Draft not for citation. The final version of this article will appear in **The Modern Law Review** (Forthcoming).

Making Constitutionalism Progressive Again:
A Primer on City Constitutionalism and State (Re)Formation in a New Constitutional Geography

Ming-Sung Kuo·

Abstract

Constitutionalism has been thinned with the idea of progress fading to the background of today's polytheistic constitutional landscape, while cities become the symbol of progressive values. Putting cities – megacities in particular – at the centre of the global constitutional map, Ran Hirschl's *City, State: Constitutionalism and the Megacity*, not only opens a new frontier for comparative constitutional studies but also suggests a progressive constitutional agenda with implications to re-imagination of political spaces. Challenging what he calls 'spatial statism' that conceives constitutional geography on the basis of nation-states, *City, State* envisages a bi-focal mapping of constitutional space where the city finds its own constitutional place vis-à-vis the corporate body of the state and suggests a radical departure from the modernist constitutional tradition moulded in the long process of state formation in Europe.

Engaging with Hirschl's manifesto for the urban turn in comparative constitutional law, this essay advances an alternative version of city constitutionalism aimed at reconnecting constitutionalism and progressive values through a shift of focus from cities to what makes cities attractive and progressive. It argues that Hirschl falls short of giving full expression to a progressive city-oriented constitutional agenda as he shifts focus between cities in general and megacities and implicitly inherits the underlying territoriality of spatial statism in his constitutional prognosis – the recognition of cities in the territorial constitution. As an

---

alternative to Hirsch's formalist prescription, this essay suggests conceiving of constitutional space imaginatively to put cities as an incubator of progressive values on a new constitutional agenda. With attention shifting from cities as territorial units of constitutional ordering to what Iris Young called 'urbanity' in addressing contemporary urban challenges in constitutional terms, an aterritorial city constitutionalism can emerge, envisaging a changing constitutional geography driven by human flow under which state formation can be reconceived in a progressive way.

I. Introduction: The Idea of Progress and Constitutionalism Reloaded

Once upon a time, constitutionalism and progress moved in tandem. Considered 'a methodological tool of societies in their painstaking and never-ending search for appropriate solutions for their manifold conflicts, dilemmas, and antagonisms',[1] constitutionalism was praised for bringing about progress. It was seen as delivering on the promise of the Enlightenment in societies where power was 'constituted' and institutional conditions were created to enable 'the elimination of the unnatural obstacles' of various 'repression[s]' and

---

[1] U.K. Preuss, 'Toward a New Understanding of Constitutions' in C. Offe and U.K. Preuss, *Citizens in Europe: Essays on Democracy, Constitutionalism and European Integration* (Colchester: ECPR Press, 2016) 129, 129.

2

the self-improvement of mankind.[2] Heralding the arrival of freedom under the 'project of emancipation',[3] constitutionalism was progressive.[4] Today it is no more. Either it is suspected of becoming a particular ideology with an unsettling agenda[5] or it is opened to any and all ideologies. 'Thin[ned]',[6] constitutionalism appears as a placeholder or an empty shell with little meaning.[7] Only thanks to its various qualifiers of geography or philosophy, if not ideology, is constitutionalism rendered intelligible. Through the geographical and ideational lenses, we now only see constitutionalism in distinct incarnations.[8] In this new intellectual landscape, constitutionalism talks can hardly be taken for the sound of freedom,[9] while progressive constitutionalism evokes more of a political manifesto than an overlapping consensus among scholars.[10]

---

[2] *ibid* 129-130.

[3] A. Somek, *The Cosmopolitan Constitution* (Oxford: OUP, 2014) 10-11.

[4] It should be noted that constitutionalism was not the only ideational position that professed progress and freedom under the Enlightenment tradition. Socialism was another example. U.K. Preuss, *Constitutional Revolution: The Link between Constitutionalism and Progress* (Atlantic Highlands, NJ: Humanities, Deborah Lucas Schneider (trans), 1995). See also A. Sajó and R. Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (New York, NY: OUP, 2017) 13-15.

[5] Sajó and Uitz, n 4 above, 13-14.

[6] M. Tushnet, 'The Possibility of Illiberal Constitutionalism?' (2017) 69 *Florida Law Review* 1367, 1370.

[7] Bruce Ackerman understands constitutionalism as 'the imposition of significant *legal* constraints on top decision-makers'. B. Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Cambridge, MA: Belknap, 2019) 2.

[8] See, eg, Sajó and Uitz, n 4 above, 13 (liberal constitutionalism); Tushnet, n 6 above (illiberal constitutionalism); M. Tushnet, 'Authoritarian Constitutionalism' (2015) 100 *Cornell Law Review* 391; L. Catá Backer and K. Wang, 'The Emerging Structures of Socialist Constitutionalism with Chinese Characteristics: Extra-Judicial Detention and the Chinese Constitutional Order' (2014) 23 *Washington International Law Journal* 251; A. Quraishi-Landes, 'Islamic Constitutionalism: Not Secular. Not Theocratic. Not Impossible' (2015) 16 *Rutgers Journal of Law and Religion* 553; K. Tuori, *European Constitutionalism* (Cambridge: CUP, 2015); M.A. Graber, *A New Introduction to American Constitutionalism* (New York: NY: OUP, 2013); J.-R. Yeh and W.-C. Chang, 'The Emergence of East Asian Constitutionalism: Features in Comparison' (2011) 59 *American Journal of Comparative Law* 805. Exceptions to the particularist turn in literature on constitutionalism include D. Grimm, *Constitutionalism: Past, Present, and Future* (Oxford: OUP, 2016); N.W. Barber, *The Principles of Constitutionalism* (Oxford: OUP, 2018)

[9] See, eg, N.S. Bui, *Constitutional Change in the Contemporary Socialist World* (New York, NY: OUP, 2020).

[10] See, eg, W.P. Marshall, 'Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory' (2011) 72 *Ohio State Law Journal* 1251, 1252-1257.

Against this backdrop, *City, State: Constitutionalism and the Megacity* (hereinafter *City, State*), another pathbreaking work from Ran Hirschl, the connoisseur of comparative constitutional studies,[11] is refreshing and particularly welcome not only for the full force of interdisciplinary scholarship it brings to bear on our constitutional (re)imagination. Even more so, it opens up a new frontier for comparative constitutional law. Hirschl structures *City, State* around three key questions in six chapters, including a compelling introduction to the state of cities in the 'new urban era' (27). He first asks why constitutional scholars – especially comparativists – should pay attention to cities by mapping the great bearing of cities on everyday policy issues such as housing, transportation, immigration, environment, poverty, and urban slums as vividly exemplified in 'megacities' in both the Global North and South (Introduction). The second question at the heart of *City, State* concerns the state of constitutional scholarship on cities. Hirschl calls out the eerie silence on the city question in the renaissance of comparative constitutional law, which stands in stark contrast to the attention that cities have received in disciplines such as political science, history, sociology, urban development, and human geography (Chapter 1). Backed up by a global survey of capital-C Constitutions, Hirschl further presents two different constitutional worlds – 'old' (Chapter 2) and 'new' (Chapter 3) – in which cities find themselves. While cities are nearly invisible in the constitutional old world,[12] constitutions in the new world score higher on their organisation of cities, despite their weaknesses. While praising innovations and experiments on self-empowerment in cities notwithstanding their constitutional status (Chapter 4), *City, State* concludes and answers the third and key question – how constitutions

---

[11] See R. Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (New York, NY: OUP, 2014) 151-191.

[12] Hirschl's constitutional old world comprises Australia, Canada, Europe, and the United States (52-101).

4

should address the city question – with a set of constitutional principles governing the status of cities (Chapter 5).

