

CHINA

IN THE NEW MILLENNIUM



**MARKET
REFORMS
and SOCIAL
DEVELOPMENT**

edited by James A. Dorn

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CATO
INSTITUTE
Washington, D.C.

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Library of Congress Cataloging-in-Publication Data

China in the new millennium : market reforms and social development /
edited by James A. Dorn.

p. cm.

Includes bibliographical references and index.

ISBN 1-882577-60-4. — ISBN 1-882577-61-2

1. China—Economic policy—1976– 2. Economic stabilization—
China. 3. China—Foreign economic relations. 4. Social change—
China. 5. China—Forecasting I. Dorn, James A.

HC427.92.C464447 1998

338.951—dc21

98-34592

CIP

Printed in the United States of America.

CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001

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22. A Constitution of Liberty for China

Roger Pilon

Over the past 20 years, China has become increasingly free and prosperous, even if those gains are selective and still relatively modest by world standards. Under the current Chinese Constitution, however, that progress is anything but secure. Rooted in socialist ideas and institutions that are dying—no less in China than in the rest of the world—the Constitution sanctions power that can fairly be described as arbitrary. If China is to preserve and expand upon its recent achievements, therefore, it will need a constitution that institutionalizes, not simply tolerates, the forces that have led to improvements there.

Fortunately, debate about such issues is alive in China today (Chen 1998: A11). This volume and the conference that brought it about are evidence, as is a more recent conference, held in February 1998 at China's Unirule Institute, where a new translation of F.A. Hayek's 1960 classic, *The Constitution of Liberty*, was the focus of discussion. That book has become an instant bestseller in China, reports the *Far Eastern Economic Review*, and is already in its second printing after the first 20,000 copies sold out immediately (*FEER* 1998: 82; *AWSJ* 1998). The importance of such developments cannot be overstated, for the constitutional principles Hayek defends—like the principles to be discussed and defended here, which are drawn from the American Constitution—are very different than the principles one finds in the Chinese Constitution.

To illustrate those differences, their importance, and their bearing on the future of China, it will be useful first to take a brief but critical look at the Chinese Constitution, especially at how it is ill-suited to ensure that the gains of the past 20 years will not be lost. By way of contrast, the principles of the American Constitution will then be

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drawn out, especially as they may have application beyond the American context. It will then remain to apply those principles, very generally, to the Chinese context.

The conclusion reached is quite simple, but no less important for that. The modest steps China has taken toward privatization and local democracy, which have produced the recent progress, need to be expanded and institutionalized in a constitution that not only separates power functionally and divides it between central and more local institutions but, of even greater importance, limits it in scope and purpose. Present arrangements—whereby all human affairs are subject, in principle, to state control—are unjust, inefficient, and fraught with the perils of self-dealing and corruption. Democracy is often urged as the natural corrective to each of those problems, but it is only one aspect of what needs to be done—and the less important aspect. In fact, democracy itself, especially under conditions of ubiquitous government, is hardly free from the perils of self-dealing and corruption—directly, by majorities, and indirectly, by special interests manipulating the majoritarian process.

To check such tendencies at the outset, therefore, the objects of government concern, even democratic government, need to be constitutionally limited. That was the fundamental insight that led to the American Constitution. The American Founders instituted not simply constitutional government but limited government—government limited primarily to securing individual liberty.

The Chinese Constitution

China's present Constitution, its fourth since the People's Republic of China was established in 1949, was adopted in 1982, amended in 1988, and amended again in 1993. Reflecting Marxism-Leninism and Mao Zedong Thought, as its Preamble says, the Constitution makes it clear from the start that the PRC "is a socialist state under the people's democratic leadership," that "the socialist system is the basic system" of the PRC, and that "disruption of the socialist state by any organization or individual is prohibited" (Article 1). Although a very limited sanction of market-like arrangements has found its way recently into the Constitution—and especially into the underlying Civil Law, adopted in 1986, and Economic Contract Law, adopted in 1993—the provisions authorizing those arrangements are highly qualified. As a matter of "law," therefore, they can

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be compromised easily—a feature common to all socialist constitutions.

