

Introduction

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As the link between law and economic development has been increasingly recognized, it has become commonplace to assert that development is not possible without a “rule of law” and good property rights. Today, these ideas are promoted in the academy, in the development policy community, and by leading international financial institutions, intergovernmental and nongovernmental organizations. There is even a special unit within the UNDP devoted to the promotion of these ideas.¹ Law is certainly crucial for economic development. But what *kind* of “rule of law” is desirable? What constitutes “good” property rights?

These questions are of particular importance to China as it continues the march toward a market economy “with Chinese characteristics” that it began in 1979, a little more than thirty years ago. China’s Eleventh Five-Year Plan recognized that one of the key challenges going forward is to create the institutional infrastructure to facilitate the development of such a market, including an appropriate legal framework of institutions, rules, and regulations. The papers collected here illuminate today’s debates about just what legal arrangements are, in fact, appropriate for a market “with Chinese characteristics.”

We focus on two broad questions. How might one define and regulate property and other legal rights in a market economy “with Chinese characteristics?” And how should we understand China’s experience with significant questions of constitutional design, particularly with respect to centralization and decentralization, and the role of the judiciary? We hope to make visible the range of experimentation and the diversity of experience with legal and institutional design in China, while also offering a range of perspectives on the relevance of Western experience and Western ideas about the links between legal arrangements and economic performance.

We stress throughout the significance—and breadth—of the choices available for China as it establishes the ground rules and institutional structures for an expanding market economy. A key set of issues, discussed below, concerns property rights. A major strand of work in law and development has argued that establishing well-defined property rights is the *central* problem in development. We challenge that presumption. Indeed, we should probably place terms such as “property rights” in quotations, for it is not at all clear what such terms should mean. That is one of the questions under discussion here. Some of the

papers in this volume even question the widespread assumption that a better legal system involves a more precise definition of property rights.

These choices are often discussed in the shadow of quite specific ideas about what has and has not worked in the West. While most policymakers know that China could not and should not simply “borrow” legal and institutional frameworks from the United States or some other advanced industrial country, there is no shortage of proposals to import this or that supposedly “best practice” legal arrangement from the West. On the whole, we are skeptical about this kind of importation. This book, in contrast, focuses on what China might indeed learn from the history of the quite different choices that various Western nations have made, and the various ways their choices have played out.

Contemporary discussions of economic development policy, as well as of the legal and institutional arrangements most conducive to sound policy, continue to be influenced by the neoliberal intellectual framework that dominated thinking among economists and jurists in the later years of the last century, especially those informed by the Chicago School tradition.² In our view, this orthodoxy, which remains prominent in much of both the legal and the economic academy, is a poor guide to the legal and institutional choices facing China today. This book draws on other traditions within economic and legal thought to highlight the range of choices available to China as it lays the foundations for its own market economy.

The orthodoxy is correct, however, in its insistence that background entitlements are absolutely central to the operation of markets. Legal arrangements matter. How entitlements are allocated and defined can make all the difference over time. They could determine, for instance, whether there emerges a large class of landless peasants, or a small elite group dominating the economy. As a result, it is absolutely critical to focus on the allocation of property and other background entitlements as China sets up the framework for its own distinctive market economy. These background rules—to which we should add corporate law, bankruptcy law, and rules about finance—structure the players who will participate in markets, and how they will interact, settling their respective powers and obligations while establishing an initial allocation of resources, income streams, and risk.

The fact that we dwell so long on issues pertaining to property rights may seem strange in a book about contemporary Chinese economic policy. Economic policy seems far more a matter of institutional arrangements and the details of regulation than of property rights. Private law—contracts, property, the law of obligations—is generally considered part of the *background* for economic policy-making. We are convinced, however, that at this juncture, a rigorous assessment of the nature of property rights is warranted.

We do not intend to provide detailed prescriptions for reforming the legal and institutional structures in any country. Rather, we hope to contribute to debates within academia and within policymaking circles by expanding and informing the intellectual frameworks through which choices among legal and institutional possibilities are made, both in the developing world and in the advanced industrial societies. The fact that China is in the midst of designing its legal and regulatory framework—making decisions that will affect the shape of its economy for decades to come—gives, of course, particular salience to this debate. China provides a concrete setting within which these issues can be discussed.

Introduction

3

This book is the result of a series of dialogues among academics and policy-makers from China and around the world, held at the Brooks World Poverty Institute at the University of Manchester, at Columbia University (under the auspices of the Initiative for Policy Dialogue and the Committee on Global Thought), and in Beijing (at Peking University, with the joint sponsorship of the Initiative for Policy Dialogue, the Committee on Global Thought, Columbia Global Centers Beijing, Peking University, Tsinghua University, China Development Research Foundation, The Institute for Global Law and Policy at Harvard Law School, and Brooks World Poverty Institute).³

Our authors straddle ongoing intellectual debates in a variety of ways. Some are more familiar with the Chinese economic experience and reflect here on the institutional and legal elements that have been—and ought to be—enshrined within it by focusing on specific policy areas and challenges, from decentralization to health care and urban policy. Individual papers within this volume examine the details of specific development policies and institutional characteristics of the emerging Chinese market economy, assessing the record of the last years and highlighting elements that have—and have not—been successful. Other authors are more familiar with Western debates about the relationship between legal forms and economic performance. They reflect here on the lessons for and from the Chinese experience for our understanding of the links between economics and law. Our authors are not at all of one mind about the nature of the Chinese market economy, nor about the relationship between legal arrangements and economic performance. The authors do share the conviction that China is now entering a critical phase in its economic development and its move to a market economy with Chinese characteristics and that law and institutions are crucial components in the development equation. Each has something important to contribute to our understanding of the potential significance of diverse legal forms for the future of Chinese market capitalism.