As suggested in its title, *City, State* envisages a bi-focal mapping of constitutional space where the city and the state are not hyphenated – ie untied – but rather the city finds its own constitutional place vis-à-vis the corporate body of the state (218-219). In this way, Hirschl makes a radical departure from the modernist constitutional tradition moulded in the long process of state formation in Europe, which he holds responsible for contemporary constitutional oblivion of urban issues in theory and practice, especially in the old world (31-36). Under what he calls 'spatial statism' that conceives constitutional geography on the basis of nation-states as well as provinces, states, *Länder*, and other subnational units in the federalist constitutional setting, cities are obscured (30-36).[13] Questioning spatial statism, Hirschl pins hopes for a new urban liberation on constitutional recognition of cities (158-165) through an innovative realignment of constitutionalism with progress. By putting cities – or rather, issues arising from urban agglomeration – on the world constitutional map, Hirschl aims to reignite the progressive flame without replaying constitutionalism as the normative trump card (11).[14] *City, State* thus presents a manifesto of new constitutionalism that is oriented towards cities and thus progressive with the incubator of progressive values – cities – at its centre.

Hirschl deserves applause for calling on comparativists in constitutional law to take a non-statist, urban turn to engage with the rich body of scholarship on cities built in other

---

[13] See also R. Hirschl and A. Shachar, 'Spatial Statism' (2019) 17 *ICON* 387.
[14] For a critical discussion of the normative view of constitutionalism, see Hirschl, n 11 above, 170-175.

disciplines (19-28). Yet his attempt to unshackle our imagination of constitutional geography from spatial statism raises fundamental issues that should concern students of constitutional theory. Engaging with Hirschl's manifesto for the urban turn in comparative constitutional law, this essay advances an alternative version of city constitutionalism aimed at reconnecting constitutionalism and progressive values through a shift of focus from cities to what makes cities attractive and progressive. It argues that Hirschl falls short of giving full expression to a progressive city-oriented constitutional agenda as he shifts focus between cities in general – ie cities as the urban centres vis-à-vis the rural area or the countryside – and megacities, and implicitly inherits the underlying territoriality of spatial statism in his constitutional prognosis – the recognition of cities in the 'territorial constitution'.[15] While Hirschl rightly points out the problem with the widespread constitutional silence on urban challenges under spatial statism, his formalist prescription for constitutional conferral of cities with independent standing will not really boost the status of cities as the incubator of progressive values. Focusing on cities as a formal territorial unit in constitutional ordering, ie a 'distinct order of government' in a constitutional realm (10, 14-16), Hirschl's urban constitutional manifesto concedes ground to bounded spatiality as conceived in existing constitutional orders. *City, State* thus gives short shrift to the constant boundary-defying process of urbanisation characteristic of the changing relationship between place and people in political geography.[16]

---

[15] The territorial constitution here refers to what Neil Walker calls 'the geographical distribution of authority within the State' under a national constitution. N. Walker, 'The Territorial Constitution and the Future of Scotland' in A. McHarg et al. (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford: OUP, 2016) 247, 247-248.

[16] E.W. Soja, 'Borders Unbound: Globalization, Regionalism, and the Postmetropolitan Transition' in H. v.

Alternatively, we need to conceive of constitutional space imaginatively to put cities as an incubator of progressive values on a new constitutional agenda. With attention shifting from cities as territorial units of constitutional ordering to what Iris Young called 'urbanity' in addressing contemporary urban challenges in constitutional terms,[17] an *aterritorial* city constitutionalism can emerge, envisaging a changing constitutional geography driven by human flow under which state formation can be reconceived in a progressive way. I start by examining what makes cities worthy of special mention in constitutions and continue with discussion of the limitation of existing constitutional responses to the city question and the alternative strategy towards progressive constitutionalism under the guidance of the idea of the city. Yet, before we explore the imaginary constitutional space where urbanity would thrive to nurture progressive constitutionalism and state reformation, let us walk with Hirschl on a constitutional tour about cities. The first stop is to uncover the shifting manifestation of the idea of the city – the replacement of the spirit of urbanity with the territorial unit of megacity. Here starts the winding tale of how cities are lost to states in our constitutional imagination.

II. From Urbanity to Megacity: A Tale of Lost Cities in a New Constitutional Age

Hirschal situates his manifesto for comparative constitutional studies of cities in what he calls 'an urban era' (1). Applying his social sciences approach to comparative constitutional

---

Houtum, O. Kramsch, and W. Zierhofer (eds), *B/ordering Space* (Aldershot: Ashgate, 2005) 33, 40-44.

[17] I.M. Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990) 237.

law,[18] Hirschl draws on the data collated by the United Nations (UN) and presents a graphic picture of the rapid growth of cities and accelerated urbanisation (1-8).[19] Given that cities are currently home to over 56 per cent of the world's population and the proportion is projected to increase to 70 per cent by 2050 (2), he warns of constitutional law being rendered irrelevant to most people in the world if it continues to leave cities out (9-11). He further notes that the Global South has seen the lion's share of the increase of urban population in the past few decades (4-5). Failing to address the phenomenon of megacities that have asymmetrically impacted the Global South, constitutionalism will remain suspected of another Western ideology to be universally projected by the Global North (5-9).

Based on empirical evidence of worldwide urbanisation, the picture of human geography drawn by Hirschl sets the stage for him moving cities and issues arising from urban agglomeration to the fore in public law. Yet there is one hurdle to be cleared before he can drive home his preferred *constitutional* approach to cities. Important as they are, matters of policy, urban or not, do not necessarily demand writing into constitutions. Hirschl needs to show readers why 'constitutional' matters in legal response to the city question.[20] Towards that end, Hirschl's constitutional tale of cities takes a normative and historical detour. To make a constitutional case for cities and urban issues that have already been addressed by administrative law and other subconstitutional statutory means (16, 103), he draws

---

[18] Hirschl, n 11 above, 166-191.
[19] Hirschl references *World Urbanization Prospects, The 2018 Revision* (Population Division of the UN Department of Economic and Social Affairs, 2019).
[20] See G.E. Frug, 'The City as a Legal Concept' (1980) 93 *Harvard Law Review* 1057, 1067-1068. cf M. Tushnet, 'What Is Constitutional About Progressive Constitutionalism' (1999) 4 *Widener Law Symposium Journal* 19, 22-27.

inspiration from Henri Lefebvre's noted 'right to the city' (21).[21] Yet, to Hirschl, it is too abstract and elusive to guide the constitutional approach to cities and challenges from urban agglomeration. The constitutional foundations for cities must dig into solid ground of which a 'fuzzy' abstract philosophical notion like the right to the city is not capable (14, 174). It is here that Hirschl's constitutional tale of cities moves beyond the current urban era.

Lamenting the relegation of cities to 'creatures of the state' in contemporary constitutions (10, 32),[22] Hirschl looks to the idea(l) of the city as a site of status with privileges and rights and thus one of freedom and liberty. As in the works such as Max Weber's classical *Economy and Society*[23] and Harold Berman's more contemporary *Law and Revolution*,[24] *City, State* draws on cities in medieval Europe to inform the envisaged constitutional revamp of today's (mega)cities (19-20, 23-24). Yet a closer look at the idealised medieval cities reveals the shifting urban image in Hirschl's constitutional tale of cities.

Invested with status and inhabited by free burghers, cities – as well as towns – appeared as the foil for the countryside in medieval Europe.[25] Capitalising on the privilege to hold

---

[21] Here Hirschl engages with Henri Lefebvre, 'The Right to the City' in *Writings on Cities* (Cambridge, MA: Blackwell, E. Kofman and E. Lebas (eds and trans), 1996) 63-184.