To an American, two things, especially, stand out about the Chinese Constitution: (a) it is programmatic; and (b) there are no genuine provisions for popular ratification. The programmatic character of the Constitution is made clear from the start: after recounting briefly “the protracted and arduous struggles” of the Chinese people, “led by the Communist Party of China with Chairman Mao Zedong as its leader,” the Preamble states that “the basic task before the nation is the concentration of efforts of socialist modernization construction in accordance with the theory of building socialism with Chinese characteristics.” Thus, the document is written with a specific agenda in mind—“building socialism”—which gives it less the feel of a constitution than of articles of incorporation for, say, “China, Inc.,” a body constituted for a specific, yet all-encompassing end. Given that character, the second feature looms especially large. For if the nation is organized along vast programmatic lines, one wants to know how it is that citizens join or consent to so far-reaching a program. Unfortunately, the Constitution gives little indication of that and thus raises fundamental questions about legitimacy. According to what principles are individuals bound to “the protracted and arduous struggle”?

A Program for Unlimited Government

The programmatic character of the present Constitution can be seen throughout the document. In the name of building socialism—the ultimate end of government—the related ends and means are essentially unlimited—reaching economic, cultural, social, and even personal affairs. To put it uncharitably, yet accurately, this is a constitution for totalitarian government, even if the actual exercise of power in recent years has fallen short of that in many respects.

To appreciate the point, one need simply reflect upon a few of the more salient articles in the document. As noted above, the Preamble summarizes the history of the Chinese people, focusing on the establishment of “the dictatorship of the proletariat” after 1949, then lays down the socialist agenda for the future. Article 1, as also noted above, states plainly that the PRC “is a socialist state.” Article 2 indicates the breadth of both the ends and the means of that state: “all power” in the PRC belongs not to people, in their individual

capacities, but to "the people," which they exercise through "the National People's Congress and the local people's congresses at various levels," managing "economic, cultural, and social affairs." That covers just about everything. In fact, it covers not only all economic affairs, as one would expect in a system based upon "socialist public ownership of the means of production" (Article 6), but education (Article 19), health and sports (Article 21), art, culture, and the media (Article 22), training and expanding the ranks of intellectuals (Article 23), morals and ethics (Article 24)—even family planning (Article 25). There is really nothing that is not, in principle, a proper subject of state concern.

It is true, of course, that the Constitution contains a section entitled "The Fundamental Rights and Duties of Citizens" (Chapter Two), which has led many in the West, including in the U.S. State Department, to believe that the human rights problem in China stems from the Chinese government's failure to follow its own law (Nathan 1997; U.S. Dept. of State 1998). But a careful reading of that section will show that the "law" provides virtually no protection for individual rights, notwithstanding its use of the language of rights. To be sure, all citizens of the PRC "are equal before the law" and are "entitled to the rights . . . prescribed by the Constitution and the law" (Article 33), including "freedom of speech, of the press, of assembly, of association, of procession and of demonstration" (Article 35), "freedom of religious belief" (Article 36), "freedom of the person" (Article 37), "freedom and privacy of correspondence" (Article 40), and other such rights. But in addition to qualifications that are included in several of the articles that stipulate rights, Article 51 sets out a general defeasance clause: "Citizens of the People's Republic of China, in exercising their freedoms and rights, may not infringe upon the interests of the state, of society, or of the collective." Given that those "interests" are boundless in principle, and vague besides, any claims that individuals might have *against* the state can always be trumped *as a matter of constitutional law*.

It should hardly surprise that the Constitution elevates the interests of the state above the rights of the citizen. After all, the whole point of the Constitution is to order affairs—including the affairs of individual citizens—toward the goal of building socialism. Given that all-encompassing end, it stands to reason that individuals should not be permitted to act in ways that might compromise the

end. In fact, when they do, their acts are branded as "counter-revolutionary" and subject to suppression (Article 28).

Under a programmatic constitution of the kind that China has, then, there are only two basic kinds of people—those who are "with the program" and those who are against it. The point is stated very nicely in a recent publication describing the Chinese constitutional and political system, issued by the authoritative China News: "The people's democratic dictatorship has two sides: democracy is practiced within the ranks of the people; dictatorship is exercised over the enemies of the people" (China News 1997).

Yet even the "democracy" that is practiced "within the ranks of the people" is a programmatic undertaking, not a clash of opposing ideas and aims. Indeed, the state organs in the PRC, Article 3 tells us, apply the principle of "democratic centralism," which amounts to a kind of top-down management of economic, cultural, and social affairs. Even "the division of functions and powers between the central and state organs," which one might think would have been designed to pit power against power, is "guided"—"by the principle of giving full scope to the initiative and enthusiasm of the local authorities *under the unified leadership of the central authorities*" (Article 3, emphasis added). Far from a check on power, the "division" of functions and powers is a kind of division of labor, aimed at implementing the program efficiently.

