulations within a polity simply are entitled to constitutional recognition on account of their size and heft. Yet this cannot be right. If size or political significance alone is sufficient to entitle a subpopulation to constitutional recognition and some degree of autonomous self-governance, then labor and business would surely qualify for constitutionally guaranteed autonomy, along with identity groups such as women or ethnic, religious, language, or racial minorities. The result would be a constitutional system of such complexity that it would make the tortured Belgian system look simple and flexible by comparison. If, on the other hand, the operative principle is territoriality, then it is difficult to see how counties, towns, villages, and rural areas would not equally be entitled to some degree of constitutionally guaranteed autonomy.

Finally, Hirschl invokes principles of stakeholding and subsidiarity. Stakeholding, however, which holds that all affected by a decision should have a role in making it, is a notoriously limitless principle insensitive to other foundational commitments of liberal constitutionalism such as polity membership and jurisdictional boundaries. And the principle of subsidiarity, according to which governmental decisions should be made at the lowest level capable of addressing the problem, also provides no basis for treating cities any differently from other types of local governments, such as rural counties or townships.

In sum, the justifications that Hirschl offers for carving out for cities a distinct constitutional status—and, in so doing, dissolving the concentration of power in the central state that he condemns—tend to justify equally a kind of general loosening of the ties that bind a state's components into a single polity. It is here, precisely, that I worry that Hirschl's attack on centralized state power mounts a troubling challenge not just to extant forms of liberal constitutionalism but also to liberalism itself.

THE ACCOMPLISHMENTS OF THE CENTRALIZED STATE

For centuries, Europe consisted mainly of a collection of small principalities, each governed by its own ancient laws and traditions. What put these local nobles out of business was the gradual centralization of power in the modern state. Through marriage, alliance, acquisition, or conquest, a few enterprising local monarchs began systematically to expand their realms. The states they assembled, however, were “composite” in the sense that acquisition of new territories typically meant that the new ruler simply stepped into the shoes of the former dynasty, ruling each component piece of his domain under its own traditional laws and customs (Koenigsberger 1989; Elliott 1992). This in turn meant that early modern states operated simultaneously under different legal regimes and customs in different parts of the realm—for example, when Castile acquired Aragon in 1479 through the marriage of Ferdinand and Isabella, Ferdinand ruled with virtually absolute power in Castile, yet was severely constrained by long-standing limitations on monarchical power in Catalonia, itself a constituent possession of the Kingdom of Aragon (Elliott 1963). As a result, different peoples contained within early modern states, as well as powerful non-territorial actors like the Catholic Church or nobility, might enjoy vastly different status and privileges.

This patchwork arrangement greatly impeded the growing ambitions of expansionist monarchs, who often found full mobilization of their resources impossible on account of constraints arising from traditionally recognized privileges. By the early seventeenth century, in response to these pragmatic considerations as well as to emerging theories of absolute state power developed by thinkers like Bodin, leading monarchs began to consolidate power centrally. In the course of this state building, monarchs slowly extinguished privileges previously held by different subpopulations and replaced the old, creakily asymmetrical system with one of uniform, nationwide duties toward the center. The ability to wield central power effectively in turn gave these monarchs the capacity to engage in much more ambitious wealth- and empire-building projects.

By the time liberalism emerged as a political force in the late seventeenth century, a large state, wielding centralized power, was firmly established as a kind of best practice of statecraft. Liberalism did not in any way challenge, and, in fact, benefited from, this premise; it simply replaced the divinely appointed monarch with a united, sovereign people as the repository of absolute state power. Indeed, liberalism went a good deal further than monarchical absolutism in denying that particular sectors of society could legitimately enjoy distinct privileges as a matter of traditional entitlement. Liberalism insisted, to the contrary, that hierarchies and privileges associated with an *ancien régime* did not survive the founding of a state by a community of political equals (Levy 2007).

In light of this history, there can be little doubt that the advent of the large centralized state, conceived as a single polity whose members enjoy full political equality and uniform status as citizens, counts as a significant accomplishment. The initial centralization of power by monarchs allowed the coordination of previously scattered resources, enabling a kind of collective prosperity previously unknown in human history, though granted, a prosperity that was by no means equitably distributed. Liberalism’s subsequent insistence on universal human political equality and dignity laid the foundation not only for a more equitable distribution of the advantages of the large, centralized state but also for the concept of universal human rights, a not insignificant driver of equality (Moyn 2010).

AT RISK: LIBERAL CONSTITUTIONALISM?

If I have accurately described Hirschl's bottom line position—that justice for urbanites can be achieved only by granting cities some kind of distinctive constitutional status within their states—then it seems to me to be a position that courts significant risk. Even within the liberal constitutional paradigm, asymmetrical forms of federalism have a well-demonstrated potential to undermine not only national cohesion but also the adaptability, stability, and even the legitimacy of the state (Sahadžić 2021). Rural communities in many liberal democracies already feel overlooked and resentful, sentiments that have opened them to appeals from populist authoritarians, contributing to significant democratic backsliding. Formally elevating cities to some kind of distinct constitutional status might only exacerbate these tensions. Moreover, to the extent that a meaningful regime of human rights requires a strong central state exercising power over a formally undifferentiated citizenry, a special status for large cities might threaten progress there too. It is ironic that *City, State* mounts an argument for distinctive treatment of the *cosmopolis* when the very idea of cosmopolitanism embraces a kind of universal equality and global citizenship that is meant to efface any aspect of the cosmopolite's situatedness in place of origin or residence.

All of this is what makes me wonder whether the account offered in *City, State* amounts, at the end of the day, to an argument that liberal constitutionalism has run its course and is simply no longer suitable for the way human life is now organized on the planet. Thirty years ago, the political theorist Benjamin Barber (1995) observed that the Westphalian nation-state has come under severe pressure from both above and below—from above in the form of globalization and interconnectedness and from below in the atavistic desires of local populations to preserve their own distinctiveness by dissociating themselves from larger and more diverse communities. Hirschl provides much additional evidence to support this contention. If the nation-state as we know it is doomed to obsolescence as a form of collective political organization, then, of course, the big question is what form of organization will replace it. But an equally significant question, it seems to me, is whether that new form of organization will be—or can remain—liberal. I very much hope that Hirschl will address these questions in a future work.

REFERENCES

- Barber, Benjamin R. 1995. *Jihad vs. McWorld*. New York: Ballantine Books.
- Elliott, J. H. 1963. *Revolt of the Catalans*. Cambridge, UK: Cambridge University Press.
- . 1992. "A Europe of Composite Monarchies." *Past & Present* 137: 48–71.
- Koenigsberger, H. G. 1989. "Composite States, Representative Institutions and the American Revolution." *Historical Research* 62: 135–53.
- Levy, Jacob T. 2007. "Not So *Novus an Ordo*: Constitutions without Social Contracts." *Political Theory* 37: 191–217.
- Moyn, Samuel. 2010. *The Last Utopia: Human Rights in History*. Cambridge, MA: Harvard University Press.
- Sahadžić, Maja. 2021. *Asymmetry, Multinationalism and Constitutional Law: Managing Legitimacy and Stability in Federalist States*. New York: Routledge.