TOWARDS A MARKET ECONOMY WITH CHINESE CHARACTERISTICS

China, as we have noted, is now entering a critical phase in its move to a market economy. There are, of course, a variety of types of market economies—the Scandinavian model differs from the Anglo-American, the Japanese, or the Continental European models. Every market economy has distinctive legal and institutional arrangements that reflect its own political, social, and cultural history. History and culture continue to matter, if only because they affect norms and beliefs, which in turn affect how legal and institutional arrangements work in practice. China has committed itself to developing a market economy with its own distinctive characteristics. Those distinctive features are now becoming visible and have increasingly become subjects of debate, both within and outside China, particularly where they diverge from what is understood in one or another place to be “best practice.” Our authors offer a number of perspectives on what has and has not worked to this point.

A distinguishing feature of China's evolution, however, is that the economy continues to change rapidly, changing the institutional forms through which economic life proceeds. At one stage, township and development enterprises (so-called "TVEs") dominated China's development strategy. At another, joint ventures dominated. There is no reason to believe that the structures that have dominated in the past decade will do so in the next. Indeed, China has committed itself to deep structural change: for instance, by seeking to become less dependent on exports and to reduce adverse environmental impacts. Organizational forms and regulatory incentives will also need to be able to change. A commitment to economic change and flexibility demands legal and institutional arrangements that are themselves both robust and flexible.

Legal and institutional regimes are constantly evolving through administrative, judicial, and regulatory processes. In every society, the people who participate are affected by political and intellectual currents whether they are elected or appointed. Moreover, institutional and legal structures create vested interests and help form coalitions that shape these processes. We have seen how, in America, they helped shape a process that led to financial market deregulation and bank bailouts; those same processes are helping to shape the post-crisis regulatory debate. The relationship between political choices and institutional forms is itself dynamic and iterative. This will also be true for China.

Nevertheless, starting points matter. Early decisions must be taken with a view toward their dynamic impact on the operation of an evolving market. Discussions over the next few years will have a major effect in determining the kind of market economy into which China will evolve. That evolution will condition—and be conditioned by—the legal and institutional arrangements that are now being put in place. Legal arrangements entrench interests, conditioning the dynamic evolution of market forms. Legal frameworks governing property rights, competition, corporate governance, intellectual property, bankruptcy, contracts, and more will influence what it will mean a generation from now to say the market economy is one with "Chinese characteristics." As a result, this is a particularly important moment to assess differences in institutional arrangements and their consequences. What would normally be an academic exercise could turn out to have an enormous impact on a quarter of the world's population. This volume aims to clarify choices now available to China as it establishes what will become the long-term framework for its own distinctive market economy.

THE RELEVANCE OF LEGAL TRANSPLANTS FOR CHINA

Early on, China recognized that it needed to have a distinctive form of market economy, appropriate to its distinctive circumstances and history. Even with clarity about the kind of economy and society China would like to create going forward, it is not clear now precisely what kinds of legal and institutional arrangements are necessary to achieve those goals. China faces debates about regulation, property rights, and institutional forms that are familiar among economists in the West. Just how relevant are their answers? It is easy to imagine that one might learn what China needs to do to achieve success by

Introduction

5

studying the legal and institutional arrangements of development success stories—perhaps particularly the advanced industrial economies of North America and Western Europe.

As it turns out, however, these societies have a wide range of distinctive legal and institutional features. Some of their differences are accidents of history and others reflect deeply held cultural views and political choices. Whether these arrangements, transported elsewhere, would be equally successful—or would even embody the same values and political choices—is far from clear. In our experience, those living in a given market economy often overestimate the importance of their own distinctive national arrangements to their own economic success. They may even come to feel their own institutions are required for the success of any market economy. Remarkably, people may feel this way even about institutional arrangements that have resulted from historical accidents or cultural developments far from economic policy—and where other nations have experienced superior economic performance with alternative arrangements. As a result, it is wise to exercise care in looking for successful legal arrangements to import.

Accordingly, we bring a deep skepticism about the desirability of extending popular, if largely mistaken, pieties about the legal prerequisites for strong economic performance in a market economy. Indeed, our discussions over the last three years have left us ever more hesitant to extrapolate from what we think we know about the relationship between law and economics in the West to what ought to characterize the institutional and legal framework for further development in China.