[22] cf O. Patterson 'The Ancient and Medieval Origins of Modern Freedom' in S. Mintz and J. Stauffer (eds), *The Problem of Evil: Slavery, Reform, and the Ambiguities of American Reform* (Amherst and Boston, MA: University of Massachusetts Press, 2007) 31, 48.

[23] M. Weber, *Economy and Weber: An Outline of Interpretive Sociology* (University of California Press, G. Roth and C. Wittich (eds), 1978) 1212-1372.

[24] H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983) 356-403.

[25] Frug, n 20 above,1083-1084; Patterson, n 22 above, 42, 48-50; Weber, n 23 above, 1217-1220, 1236-1238; Berman, n 24 above, 360-362. See also G. Poggi, *The Development of the Modern State: A Sociological Introduction* (Stanford, CA: Stanford University Press, 1978) 36-41. For the ancient relationship between *civitas* and *pagus* and the later distinction between *civitas* and *comitatus* in the Early Middle Ages in Latin Europe, see T. Ertman, *Birth of the Leviathan: Building States and Regimes in Medieval and Early*

markets, medieval cities thrived with trade and other commercial activities and emerged as the magnets for people seeking opportunities and liberty.[26] In cities, residents broke the yoke of their feudal lords, merchants attracted to trade fairs mingled, various self-regulated commercial and non-commercial guilds emerged, legal autonomy and political self-rule took shape, and moreover, a communal identity arose by participation or oath-taking.[27] This bright image of cities surfaced at the juncture when the prototype of nations-states were barely taking stage on the fragmented political scene of medieval Europe.[28] It goes without saying that as in today's cities, the image of medieval cities and towns was not always shining.[29] Furthermore, as medieval Europe faded out, cities faced even graver challenges of rapid population growth, poverty, immigration, social inequality, and conflicts among different identity groups and social classes.[30] Yet, as with other cities blessed with charter-based rights and privileges,[31] the idolised imperial and free cities within the Holy Roman Empire noticeably fared better in coping with urban challenges than towns that shared urban character but were subjected to territorial princes at the dawning of the Modern Age.[32] Moreover, the later decline of imperial and free cities as a result of 'territorialisation' and 'mediatisation' in the twisted formation of the German state[33] seemed to attest to the

---

Modern Europe (Cambridge: CUP, 1997) 42-43.

[26] Weber, n 23 above,1212-1215, 1236-1241; Berman, n 24 above, 359-360. See also Frug, n 20 above, 1083-1087.

[27] Weber, n 23 above,1212-1215, 1218-1226, 1236-1243, 1248-1251, 1344-1347; Berman, n 24 above, 359-363, 390-394. See also S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton, NY: Princeton University Press, 2006) 53-71.

[28] Poggi, n 25 above, 42-59; Sassen, n 27 above, 43-44, 53-54. cf Ertman, n 25 above.

[29] Patterson, n 22 above, 49-50.

[30] See, eg, J. Whaley, *Germany and the Holy Roman Empire, Volume I: Maximillian I to the Peace of Westphalia, 1493-1648* (Oxford: OUP, 2012) 139, 538, 545-550.

[31] Weber, n 23 above, 1276-1282; Berman, n 24 above, 364-370, 380-390. See also Frug, n 20 above, 1090-1091.

[32] Whaley, n 30 above, 249-250, 532-538.

[33] As feudal lordship, which had originated as the 'cumulation of jurisdictional and prerogative rights',

importance of independent status and standing to medieval cities. Emerging from this changing political landscape was a picture of the dimming of city lights as the fragmented political spaces of medieval Europe were gradually consolidated into bounded territorial states in the process of state formation culminating in the 19th century – dubbed 'a constitutional age' for the contemporaneous spawning of constitutions.[34] Losing their past glory to the state, cities have since been reconceived of as 'creatures of the state' and made constitutionally invisible (32).[35]

Looked at through the historical lens of medieval cities as schematically depicted above, the legal status of cities and urban freedom appears to go hand in hand.[36] With the status safeguarded by legal charters predating the culmination of state formation in the 19th century, medieval cities had not only emerged as the places of attracting people of different backgrounds but also better managed urban challenges resulting from their own success. In this way, they had continued to flourish as the 'refuge of use values' with inflowing migrants aspiring to the life of free burghers.[37] Being such a refuge, medieval cities are not as antithetical to their modern progeny as critics of communitarian idealisation of non-urbanised

---

gradually became a blanket authority or claim over land – or rather, territory – in the process of 'territorialisation', imperial and free cities looked more like enclaves than equal entities enjoying 'imperial immediacy' in the Holy Empire. *ibid* 48-49, 532. Imperial and free cities, along with other territories under the direct vassalage or control of the emperor, were eventually 'mediatised' in the lead-up to the dissolution of the Holy Roman Empire as they lost the status of 'imperial immediacy' and were incorporated into other Imperial Estates – the principalities-turned constituent states. P.H. Wilson, 'Bolstering the Prestige of the Habsburgs: The End of the Holy Roman Empire in 1806' (2006) 28 *International History Review* 709, 718-719.

[34] K.L. Grotke and M.J. Prutsch, 'Introduction' in K.L. Grotke and M.J. Prutsch (eds), *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences* (Oxford: OUP, 2014) 3, 3.

[35] See also Frug, n 20 above, 1089.

[36] H.P. Glenn, *The Cosmopolitan State* (Oxford: OUP, 2013) 29-30.

[37] Lefebvre, n 21 above, 68. See also L. King, 'Henri Lefebvre and the Right to the City' in S.M. Meagher, S. Noll, and J.S. Biehl (eds), *The Routledge Handbook of Philosophy of the City* (Abingdon: Routledge, 2019) 76, 83.

medieval towns and villages have suggested.[38] Rather, they come closer to being the distant intimation of modern 'city life' as 'a powerful attraction' that suggests 'a form of social relations … as the being together of strangers' than we moderns recognise.[39] Such social relations further give rise to 'energy, cultural diversity, technological complexity, and the multiplicity of activities' that we habitually associate with cities.[40] Freedom, found in city life, leads to group differentiation that further breeds diversity and freedom – the matrix of unique urban virtues, including publicity.[41] Forming a community or not,[42] city dwellers face common problems and develop common interests by being together in the common living space, while urban virtues help resolve common problems and enhance common interests.[43] What has enabled cities – medieval and modern – to attract people and inspire intellectual exploration is not only urban economy. Rather, the charm of cities comes down to the character of 'urbanity' as Iris Young called it.[44] And constitutionalism will fall short if it works against urbanity.

The foregoing sketch suggests that early elements of urbanity were nurtured in medieval cities by virtue of their charter-guaranteed status. As a corollary, urbanity in modern cities undoubtedly deserves institutional preservation and more – constitutional shielding. Here arise the sixty-four-thousand-dollar question: does constitutional nurturing and shielding of

---

[38] Young, n 17 above, 236. cf Frug, n 20 above, 1081.

[39] Young, n 17 above, 237.

[40] *ibid*. Freedom of medieval city dwellers remained embedded in the feudal structure. Even so, Orlando Patterson argues that elements of the modern conception of freedom took shape in medieval Europe. Patterson, n 22 above.

[41] Young, n 17 above, 238-241.

[42] Compare *ibid*, with Frug, n 20 above, 1061-1062. Notably, such communities would depend more on their freedom-bred urban character than on the (small) size of cities as political units vi-s-a-vis nation-states. I am grateful to an anonymous reviewer for pointing me to the downside of small-scale political units.

[43] Young, n 17 above, 238-241.