The ultimate source of "guidance," of course, is the Communist Party of China, although the party is nowhere mentioned in the Constitution, except in the Preamble. In that respect, the Chinese Constitution is more subtle than the final Soviet Constitution, the so-called Brezhnev Constitution, which stated in Article 6 that the Communist Party of the Soviet Union is "the leading and guiding force of Soviet society and the nucleus of its political system, . . . directing the great constructive work of the Soviet people" (Ramundo 1978: 73; Pilon 1986: 2). Less subtle than the Chinese Constitution is the above-mentioned China News piece: discussing the relationship between the CPC and the eight other "democratic" parties in China—not to be confused with "parties out of power or opposition parties"—the article states that the CPC works "in tandem" with those parties "to build socialism," that the CPC "governs China," and that it "employs the legal process to make its positions the national will" (China News 1997). That makes the role of the CPC quite clear, even if the Constitution itself leaves it unclear.

No Provisions for Popular Ratification

Because the Chinese Constitution sanctions so vast a program, enabling the government to reach and control virtually every aspect of life in China, and because the Communist Party of China, a small fraction of the Chinese population, plays so central a role in setting the policies of the government, questions about legitimacy loom especially large. How is it that individual citizens are bound to such a program?

One measure of political legitimacy—by no means the only or the most important measure, as will be discussed shortly—is to be found in consent or, in the constitutional context, ratification. If people agree to be bound under a set of rules or rulers, they cannot be heard later to complain about the arrangements they consented to, whatever the scope of those arrangements may be.

But as noted earlier, the Chinese Constitution, with its far-reaching program, contains no genuine provisions for popular ratification—certainly no section dealing explicitly with that issue. At best, the National People's Congress, composed of approximately 3,000 deputies (out of a population of more than 1.2 billion people), exercises the power to adopt and to amend the Constitution by a two-thirds vote of all the deputies (Articles 62 and 64). That is not popular ratification, of course. Moreover, whatever measure of legitimacy a constitutional vote by the NPC may impart—through "representational ratification"—is attenuated by the influence of the CPC. The party is hardly constituted by direct elections; nor, as the "leading" party, can it be said to represent the population as a whole, notwithstanding several claims to that effect in the Preamble of the Constitution.

To be perfectly fair, however, China is not alone in the world in not having solved the problem of establishing formal legitimacy through consent. In truth, the problem is intractable. For if consent is a necessary condition for legitimacy, then even large majorities cannot bind minorities who, by definition, have not consented. Only unanimity will do. But as a practical matter, unanimity is impossible, especially when a vote must run over time and changing populations.

In the end, therefore, one wants to ground legitimacy not simply in formal consent but, more importantly, in substantive considerations, as will be discussed below. Nevertheless, some measure of

formal consent will always be needed simply to establish a legal regime in the first place, to get it off the ground. The problem with China is that its measure is terribly thin. Absent anything remotely approaching popular ratification, even a two-thirds vote of the NPC lends little legitimacy, especially when the regime is as far-reaching as the Chinese regime is.¹

A Transition to Freedom?

But what of the relative freedom that has emerged in China over the past 20 years? How has that happened under so all-encompassing and authoritarian a Constitution? The answers to those questions are complex, but for present purposes a brief response should suffice, especially as it points to the difficulties inherent in the "mixed" situation in China today.

It seems that in the aftermath of the breakdown of authority that followed the so-called Cultural Revolution of the 1970s, quasi-private agricultural arrangements arose "spontaneously" in rural areas—along lines that Hayek discussed—unleashing the productive power of individual self-interest. And the increased productivity that resulted over time did not go unnoticed by local and national authorities. First in the countryside, then later in more urban areas and in non-agricultural affairs, such arrangements came to be tolerated and even encouraged. Thus, by 1993, when the First Session of the Eighth People's Congress met to approve revisions in the Constitution, we find up for approval such phrases as "socialist market economy" (Article 15) and "rural household contracted responsibility system . . . linking remuneration to output" (Article 8). And those changes were approved. Non-socialist arrangements have found their way into a programmatic Constitution dedicated to "building socialism."