[44] *ibid* 237. cf Frug, n 20 above, 1067-1068.

urbanity require cities to be conferred with constitutional standing? 'Yes', or so argues Hirschl (14-16, Chapter 5).

Yet, that the dimmed modern cities have continued to incubate urbanity suggests otherwise. Specifically, urbanity results from the social dynamics of city life and does require appropriate constitutional preservation[45] – a theme to be further explored later. For now, what is important is the fact that urbanity engendered by 'given experience of cities' is not contingent on the city's constitutional status.[46] As a result, Hirschl can no longer rely on urbanity as first intimated in medieval cities to argue for constitutional conferral of standing and status on cities. How can he complete his constitutional tale of cities?

Instead of fixing his eyes on the shining picture of medieval cities, Hirschl zooms in on the dark image of modern cities confronted with a host of contemporary urban challenges (51, 173-174, 230-232). By aligning the city's everyday struggle with its obscurity when the world has been seeing another constitutional age,[47] he plays a sleight of hand and forces the conclusion: constitutional obscurity has a share of responsibility for the current conditions of city life. It follows that constitutional recognition of cities is indispensable to the resolution of urban challenges (175-176).

What is of particular pertinence to the present tale of cities being lost to the state is not whether constitutional recognition as Hirschl suggests will help solve cities' problems. My

---

[45] cf Young, n 17 above, 236-241.
[46] *ibid* 238.
[47] See B. Goderis and M. Versteeg, 'The Diffusion of Constitutional Rights' (2014) 39 *International Review of Law and Economics* 1, 16-17. See also J. Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364, 368-369.

point here is rather that the departure from the idea(l) of the city for the reality of modern-day urban life in Hirschl's advocacy for cities' constitutional recognition suggests the shifting focus in his analysis: from urbanity – which originated in medieval Europe and has continued into today's city life – to megacities. As urban challenges bear most greatly on megacities where over half a billion people lead their lives,[48] Hirschl's suggestion that resolving urban challenges require constitutional recognition of cities is actually directed at megacities. This is understandable.

Yet shifting focus to megacities creates a problem for Hirschl's constitutional project for the new urban era. While urbanity envelops megacities, it also plays out in numerous middle and small cities, or rather, urban centres.[49] If Hirschl's *constitutional* choice for cities took on urbanity-related challenges associated with megacities at the expense of other urban centres where urbanity also thrives and requires constitutional response, he would exclude a substantial proportion of the world's population from his new city-oriented constitutional geography. As a result, the empirical premise of his constitutional advocacy for cities would be thrown into question. Steering clear of that path, Hirschl proffers constitutional recognition for cities in general instead of confining it to megacities (219, 232), even though megacities as the microcosm of variegated urban challenges underpin his call for an urban turn in comparative constitutional law. In sum, while the paragon of the idea of the city shifts from urbanity to megacities, cities and megacities are elided in Hirschl's constitutional

---

[48] As of 2018, the UN refers to 33 cities with over 10 million inhabitants as megacities. *The World's Cities in 2018: Data Booklet* (Population Division of the UN Department of Economic and Social Affairs, 2019) 2-3, at
https://www.un.org/en/development/desa/population/publications/pdf/urbanization/the_worlds_cities_in_2018_data_booklet.pdf (last visited 10 July 2021).
[49] See Young, n 17 above, 237.

14

manifesto for the urban era (8-10, 230-232).

This is not so much an indication of Hirschl's faulty analysis as a reflection of the complexity of challenges that urbanisation poses to constitutional theory and practice. Studies of urbanisation, including Hirschl's comparative constitutional studies in *City, State,* have drawn on the UN statistics and data on urban population. The question is that as noted in those UN reports, there is no universal definition of *urban* population or urbanisation. Rather, they rely on the reporting state's definition and calculation.[50] Apart from the usual criteria of minimum population and minimum population density, the sectoral employment or the provision of infrastructure and services is also one of the indicators that have been used to differentiate the urban from the rural area.[51] In other words, urban challenges as indexed in empirical evidence actually transcend cities or megacities as territorial units, suggesting a reconfigured urban space in the territorial state.[52]

Seen in this light, Hirschl's constitutional tale of cities in the new constitutional age retells the story about the loss of cities in state formation with a forward-looking orientation towards the resurgence of cities from spatial statism (31, 49-50). Yet, as the storyline moves from urbanity to megacities, what lies at the core of Hirschl's concern remains elusive. Is it megacities, urban centres, metropolitan areas, or just places with the legal designation of city (see 8-10)? They are all manifestations of the reconfigured urban space in state territory that

---

[50] C. Deuskar, 'What Does "Urban" Mean?' (World Bank Blogs: Sustainable Cities, 2 June 2015) at https://blogs.worldbank.org/sustainablecities/what-does-urban-mean (last visited 10 July 2021).
[51] L. Dijkstra et al., 'How Do We Define Cities, Towns, and Rural Areas?' (World Bank Blogs: Sustainable Cities, 10 March 2020) at https://blogs.worldbank.org/sustainablecities/how-do-we-define-cities-towns-and-rural-areas (last visited 10 July 2021).
[52] Soja, n 16 above.

requires constitutional (re)ordering but are all elided in *City, State's* bi-focal constitutional (re)mapping.

Following Hirschl's tale of the territorial unit of megacity as the idea of the city in the place of the spirit of urbanity, the next stop of the constitutional tour about cities is to see how another tale of cities has been written. Is the city really absent from the designed constitutional space? How does the city figure in constitutions? Here enter the three models of cities in the constitutional worlds.

III. Cities' 'Capital-C' Trap: Standing in the Constitution or Bounded to Territoriality?

City, State justifies granting independent constitutional standing to cities based on a broad survey of national constitutions (235-246). The result reveals a general constitutional silence around the globe. Yet it does not mean that all countries in the world have left cities out of their capital-C Constitutions. As Hirschl, observes, the dividing line does not entirely correspond to the distinction between the Global North and South but rather suggests two distinct constitutional worlds: 'old' and 'new' (51, 103). In the 'constitutional old world', the sound of silence mostly surrounds cities, whereas cities in the new world are more visible. Although the city provisions in the capital-C Constitutions of the new world leave much to be desired, Hirschl considers those instances a source of inspiration in furtherance of constitutional recognition of cities (103-104). Is his optimism a misconception or the herald of a new global constitutional phenomenon? Let us take a closer look at how cities have figured in the capital-C Constitutions of the two constitutional worlds under Hirschl's global survey and beyond.

Although Hirschl does not specify the content of all the constitutional provisions he has examined and only discusses the distinction between the constitutional old and new world without further classification, three distinct forms can still be discerned in constitutional recognition of cities from his survey. The first appears in constitutions that provide for the institution of local government in general. As a constituent of the constitutional organisation of local government, cities therefore gain some constitutional status alongside other municipalities. Call it the municipal equality (ME) model. As the Constitution of Japan illustrates,[53] such capital-C Constitutions only set out general principles governing local self-government, municipal autonomy, and allocation of powers with a further mandate that the parliament hammer out details concerning the organisation of local government through legislation. Recognised in such a capital-C Constitution, all municipalities are equal and regarded as the creatures of the state in constitutional terms. Strictly speaking, megacities and rural counties are *constitutionally* indistinct under this model.

A variant of the ME model is the recognition of city-provinces and the like alongside the general mandate regarding the constitutional organisation of local government as exemplified in the German Basic Law. Apart from the general clause on municipal autonomy under the chapter governing the relationship between the federal government and the subnational provincial governments (*Länder*),[54] the German Basic Law recognises two non-capital cities – Bremen and Hamburg[55] – along with the capital, Berlin, as constituent

---

[53] The 1946 Constitution of Japan Chapter VIII Local Self-Government (articles 92-95).
[54] The 1948 German Basic Law article 28 (as amended in 2020).
[55] In contrast to Hamburg, the city-*Land* Bremen administratively consists of two enclaved cities: Bremen and Bremenhaven.