Needless to say, that inconsistency creates a certain tension that is resolved only by couching the "market" arrangements in an overarching socialist framework—much as "individual rights" are recognized only insofar as they do not compromise state interests. Thus, the "rural contracted responsibility system" and "cooperative economic forms" recognized in Article 8 are nonetheless "part of the

¹I have discussed the foundations of legitimacy more fully in Pilon (1992; 1992/1993).

socialist economy collectively owned by the working people." And Article 8 also states that members of such collectives have the right to engage in various "private" activities—"within the limits prescribed by law," an important qualification we find throughout the Constitution. More generally, in Article 11 we find that,

The state permits the private sector of the economy to exist and develop *within the limits prescribed by law*. The private sector of the economy is a complement to the socialist public economy. The state protects the lawful rights and interests of the private sector of the economy, *and exercises guidance, supervision and control over the private sector of the economy* [emphasis added].

Make no mistake, those and a few other such additions to the 1982 Constitution mark important steps in the evolution of Chinese law. They amount to *constitutional* recognition of changes that had already taken place, however "unsanctioned" by the Constitution.

But while granting the importance of those changes, we should also be candid about them: they are anomalies within a vast overarching regime that runs the other way, toward a ubiquitous public sector. More importantly, they are *tolerated* more than recognized. Because they sit within an essentially arbitrary regime of power, dedicated to opposite ends, they can be eliminated with perfect legality. To put the matter in a different idiom, the private economic arrangements that have emerged recently in China, which have contributed so much to the well-being of the average citizen there, are operating more as a matter of "concession" than of right. Those who work under such arrangements are "permitted" to do so—by authorities who can withdraw their permission, if they wish, at any time, as the Constitution repeatedly makes clear.

Such arbitrary power, moreover, can lead only to corruption and self-dealing, as has already happened in many cases. And the issue is not simply the bribery that inevitably arises when officials have such power. More subtly, it relates to the absence in Chinese law of any clear line between private and public, notwithstanding the Constitution's use of the word "private." Thus, it is not entirely accurate to say that over the past 20 years "private" firms have arisen as officials "looked the other way." Rather, the cooperatives and village-based enterprises that have flourished are quasi-public, quasi-private entities. Indeed, Article 17 tells us that, in accordance

with the law, "collective economic organizations" (as distinct from the "state-owned enterprises" covered in Article 16) practice "democratic management." A truly private enterprise, of course, would practice whatever management its owners wished. Not here. Instead, collectives compete in market-like settings, but with varying degrees of state "guidance, supervision and control." That is a situation ripe for self-dealing. It affords an opportunity for local officials, who may be managers of local collectives, to use their public power against competitors for private gain (Pomfret 1998: F1).

Corruption will be reduced, however, not by stiffer oversight but by reducing the opportunities for corruption. And the key to that is to reduce or eliminate the official power that enables the corruption in the first place. Thus, just as the key to increasing economic production is to reduce or eliminate the official power that frustrates the forces of individual self-interest, so too the key to reducing corruption is to reduce or eliminate the official power that is the seedbed of corruption.

In the end, all of that should be accomplished through fundamental, constitutional law. To better secure and vastly expand the progress of the past 20 years, what is needed is a constitution that goes about the matter in a very different way. The freedom that the present Constitution "permits," at the pleasure of the government, needs to be taken for granted—as a matter of *right*. What needs to be permitted, by a constitution, is government actions. Those actions need to be "authorized," in the strict sense of that word, and then carefully limited, much like the Chinese Constitution today authorizes, then strictly limits, individual liberty. What is needed, in short, is a constitution that starts at the other end of the matter.

The American Constitution

Nowhere is that other end of the matter more clearly found than in America's Declaration of Independence, which set forth the principles that 11 years later would inspire America's Founders as they sat down to draft the Constitution of the United States of America. The Declaration is not "law," strictly speaking, but its broad principles so illuminate America's fundamental law, the Constitution, as to make it difficult to fully appreciate that law without first understanding its wellsprings. Thus, we begin with the Declaration of Independence.

The Declaration of Independence

In starting at the "other end," the Declaration does not presume government, then carve out areas where individuals are permitted to be free, as the Chinese Constitution does. On the contrary, it presumes freedom, then carves out areas where government is permitted to act. More precisely, the Declaration starts with a situation free of government—a "state of nature"—in which individuals are free by right, then asks how government might be justified under such circumstances.