Länder of Germany in its preamble.[56] As a result, despite the difference in population and importance between Bremen and Hamburg,[57] these two German historical port cities and the metropolitan Berlin have their own representation in the upper house (*Bundesrat*) in the same way as do other *Länder*.[58] In contrast, star cities of Germany such as Munich and Frankfurt are constitutionally inferior to such city- *Länder* and viewed as part of municipal government under their respective *Länder* from the constitutional perspective, even if their importance and size are not necessarily less than all the three city- *Länder*.[59] Other than the three city- *Länder* listed in the constitutional preamble, a global city and a university town in Germany, say, Frankfurt and Heidelberg, enjoy municipal equality in terms of the Basic Law.

In the second form, which I call the urban branding (UB) model, the constitution explicitly distinguishes cities from counties in branding municipalities under its provisions setting out local government and municipal autonomy. Consider Taiwan. Under Chapter XI 'System of Local Government' of its working constitution, the 1947 Constitution of the Republic of China (ROC),[60] some subprovincial municipalities are constitutionally branded as 'cities' to which the privileges and rights attached to counties as provided for in Section 2

---

[56] The German Basic Law preamble paragraph 3.

[57] In 2019, the population of Hamburg is over 1.8 million, three times more than that of Bremen, while over 3.6 million people live in Berlin, Germany's most populous city. See 'Germany: States and Major Cities' at https://www.citypopulation.de/en/germany/cities/ (last visited 10 July 2021).

[58] The German Basic Law articles 50-51 (as amended in 2020).

[59] Among the twelve 'major cities' listed by the German government, Bremen occupies the eleventh place with a population of 566,000, while approximately 680,000 people live in the city-*Land* Bremen. Frankfurt is Germany's fifth major city with more than 740,000 inhabitants. See n 57 above.

[60] Chapter XI consists of two sections: Section 1 (articles 112-120) governs the provincial level of local government, while Section 2 (articles 121-128) sets out the county (*hsien*) level of local government. The allocation of powers between the national government and both levels of local government is addressed in Chapter X (articles 107-111). Taiwan is not included in Hirschl's global constitutional survey, although he notes the Taipei-Keelung metropolitan area in Taiwan (7).

18

apply *mutatis mutandis*,[61] whereas some municipalities constitutionally branded as 'cities' but directly under the national government are considered part of the provincial level of local government in Section 1 with the proviso that their rights and privileges are to be laid out in legislation.[62] Another example is the 1982 Constitution of the People's Republic of China (PRC). Under article 30, cities and counties under the provincial governments are arrayed in parallel,[63] while both the provincial level of 'municipalities directly under the Central Government' – also known as Centrally Administered Municipalities (CAMs) (112) – and 'other large cities' can be further divided into 'counties' and 'districts'.[64] What municipalities are to be branded as 'cities' or placed directly under the national government are subject to statutory regulation under the UB model.[65]

The third form of constitutional recognition of cities is what I call the special district (SD) model.[66] Under this model, the constitution names specific cities for their prominence and invests them with special rights and privileges vis-à-vis other municipalities. It is worth noting that the special rights and privileges conferred by the constitution do not necessarily turn such cities into subnational provincial units in terms of the territorial constitution.[67] What distinguishes the SD model from others is that under this model, the status of a city that is prominent for its metropolitan character or other considerations is not subject to wholesale

---

[61] The 1947 ROC Constitution article 128.

[62] The 1947 ROC Constitution article 118.

[63] The 1982 PRC Constitution article 30 paragraph 1 subparagraph (2).

[64] The 1982 PRC Constitution article 30 paragraph 2 (as amended in 2018). Paragraph 1 subparagraph (1) provides for the provincial status of 'municipalities directly under the Central Government'. The organisation of local government in China is further set out in Chapter V (articles 95-111).

[65] See, eg, the 1947 ROC Constitution articles 108 (paragraph 1 subparagraph (1)), 118, 122, and 128; the 1982 PRC Constitution article 95 paragraph 2.

[66] It should be noted that the SD model that grants special status to the cities named in the capital-C Constitution may be complemented by the ME or the UB model that governs other urban municipalities.

[67] This is why the SD model is set apart from the foregoing German variant of the ME model.

legislative discretion but rather gains constitutional recognition in its own right. Examples of this model include Delhi in India,[68] City of Buenos Aires in Argentina,[69] and Mexico City in Mexico.[70] Despite the variances among the relevant constitutional provisions governing these three capital cities, they all enjoy special treatment in constitutional terms – which sets the SD model from the capital provision in some constitutions under which the capital city is simply named and unaccompanied by distinct rights or privileges.[71] Notably, the SD model may apply to non-capital cities. For example, the Federal Constitution of Malaysia grants the status of 'federal territory' to Labuan and Putrajaya besides the capital Kuala Lumpur for different reasons.[72]

It is true that constitutional recognition does not guarantee the success of cities. As Hirschl acknowledges, a rethink of the status of cities in constitutional orders requires tackling issues surrounding city administration such as political underrepresentation, taxation power and fiscal independence, implications of population density, fiscal equalisation, and the principle of subsidiarity (174-176). Nevertheless, to him, independent standing recognised by capital-C constitutions is required for cities' 'constitutional emancipation' (232). The problem is that none of the foregoing three models of constitutional recognition can set cities free.

---

[68] The 1950 Constitution of India article 239AA (as amended in 2020). As Hirschl suggests, India adopts the UB model in respect of other cities (120-124).

[69] The 1853 Constitution of the Argentine Nation sections 124-125, 129 (as amended in 1994).

[70] The 1917 Constitution of Mexico articles 44 and 122 (as amend in 2015). The system of municipal governance is largely set out in article 115, which evokes the ME model.

[71] For example, the 2011 Constitution of Hungary article F (1) simply provides, 'The capital of Hungary shall be Budapest'.

[72] Constitutional recognition of these three federal territories appears in the 1957 Federal Constitution of Malaysia article 1 (4) (as amended in 2010). The attendant rights and privileges are laid out in the relevant constitutional provisions throughout. Noticeably, like Taiwan, Malaysia is not included in Hirschl's constitutional survey, while Kuala Lumpur is mentioned in passing (7).

As suggested above, under the ME model, the capital-C Constitution does not distinguish cities – let alone megacities – from other units of local government, resulting in the urban and rural municipalities being constitutionally undifferentiated. Hirschl is right that this approach does not lead to the hoped-for constitutional renaissance of cities.[73] Noticeably, the UB model is superior to the ME model in this regard by setting cities apart from other municipalities. Yet, in contradiction to Hirschl's high hopes (112-115), this does not move cities under the UB model in the direction of constitutional emancipation. Under this model, the capital-C Constitution leaves to the legislature the important power to designate municipalities as cities – or as CAMs in the case of China. In this way, constitutional emphasis on cities is obfuscated, although we may still see cities empowered under this model as the case of South Africa suggests.[74] Moreover, as with the ME model, the UB model depends on the legislature to provide for details concerning the status of cities.[75] In sum, cities under these two models remain the creatures of the state.

In contrast, the SD model suggests more robust constitutional recognition and marks the

---

[73] While Hirschl is unimpressed by the German variant of the ME model, he regards the Japanese version of the same model and its implementation as 'constitutional innovation' (88-89,105).

[74] South Africa can be regarded as a hybrid of the ME and UB models or simply as a quasi-UB model. The general institution of local government is set out in Chapter 7 of its 1996 Constitution (sections 151-164), while municipalities are differentiated into three categories in Section 155 (1). As Hirschl notes, major cities fall in Category A (129). Despite the details set out under Chapter 7 Local Government, the establishment of municipalities requires national and provincial legislation. The 1996 Constitution of the Republic of South Africa section 155. Hirschl suggests that the success story of the quasi-UB model in South Africa seems to be more attributable to the South African Constitutional Court than to the capital-C Constitution itself (130).

[75] Hirschl regards Hong Kong under the 'one country, two systems' constitutional arrangement after its handover to China in 1997 as an example of the Chinese approach to megacity empowerment – 'a mix of constitutional devolution and municipal autonomy alongside central monitoring and massive investment in infrastructure' (117-119). A closer look at the status of Hong Kong as a 'special administrative region (SAR)' under the Chinese constitutional order suggests that it reflects the UB model. Apart from the special brand, SAR, is codified in the 1982 PRC Constitution article 31, the rights and privileges attached to such status are set out in ordinary legislation in terms of the Chinese constitution: Hong Kong Basic Law. Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 2nd edn, 999) 177-78. The recent imposition of a National Security Law on Hong Kong by Beijing fully exposes the fragility of the UB model.

contribution from the constitutional new world. The special status of those cities named in the capital-C Constitution is independent from the legislative will. Without constitutional amendment, the legislature cannot strip these chosen cities of their constitutionally recognised status and the attendant rights and privileges. Thus, the SD model seems to suggest the way out of the trap of reducing constitutional prescription to legislative discretion as both the ME and UB models suggest. No wonder that when it comes to constitutional design (vis-à-vis constitutional jurisprudence), to Hirschl, constitutions that adopt the SD model – under which (some) cities are no longer reduced to the creatures of the state – seem to offer hopes for cities' constitutional emancipation (133-140).

On closer inspection, however, the SD model is less promising than hoped for. As noted above, capitals are not the only cities that have received constitutional recognition under this model. Yet, overall, capitals dominate the list of chosen cities under the SD model. Other cities are included for different strategic considerations, including economic development and region rebalance within a state. Taken together, constitutional recognition of cities under the SD model is political in character. The image of cities emerging from this model of constitutional recognition seems to be closer to the more politically-oriented ancient cities than the urban model of medieval cities.[76] Noticeably, what is distinctive of the SD model is that only a few privileged cities find their places in the capital-C Constitution. The expected economy of constitutional regulation may explain selectivity and brevity in part.[77] After all, to name all the municipalities that incubate urbanity would turn a constitution into an

---

[76] Weber attributed the origin of ancient cities to coastal settlements of warriors. Weber, n 23 above, 1285-1296, 1343-1347.

[77] G. Tsebelis and D.J. Nardi, 'A Long Constitution Is a (Positively) Bad Constitution: Evidence from OECD Countries' (2016) 46 *British Journal of Political Science* 457.

unwieldy toponymic text. Yet investing select cities with independent standing in constitutions based on political calculation is problematic in attempts to reorient statist constitutionalism towards cities. Instead of urbanity that pervades all cities, it is the strategic character of some selected urban places that determines robust constitutional recognition of cities. In this way, the SD model turns away from what a city-oriented constitutionalism is all about.

More importantly, both the legislative trap in which the ME and UB models find themselves and the robust but limited constitutional recognition under the SD model converge on the image of city as a territorial unit in guiding their constitutional choices. Conceived as a territorial unit, a city is a place to be designated, located, and defined by its boundary.[78] Constitutional regulation of cities is thus contingent on the identification of such bounded places, suggesting a constitutional approach to cities resting on the principle of territoriality.[79] For the ME and UB models, it is reckoned that cities – as bounded places where urbanity flows – are not only too numerous to be individually recognised within a wieldy constitutional code but their experiences are also too fluid to be written into the capital-C Constitution that is expected to resist haphazard changes.[80] Notably, instead of perpetuating itself in a bounded place, a city may grow and die with dynamic human flow.[81] Both urban growth and death reconfigure constitutional space, requiring city boundaries to be

---

[78] J.B. Parr, 'Spatial Definitions of the City: Four Perspectives' (2007) 44 *Urban Studies* 381, 382-385.

[79] Compare S. Elden, 'Territory/ Territoriality' in A.M. Orum (ed), *The Wiley-Blackwell Encyclopedia of Urban and Regional Studies* (Hoboken, NJ: Wiley-Blackwell, 2019), with H. Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford: OUP, 2013) 103-104. See also J.G. Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations' (1993) 47 *International Organization* 139.

[80] cf Elden, n 79 above.

[81] A. Power and K. Mumford, *The Slow Death of Great Cities? Urban Abandonment or Urban Renaissance* (York: Joseph Rowntree Foundation, 1999).

redrawn.[82] And this alone defies the strategy of robust constitutional recognition. As a result, both the ME and UB models end up falling into the legislative trap.

Departing from the legislative trap, the SD model nonetheless falls short of being a meaningful alternative. Instead of extending to all places of which urbanity is characteristic, constitutional recognition of cities under this model is tied to the strategic importance of chosen places in terms of geographical location, which is defined by boundary – a function of the principle of territoriality.[83] Seen in this light, territoriality dims urbanity under the SD model, no less.

Taken as a whole, when we fix our eyes on capital-C Constitutions in conceiving constitutional recognition of cities under the form of independent standing, we can hardly see cities stand out as the incubator of urbanity. Rather, what looms before us is the principle of territoriality that not only steers international relations but also bounds constitutional recognition of cities as attested by the three constitutional models.[84] Thus conceived, a city-oriented constitutionalism remains territorial and will not set itself free from spatial statism or move the constitutional project in the progressive direction. Moreover, this territorial version of city constitutionalism is not as bright as it seems. As evidenced in various empirical studies, inhabitants of small political units tend to show less cosmopolitan attitudes.[85] In this light, departing from the statist tradition for city constitutionalism would

---

[82] See, eg, B. Jones, D. Balk, and S. Leyk, 'Urban Change in the United States, 1990–2010: A Spatial Assessment of Administrative Reclassification' (2020) 12 *Sustainability* 1649.

[83] See Sassen, n 27 above, 416, 418; Lindahl, n 79 above, 102-103. See also Elden, n 79 above.

[84] For a critique of the influence of territoriality in thinking international relations, see Ruggie, n 79 above.

[85] Eg, T. Huijsmans et al., 'Are Cities Ever More Cosmopolitan? Studying Trends in Urban-Rural Divergence of Cultural Attitudes' (2021) 86 *Political Geography*, at https://doi.org/10.1016/j.polgeo.2021.102353 (last visited 10 July 2021).

be anything but progressive.[86] Instead of going down the retrogressive territorial route, it is time to take the focus away from cities that stand – if not trapped – in capital-C Constitutions in contemplating constitutional response to the urban era. Bring urbanity back in.

IV. Back to Urbanity: City Constitutionalism and Constitutional Transformation

As noted above, Hirschl identifies six issues and principles to signpost the project of city-oriented constitutionalism apart from his advocacy for granting cities with independent standing in capital-C Constitutions (175-176). Some of them simply extend the existing constitutional principles to cities as territorial units. Taxation power, financial independence, fiscal equalisation, and the principle of subsidiarity fall into this category, suggesting cities being included in the design of the territorial constitution (214-219, 221-223).[87] This should be no surprise given the territorial underpinnings of Hirschl's formalist prescription for recognition of cities in capital-C Constitutions. Yet two issues characteristic of cities identified in the concluding chapter of *City, State* stand out from those relating to the territorial constitution – political underrepresentation and population density – and speak to cities as the incubator of urbanity.