The reasons for so starting are several, but two stand out. First, as a practical and immediate matter, the Founders wanted to justify to "a candid World" their decision to declare America's independence from Great Britain. Toward that end, they set forth a theory of legitimate government, then demonstrated how far English rule had strayed from that ideal. But second, from a more theoretical perspective, individuals come first, not government—which is constituted by individuals. Thus, the "natural" starting point is a state of affairs without any government. Once that fundamental insight is appreciated, what must be justified is government's power over the individual, not the individual's freedom from government control (Nozick 1974). As we will see shortly, that insight is at the heart of the American Constitution.

Starting from the other end, then, is tantamount to putting morality first, politics second. In fact, that is made clear in the very first phrase of those famous words that have inspired countless millions around the world for more than two centuries. When America's Founders wrote "We hold these Truths to be self-evident," they were saying that the propositions that followed were true and, what is more, "self-evidently" true—true by virtue of being grounded in reason. America government thus springs from moral or natural law—from the idea that there is a "higher law" of right and wrong, discoverable by reason, from which to derive human law and against which to judge human law (Corwin 1955).

Thus, using ordinary reason, accessible to all, the Founders derived the following truths:

that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.

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We are all created equal, as defined by our natural rights—meaning that no one has rights superior to those of anyone else. Moreover, we are born with those rights, we do not get them from government—indeed, whatever rights or powers government has come from us, from “the Consent of the Governed.” And rights to life, liberty, and the pursuit of happiness imply the right to live our lives as we wish—to pursue happiness as we think best, by our own lights—provided only that we respect the equal rights of others to do the same. Drawing by implication upon the common law tradition of liberty, property, and contract—its foundations rooted in “right reason”—the Founders thus outlined the moral foundations of a free society.

Only then, after outlining the basic moral principles, did they turn to government. We institute government, the Declaration says, to secure our rights—our natural rights and the rights we create as we live our lives. But the powers government may need to do that must be derived from our consent if they are to be just. Government is thus twice limited: by its end, which any of us would have a right to pursue were there no government; and by its means, which require our consent.

Notice, then, how fundamentally different this approach to government is than the approach taken by the Chinese Constitution. Government in America is not instituted to undertake a vast, all-encompassing program like “building socialism.” To the contrary, its sole function, at least in principle, is to secure our rights—against domestic and foreign threats. As for the rest—“economic, cultural, and social affairs”—that is for individuals and private organizations to “manage,” not in any public sense but in their private capacities. Individuals are *free*, that is, to plan and live their own lives—free from the interference of other individuals, if government is doing its job, and free from government interference as well.

The Constitution

In America, then, what must be justified is government power, not individual freedom. Freedom is a given, power is not. And since all power resides first in people—not “the people,” in their political capacity, but people as individuals—then the basic political question is how power gets from people to the government. That, of course,

is a question about how Americans constituted themselves, which returns us to the issue of ratification.

1. *Ratification.* Since the Declaration makes it clear that legitimacy is a function of consent—that government derives its *just* powers from the consent of the governed—it is crucial to understand just how consent operates to impart legitimacy to the institutions and actions of government. And the first, primordial consent takes the form of constitutional ratification.

Unlike in the Chinese Constitution, there is a section in the American Constitution that deals with ratification. Article VII provides, quite simply, that “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.” Moreover, there is a separate section that deals with amending the document. Amendments can be proposed by two-thirds of both houses of Congress or by a convention called after application to Congress by the legislatures of two-thirds of the states. Ratification of any such proposed amendment requires approval by three-fourths of the legislatures of the states or by conventions in three-fourths of the states, depending on which mode Congress has determined.

Clearly, those methods get us closer to popular ratification than do the methods of the Chinese Constitution, especially insofar as the process takes place not just at the national level—like that of the Chinese Constitution—but at the state level as well. Moreover, ratification in America is not influenced or determined by a party that operates like the Communist Party of China; as noted earlier, in China there are no “parties out of power or opposition parties.” And notice too how unanimity was recognized as important as an initial matter: once nine states had ratified the Constitution, it became effective “*between the States so ratifying the Same.*” By implication, those states could not have bound other, non-ratifying states to the Constitution. The document was binding only upon those states that agreed to be so bound: thus, among them, there was unanimity.

Still, a number of problems remain if consent is indeed to be the bedrock of legitimacy. At the time of America’s founding, for example, the franchise was relatively limited; thus, many had no say in the process, even though they were bound by its result. Moreover, even if the franchise had been much wider, unanimity was required only at the outset and, even then, only with respect

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to states: at the level of individuals, minorities who voted against ratification—whether of the Constitution originally or of an amendment later—were still bound by the vote of the majority. And finally, the still larger problem of changing populations remains: no American today, except officeholders and immigrants who later become citizens, has consented to be bound by the Constitution. In sum, a basic question any American citizen can ask—Why should I be bound by the consent of others?—remains unanswered for most.

Assuming consent were the only criterion of legitimacy, one can answer, at best, that the American Constitution did and does a better job providing for popular ratification—and thus a better job of achieving legitimacy—than does the Chinese Constitution. That is no small matter, of course, especially when the consent afforded by periodic elections is added in—although that consent pertains primarily to selecting those who exercise the powers of government, not to what those powers should be. But as noted earlier, the problem of achieving legitimacy through consent alone is intractable. And America's Founders understood that, which is why they spoke of government as a "necessary evil": necessary because the problems that arise when individuals try to secure their own rights, outside of common institutions of justice, are themselves intractable; yet evil because those who do not wish to come under common, government rule—those who oppose ratification—are nonetheless forced to be so ruled, as a practical matter. In the end, then, George Washington got it right when he said that "government is not reason, it is not eloquence, it is force" (quoted in Wilstach 1924: 526).

2. *A Program for Limited Government.* Once we recognize, however, that government is a forced association, that no matter how extensive the provisions for popular consent may be, they will always fall well short of the kind of consent we would expect in, say, an ordinary contractual arrangement, we can look for other, more substantive indicia of legitimacy. In doing so, however, the conclusion drawn from an inquiry into consent has an important implication that needs to be noticed: if government is indeed a forced association—due to the problems of achieving consent—then one wants to do as little as possible through government, through the public sector, where forced association is inescapable, and as much as possible through the private sector, where things can be done voluntarily and thus in violation of the rights of no one. If minimizing coercion and

respecting rights are fundamental concerns in the search for legitimacy, that is a profoundly important implication. Government is necessary. But if it is limited in what it does, then the forced association that necessarily characterizes it can be minimized.

That view—that healthy skepticism about government, rooted both in experience and in the theoretical concerns just discussed—imbued America's Founders as they sat down to draft a Constitution 11 years after they wrote the Declaration of Independence. The central problem facing them was to design a government that was strong enough to do the things it needed to do—especially by way of securing rights, its principal function—yet was not so powerful or extensive as to violate rights in the process. Toward that end, the document they drafted, once ratified, authorized government and governmental powers, then checked and balanced those powers through a series of extraordinarily thoughtful measures.

At the heart of the plan, however, was the doctrine of enumerated powers. The Preamble of the Constitution sets the premise for the doctrine: "We the People," for the purposes listed, "do ordain and establish this Constitution." All power, again, comes from the people. But as a reflection of the principles of the Declaration, the power the people give to government, to exercise on their behalf, is strictly limited. In fact, the very first sentence of Article I, following the Preamble, implies as much: "All legislative Powers herein granted shall be vested in a Congress." By implication, not all powers were "herein granted." And that is borne out in section 8 of Article I, where the powers of Congress are enumerated and thus, by implication, limited. But just to make the point clear beyond any doubt, when the Bill of Rights was added to the Constitution two years after the Constitution was ratified, the Tenth Amendment, the final member of that Bill of Rights, recapitulated the point and, with it, the constitutional philosophy of the Founders: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Plainly, only certain powers were delegated or granted by the people. Those powers were then enumerated in the Constitution. The rest were reserved to the states—or to the people, never having been granted to either level of government.

The contrast between that approach to constitutionalism and the Chinese approach could not be more stark. Both constitutions begin

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at the same place—with power in the hands of people. But whereas the Chinese Constitution transfers that power, in its entirety, from the people to the government—while maintaining the façade of democratic decisionmaking, to be sure—the American Constitution delegates only certain limited powers to the national government, which are then enumerated, while leaving most with the states or the people. The key to understanding the American Constitution, then, is not through its Bill of Rights, which was added only two years later. Rather, it is through the doctrine of enumerated powers. Americans gave their government only certain things to do. The rest they left to be done by the states—or, far more so, by themselves, in their private capacities. They did not want government managing “economic, cultural, and social affairs,” because they knew that that would be the end of freedom. They wanted to manage those affairs themselves, free from government interference.