Political underrepresentation of cities, especially the populous megacities, is chiefly ascribed to the distorted division of constituencies and the flawed design of the electoral system that fail to give adequate voice to the large city population (178-179). The upper

---

[86] cf. Glenn, n 36 above. I owe this point to an anonymous reviewer.
[87] See note 15. See also F. Palermo and K. Kössler, *Comparative Federalism: Constitutional Arrangements and Case Law* (Oxford: Hart, 2017) 201-245.

house of a bicameral parliament in a federalist constitutional order exacerbates this issue by amplifying regional influence at the expense of city representation (61). Moreover, the political underrepresentation of cities – or rather, city population – becomes even acuter when we take account of the density factor in terms of the people-per-space (PPS) ratio as Hirschl indicates (203). Consider situations where population density aggravates the negative effect of a democratic decision to the extent of a justifiable restriction on basic rights being turned into a measure with 'deleterious impact' on some groups (204). Hirschl perceptively notes that in those situations, a decision underpinned by the 'foundational' 'axiom' of democracy – 'one person, one vote' – fails to protect such groups 'as equal members of a given … state' (203-205). For example, to prevent the spread of an infectious disease, the parliament resolves that only intra-municipality outdoor activities and movement be allowed. Although the ban on inter-municipality movement works to stop the wide spread of the infectious disease, inhabitants of urban centres with a high PPS value would be more exposed to heighted infection threat when exercising outdoors. In such situations, density may justify deviating from a democratic decision-making mechanism ultimately resting on the axiom of 'one person, one vote'.

The question of political representation, especially when taking into account the density factor, suggests a point of departure in the quest for city-oriented constitutionalism. Political underrepresentation of cities diagnosed by Hirschl essentially narrows the channel through which people congregating in urban centres – whether we call them cities or not – can make their voices heard. Notably, people form opinions and hold values through their interaction

26

with each other and with the environment of their living places.[88] The narrowed channel for city dwellers in political representation virtually gives short shrift to values moulded in the dynamics of city life. Seen in this light, political representation in the urban era turns out to be more of a question of giving adequate voice to city life than an issue of city status vis-à-vis other units of the territorial constitution (176). In contrast to other principles that are aimed at strengthening the formal standing of cities in Hirschl's city-guided revamp of the territorial constitution, foregrounding political representation gets to the heart of the matrix of urbanity – urban places as the space where people congregate by being or living together – and thus speaks to the person-space relationship. With emphasis shifting to the question of density-factored political (under)representation, the grand constitutional design for the urban era is thus oriented towards issues of justice that result from the unique person-space relationship in urban places.

More importantly, this person-space relationship and the attendant population density are engendered by the same process – urbanisation as broadly defined – in which urbanity also takes shape. Factoring population density into the revamp of the political representation of cities suggests bringing the engendering process to the fore and including urbanity in constitutional reasoning. Beyond political representation, constitutional decisions on discriminatory impact in equality and proportionality analyses, for example, can also embrace urbanity by taking the density factor into consideration.[89] Incorporating density into constitutional decisions illustrates how urbanity can inform the liberation of cities and the

---

[88] Somek, n 3 above, 264-265.
[89] See, eg, P. deVise , 'Housing Discrimination in the Chicago Metropolitan Area: The Legacy of the *Brown* Decision' (1985) 34 *DePaul Law Review* 491, 497.

27

constitutional transformation of our times.[90]

With city constitutionalism gravitating towards urbanity rather than continuing to pivot on territoriality, cities gain constitutional recognition through what I call 'soft constitutionalisation'. Informed by urbanity, constitutionalism required for the preservation of city life is no longer pivoted to capital-C Constitutions. City constitutionalism conceived in this way will focus on how to safeguard values associated with urban life such as diversity, multiculturalism, and individuality with various constitutional instruments, including doctrines in fundamental rights. Moreover, with existing constitutional doctrines adjusted to accommodate city-embedded considerations, say, density-factored political representation, the incubation of urbanity is thus enshrined and not subject to legislative discretion. In contrast, the formalist constitutional recognition of cities as a distinct order of government in capital-C Constitutions suggests 'hard constitutionalisation' as it is susceptible to hardening, despite the dynamically reconfigured urban space. Tuned to the dynamic process that constantly reconfigures the urban space, soft constitutionalisation responds adroitly with urbanity placed at the centre of the constitutional project for the urban era.

As noted above, both urbanity – the unique and charming character associated with city life – and population density result from the dynamics in which people from different backgrounds are drawn into a particular place for pursuing individually imagined new lives, ie urbanisation.[91] Instead of running along the boundaries of cities, urbanisation has

---

[90] This is an adaptation of the slogan 'Liberate Hong Kong, revolution of our times' of the pro-democracy protest movement in Hong Kong.
[91] V. Smil, *Grand Transitions: How the Modern World Was Made* (New York, NY: OUP, 2021) 57-66.

28

continuously reshaped spatial configuration in a constitutional order.[92] With urbanity in focus, the soft constitutional approach also has regard to the actual and ongoing process of urbanisation. It is in this way that city constitutionalism is progressive. As has been suggested, people's interaction with each other and with the environment of their living places shapes their opinions and values. Thus, taking on challenges such as political representation that are caused by the fact of urbanisation, city constitutionalism aims to do justice to the progressive values associated with city life moulded in the dynamics of urbanisation.[93] In response to urbanisation-entailed problems, the soft constitutional approach to the city question is pivoted to urbanity instead of cities as bounded places. Progressives values come to the fore in city constitutionalism thus conceived. With urban voices heard and even amplified, cities can continue to thrive as the incubator of progressive values, giving impetus to transformative reform in the new constitutional age (23, 162-163, 170-171, 177, 196-97, 224-229). Living out the urban era will make constitutionalism progressive again.

Unshackled by the territoriality of cities as bounded places, the soft constitutional approach avoids being dragged by the formal status of city as with the choice of hard constitutionalisation alluded to in *City, State*. Yet it does not deny the importance of place in constitutional ordering nor is the continuing role of cities as territorial units ignored in conceiving city constitutionalism.[94] After all, urbanity, urbanisation, and issues such as

---

[92] See H. Angelo and D. Wachsmuth, 'Urbanizing Urban Political Ecology: A Critique of Methodological Cityism' (2014) 39 *International Journal of Urban and Regional Research* 16, 19-20.

[93] Hirschl divides the six principles of city constitutionalism into general arguments and those 'that emanate from the urban condition itself' (230).

[94] For the importance of place in constitutional ordering, see Somek, n 3 above, 264-266.

population density and political underrepresentation surrounding cities all result from a reconfigured relationship between place and people. [95] Unbounded by territoriality, progressive city constitutionalism is not unhinged from place. Rather, taking into account human flow that drives urbanisation, it conceives of the territorial configuration of cities or urban centres as constantly reshaping in defiance of territoriality. [96] This in-between character of progressive city constitutionalism renders it 'aterritorial'. Conceived of aterritorially, city constitutionalism thus suggests a dynamic relationship between place and people. How to cast this new place-people relationship in constitutional terms is another piece of puzzle in mapping the constitutional order under city constitutionalism.