There were many other restraints on power that the Founders put in the Constitution, of course: the separation of powers among the three branches of government, defined functionally, with power pitted against power; a bicameral legislature, with each chamber differently constituted; provision for judicial review of the acts of the political branches by an independent judiciary, among many such checks; a Bill of Rights; and periodic elections—to name just a few. The important thing to notice, however, is that each of those is in fact a restraint. The American approach was not to facilitate active government dedicated to accomplishing great ends. Quite the contrary, it was to empower limited government for limited ends, and then to check that power as much as possible. The great danger, the Founders understood, lay not in allowing individuals to be free but in allowing government to be free. Individuals were meant to be free; they were born free; *they* were the source of a nation’s greatness, not the government.

To return to the question of legitimacy, then, as a formal matter, the American Constitution enjoys such legitimacy as it finds in the fact that it was ratified to the extent that it was: the powers it contains, and only those powers, were thus “authorized” from the outset. As a substantive matter, it enjoys the legitimacy that comes from its leaving individuals free to enjoy their rights to life, liberty, and the pursuit of happiness. (Notice, the Constitution does not “permit” individuals to be free. They already have their freedom.) American

citizens pursue happiness in an infinite variety of ways—by working, acquiring property, creating businesses, raising families, and on and on, all without government managing those activities for them. It is a just system of government. And by leaving the productive power of individual self-interest largely free, it is an efficient system, one that maximizes economic productivity.

A Transition from Freedom?

Notwithstanding the manifest virtues of the American approach to government, many changes have taken place in the more than two centuries that have passed since the Constitution was ratified. And many of those changes, especially in the 20th century, have reduced rather than expanded freedom. For the purpose of applying the principles of the American Constitution to the Chinese context, therefore, it would be useful to review briefly a few of those changes.²

Without question, the most important change came in the 1930s, during the New Deal Era, in the form of the demise of the doctrine of enumerated powers, the centerpiece of the Constitution, at the hands of the Supreme Court. The impetus for that change came earlier, however, during the Progressive Era at the turn of the century. It was then that many Americans, especially “progressive” Americans, stopped thinking of government as a necessary evil and started thinking of it as an “engine of good”—an institution for solving all manner of social and economic problems. Like the thinking that underlies the Chinese Constitution, Progressive Era thought called for expansive government aimed at accomplishing great things—not by individual initiative, motivated by self-interest, but by government direction, motivated by the “common good.” Unfortunately, for that school of thought, the Constitution authorized only limited government, and so the efforts of the progressives to use public power, usually at the state level, to pursue their grand ends were most often frustrated by the courts, especially the Supreme Court, which applied the principles of the Constitution to find those schemes unconstitutional.

With the coming of the Great Depression in the 1930s, however, the focus of the progressives shifted to the federal level. Still, the Court resisted those efforts—until President Roosevelt, early in 1937,

²I have discussed the issues that follow more fully in Pilon (1993).

threatened to pack the Court with six additional members. Not even Congress would go along with the scheme. Nevertheless, the Court got the message. It started rethinking its conception of the Constitution. And the result was the demise of the doctrine of enumerated powers.

What happened, essentially, was this. Two broadly worded clauses in the Constitution—the General Welfare Clause and the Commerce Clause—were reinterpreted by the Court. Written primarily to be shields against power, they were stood on end by the Court, which turned them into swords of power. Through the reinterpreted General Welfare Clause, Congress was given a vast redistributive power—which has led to the modern American welfare state. Through the reinterpreted Commerce Clause, Congress was given a vast regulatory power—which has led to the modern American regulatory state. Then a year later the Court reinterpreted the Bill of Rights, relegating property and contract rights—the foundations of the free-enterprise system—to a kind of second-class status. With that, the complex web of protections against overweening government that the Founders had established was largely eviscerated from the Constitution.

Not surprisingly, American government has grown exponentially in the wake of those changes. By world standards, it is still relatively limited. But by the standards of the Constitution—as understood by lawyers and laymen alike for some 150 years—it is largely unlimited. It is no surprise either that the problems of corruption and self-dealing that one would expect to find under conditions of ubiquitous government are to be found in America today. Most prominently, the penchant for middle-class majorities to use the political process to provide themselves with benefits paid for by the upper and lower classes has a thousand variations—none more prominent, perhaps, than public higher education, which the upper classes often avoid and the lower classes often fail to qualify for. Less prominent, but more common and more insidious, is the penchant for special interests to work the system to gain concentrated benefits for themselves, the costs of which are widely dispersed and thus little noticed by the many, except in the form of aggregate taxes (Gwartney and Wagner 1988: 19–23).

All of this is the result of the essentially unbridled democracy that followed in the wake of the New Deal court, which is exactly what

one should expect when substantive restraints on democratic decisionmaking have been lifted and any subject is a proper candidate for a vote. The tyranny of the majority follows. More commonly, it is the tyranny of special interests who have learned to work the levers of power within the majoritarian system. Independent courts are supposed to restrain such tyranny under the American system of government. But when the tools that would otherwise enable them to do that have been removed from the Constitution, the courts end up deferring to the political branches. Thus, democracy, by itself, is no guarantee of liberty or prosperity. In fact, as philosophers from antiquity to the present have understood, an unbridled democracy may be one of the fastest routes to both tyranny and poverty.

In recent years, however, many more Americans have come to appreciate such issues than seemed to a half-century and more ago. Thus, the Supreme Court today is taking something of a fresh look at the jurisprudence of the New Deal—in a tentative way, to be sure—and the Congress, to say nothing of state governments, is much less enamored of government programs and government planning than it was 20 years ago—to say nothing of 60 years ago. Most importantly, however, the climate of ideas among the general public has noticeably changed in the direction of greater suspicion of government. Whether those recent changes will end America's transition from freedom and head the nation back toward freedom remains to be seen, but the sighs for several years have been pointing increasingly in the direction of restoring freedom.

Applications to China

Thus, in both America and China—and most other parts of the world, for that matter—the trend in recent years has been toward greater freedom. And the reason is obvious. The great socialist experiments of the 20th century have all failed—invariably at tragic human cost. The world has learned from bitter experience the truths that Hayek and a few others, a half-century and more ago, were teaching from reason: that human freedom not only is right but is the wellspring of human prosperity; and that efforts to politically plan and manage a society toward prosperity are doomed to end in tyranny and poverty.

What then is to be done about the Chinese situation? The first thing to be said is that only the Chinese can address their situation,

although they can certainly take counsel from others in the process. Yet it is hard to believe that there is anyone in China today who does not understand that the improvements there over the past 20 years are due to anything but the increased measure of freedom that has been allowed. If that is so, then the only question remaining is how to expand that freedom—and the prosperity that follows it—in a secure way, how to insure that the expansion takes root in secure institutions.

On such matters, nothing can be sure, of course. Nonetheless, certain general conclusions can be drawn from the analysis above. The first, and most important, is simply a restatement of what has just been said, namely, that prosperity comes not from government planning but from individual initiative, motivated by self-interest, fairly narrowly understood, but constrained by the rights of others to pursue their own self-interest. Thus, legal affairs must be arranged in a way that both encourages and restrains the individual pursuit of self-interest—the pursuit of happiness. That means that private property must be encouraged by being legally protected. And contracts of all kinds must be allowed and protected, for none of us knows, *a priori*, which agreements will prove beneficial and which not—even if the parties to an agreement inevitably believe that their contract will prove beneficial. With that—property, broadly understood as life, liberty, and estate; and contract—one has the legal foundation of a free market—and of a free society (Epstein 1995).

As noted earlier, China's Civil Law of 1986 and Economic Contract Law of 1993 are already moving in the right direction, even if they are still too heavy with a socialist overlay. The Constitution, however, is another matter. Even after the revisions of 1993, it is a dated relic of a bygone age, a shell that is increasingly ignored in practice—even if its bite remains very real for those who run afoul of it in selected ways.

In thinking about a new constitution, then, one wants to think first not about democracy but about getting the government out of the business of running the business of life. The Chinese people are fully capable of planning and living their own lives, as they have demonstrated for centuries under less officious governments around the world—and as they have demonstrated for 20 years on the mainland. Well more than half the battle would be won if that step alone were taken. There is simply no need to “plan socialism.” There is a need to allow freedom.

Beyond that, it is a matter of mechanics—and there, experience is the best guide. Regarding those functions that government must or should perform, in most cases dispersed power is better than central power; but central power can be a check on dispersed power—to insure that it is performing as it should. Similarly, democracy is a check on power; but for all the reasons cited above, it too needs to be checked, especially by limiting the things open to democratic decisionmaking. Such limits will reduce democratic corruption, of course, and they will reduce official corruption as well. But they need to be spelled out in a judicially enforced constitution—and precisely spelled out, as the American experience with broad language should teach.

At the end of the day, then, the answer is, as it has always been, liberty, secured by a constitution grounded in the rule of law, not in the rule of man. If China is to continue on its present course, it will need a constitution of liberty.

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