V. Towards a New Progressive Constitutionalism: City, State Re-Formation and Constitutional Geography

Urbanity takes shape in a unique person-space relationship engender by the dynamics of urbanisation that challenges the boundedness of territoriality underpinning current constitutional approaches to cities. The place-people relationship characteristic of urbanity needs to be conceived of without being straightjacketed by boundaries.[97] To be more precise, city boundaries should be open to dynamic changes without bounding urbanity in the reconceived constitutional space under city constitutionalism. To this end, constitutions should provide for procedures through which city boundaries can be redrawn to accommodate the dynamics of urbanisation. What lies at the core of city constitutionalism is how to constitutionalise the dynamics whereby cities emerge, grow, and decline with the

---

[95] A. Acedo, M. Painho, and S. Casteleyn, 'Place and City: Operationalizing Sense of Place and Social Capital in the Urban Context' (2017) 21 *Transactions in GIS* 503.
[96] Angelo and Wachsmuth, n 92 above, 20-24.
[97] *ibid* 23-24.

30

human flow.

Obviously the constitutionalisation of city expansion as well as contraction goes beyond the soft approach as suggested above. Yet it should be noted that the envisaged constitutional procedure regarding the changing boundaries of cities engendered by urbanisation is not intended to enlarge cities at the price of the countryside. As geographical studies of the 'city-region' trend – in which cities are enlarged to absorb neighbouring regions for the purpose of enhancing the former's competitiveness in economic globalisation – have indicated, such strategic expansive transformation of cities into metropolises raises governance issues.[98] Instead, the constitutionalisation of the process regarding the redrawing of city boundaries is meant to address the question of density-factored political representation through adjustment of administrative boundaries of cities. Although it does not exclude the possibility of creating new metropolises by municipal integration or city enlargement, metropolitanisation under such circumstances should nonetheless be tailored to complement the soft constitutional approach to city constitutionalism as discussed above. From the perspective of city constitutionalism, metropolitanisation is not conceived in terms of regional governance or economic competitiveness. Rather, it is aimed at the representation of values and virtues associated with urbanity. Thus, the process of representation-reinforcing metropolitanisation to be constitutionally enshrined should be initiated from the municipal bottom, not the central government sitting atop. As regards the metropolitanisation of cities and urban centres through territorial incorporation under the rubric of 'city-regionalism', it should be distinguished from the attempt to transform

---

[98] J. Harrison and J. Heley, 'Governing Beyond the Metropolis: Placing the Rural in City-Region Development' (2015) 52 *Urban Studies* 1113.

constitutional space according to city constitutionalism. Such competitiveness-driven metropolitanisation should be distinctly evaluated in light of the needs of urban governance and regional development.[99]

Moreover, to make constitutional regulation of delimiting cities meaningful, individual municipalities, rural and urban, must be able to participate in the constitutionalised process of municipal redrawing as full stakeholders. This suggests that city constitutionalism and the movement of localism or decentralisation move in tandem. While decentralisation focuses on the constitutional reform of the general institution of local government under the guidance of the principle of subsidiarity as Hirschl notes (219-223), the purpose of city constitutionalism is to safeguard the incubation of urbanity resulting from the changing landscape of municipal autonomy. It is also worth noting that urbanisation is not confined to cities. Rather, urbanisation pervades all places, while values of urbanity are spread beyond city boundaries along with the flow of city dwellers as well as commuters from outside cities.[100] By opening municipal governments to residents, local government will become an institutional channel for urbanity and its associated values. In other words, the parallel reform of local government is not isolated from city constitutionalism. Nor is city constitutionalism a choice of putting cities ahead of the countryside. Guided by localism and decentralisation, city constitutionalism can lead to a new constitutional space where progressive values that originate in cities but spread nationwide can find constitutional support to impact the overall

---

[99] *ibid.*

[100] Angelo and Wachsmuth, n 92 above, 23-25. The different formative effect of city life on residents and commuters may explain the distinct political orientations of city dwellers and suburbanites. Thad Williamson, 'Sprawl, Spatial Location, and Politics: How Ideological Identification Tracks the Built Environment' (2008) 36 *American Politics Research* 903.

governance in a constitutional order.

Taken as a whole, city constitutionalism envisages a layered constitutional approach to the urban era. It comprises the incorporation of urbanity-associated values and city-embedded factors into constitutional reasoning and doctrines, the installation of constitutional procedures governing the representation-oriented municipal delineation, and the urbanity-channelling decentralisation in the general reform of local government. To be clear, the picture of the layered city-oriented constitutional order drawn above is skeletal. Nevertheless, it prefigures how spatial statism can be reconceived in the urban era. Hirschl in *City, State* and elsewhere points out that the state as the centre of gravity of the constitutional order has shaped the relationship between places of political power and people.[101] A closer look reveals that such relationships are more of a function of jurisdictional boundaries than a dictate of territoriality as plays out in the installation of borders and the delimitation of cities, for example.[102] With focus shifting from territoriality to jurisdictional boundary, constitutional spaces can be conceived in a way that recasts the relationship between places of political power and people in more dynamic and functional terms. Emerging from this dynamic relationship between place and people is a fluid constitutional geography. Atteritorial city constitutionalism reflects this dynamic view of constitutional space as it envisages cities more as places defined by urbanity placed under the protective jurisdiction of constitutional orders than geographical sites enclosed by boundaries. As cities are foregrounded with the spawning of urbanity, the state – the formation of which was long

---

[101] Hirschl and Shachar, n 13 above.
[102] M.-S. Kuo, 'The End of Constitutionalism As We Know It? Boundaries and the State of Global Constitutional (Dis)Ordering' (2010) 1 *Transnational Legal Theory* 329, 345-351.

concluded – can be opened to re-formation again. Envisaging a new constitutional space in which the dynamic place-people relationship gives rise to state reformation, city constitutionalism is both aterritorial and progressive.

VI. Conclusion

City, State undoubtedly sets out a new research agenda for constitutional scholars groomed in the statist tradition. Moreover, it sows the seeds for transforming the relationship between place and people by bringing cities to the fore, suggesting a progressive view of constitutionalism. Answering Hirschl's call for the urban turn in comparative constitutional law and drawing on his insights and discoveries, this essay investigates the city question from the perspective of constitutional theory. It argues that *City, State* elides urban centres, cities as municipal units, megacities, and metropolises as it struggles to make a case for a general constitutional approach to the city question, only to end up casting cities in terms of the territorial constitution. The limitation of Hirschl's formalist approach that focuses on the standing and status of cities in capital-C Constitutions is further revealed through comparative analysis of city provisions in current constitutions. Stranded in cities as bounded places, *City, State* centres on the design of the territorial constitution with urbanity – that which makes cities, or rather city life, attractive to people – obscured.

Even so, the constitutional principles that Hirschl proposes to complement his formalist prescription for the constitutional status of cities suggests an alternative approach to the city question. Inspired by his perceptive discussion of political representation and the density factor, I tap into the progressive potential of city constitutionalism conceived in *City, State* and suggest that urbanity be placed at the centre of the proposed urban turn in constitutional

scholarship. Taking account of the dynamic process that engenders urbanity, city constitutionalism is allied with values such as multiculturalism, diversity, and individuality, thereby turning cities into incubators of progressive constitutionalism. On this view, a city is more a function of the boundary-defying process of urbanisation than a distinct order of government. City constitutionalism becomes aterritorial as it conceives of cities as being unbounded through the constitutionalisation of the process of redrawing city boundaries. Thus emerges a new constitutional geography, suggesting a dynamic space-person relationship amid state re-formation.

With *City State*, Hirschl blazes a trail in constitutional studies again, indicating how comparative constitutional studies can broaden perspectives of constitutional theory. To take city constitutionalism forward, in this essay I wish to show that the conduct of comparative constitutional studies of cities can be better informed with constitutional theory. City constitutionalism illustrates how comparativists and theorists can enrich constitutional scholarship through engaged dialogue.