In good part, our hesitance arises from the realization that much “common sense” about the relationship between law and economics in the West itself is incorrect. While it is widely accepted that developing countries need to adopt “good” legal frameworks, there is no agreement today about what that means. If this could be said before the global financial crisis, it is even more so today, as even those in the West are questioning the assumptions underlying the policy frameworks and legal structures that govern economic affairs.

The crisis has destroyed a large number of prevailing myths and shibboleths. It has even thrown into doubt our ability to recognize “bad” frameworks. For instance, independent central banks were supposed to be the “best practice” institutional arrangement for governing financial markets. As it was, more independent central banks, such as those in the US and Europe, performed less well than did less independent central banks, such as those of India, China, and Brazil. The independent central banks were evidently more easily captured by the financial sector that they were supposed to be regulating.

Similarly, before the crisis, most would have thought of America’s financial regulatory structure as exemplary. The international financial institutions had urged countries around the world to aspire to that as a “model.” The crisis exposed the US regulatory system as having been “captured” (intellectually, if not financially) by those it was supposed to regulate. A system of “revolving doors” on the part of those who wrote and implemented regulations created distorted incentives. And the problems weren’t limited to America’s financial regulatory structure: defects in corporate governance help explain why bank executives may have done so well, even as shareholders and bondholders lost so much.

Intellectual property provides another example, which we discuss below. While there is widespread support for the notion that there should be some form of intellectual property protection, details matter. America held up its intellectual property regime as “best practice” and tried to extend it to the rest of the world. Within the United States, meanwhile, dissatisfaction with the intellectual property regime has grown. For example, many in the software industry worry that it stifles innovation, while many health advocates believe it impairs access to life-saving medicines. The social, political, and economic choices embedded in the intellectual property regime have been reopened for debate.

This book begins where confidence in the right answers and model practices fades.

THE UNFORTUNATE IMPORTANCE OF NEOLIBERAL POLICY ORTHODOXY

Even as China works to create its own distinctive legal and institutional framework, it will inevitably look to “models” abroad. It will strive to incorporate at least the best ideas, if not the best practices. Moreover, China’s success over the past three decades is in no small measure a result of globalization. It will, at the very least, need to harmonize, to some extent, its policy frameworks with those of the rest of the world. As it seeks to attract investment, it will inevitably be sensitive to others’ perspectives on its own legal and institutional framework. Much of the debate within the papers in this volume centers around the economic significance of particular regulatory arrangements and forms of property often associated with the Anglo-American economic tradition.⁴ The question is, to what extent are these appropriate for China today?

In recent years, as we commented earlier, ideas about the role of law in development have been greatly influenced by attitudes about law held by Chicago School economists responsible for the neoliberal consensus about what constitutes good national economic policy. One result has been the emergence among economists of a powerful orthodoxy about “best practice” legal and institutional arrangements for market efficiency and growth. At the same time, many economists and legal scholars in the United States—and in the international financial institutions—have developed theories and launched empirical studies suggesting the superiority of specific legal and institutional arrangements they regard as characteristic of the Anglo-American model of market economy and which they see as expressing the unvarying demands of market efficiency. One result of this intellectual work has been the emergence, starting in the mid-1980s, of a powerful orthodoxy about the “best practice” legal and institutional arrangements for market efficiency and growth. This legal orthodoxy has run parallel to—and often been linked with—neoliberal economic policy orthodoxy. Like their neoliberal economic cousins, neoliberal proponents of “best practice” legal arrangements have been active in global debates about the institutional framework for national development. They have also been active in discussions about Chinese

economic policy, promoting these “best practice” legal and institutional forms as integral to China’s transition to a market economy.

In broad terms, the neoliberal orthodoxy, both legal and economic, has been hostile to economic regulation and supportive only of those specific rules thought necessary to “support” markets. The list of legal rules necessary to support a market can seem quite limited: a clear assignment of property rights, strong and independent judiciary to enforce those entitlements, the institutional framework for an independent monetary policy, an effective criminal justice system, particularly with respect to corruption. Other rules are broadly viewed as “distorting” the work of market forces, however important they may be as expressions of political or moral commitment. Underlying this set of policy preferences is a strong presumption that markets are competitive, that the pricing mechanism operates effectively, that markets can handle externalities and public goods on their own, and that individuals should bear responsibility for protecting themselves (*caveat emptor*) and that an economic policy oriented to growth ought to distinguish what is necessary for efficiency from what might be desirable for other reasons. There is little attention in this framework to the conditions that might transform efficiency into growth, or to the availability of alternative development paths and alternative equilibria with different distributional effects.

Interestingly, just as these ideas were gaining currency in development policy discussions, the Chicago tradition was itself coming under attack both by economists and legal scholars. In both legal and economic circles, the challenges have been empirical and historical as well as analytic and theoretical.

The historical/empirical critique

Economists and legal scholars have challenged the association of the policies associated with neoliberal economic and legal orthodoxy with economic growth and efficient market organization. They have questioned whether these legal arrangements can be reliably linked, theoretically or empirically, either to market efficiency or to growth, let alone both. East Asia’s success—the most rapid growth in the history of the world—based on other premises provides evidence that the neoliberal model (both the economic and legal doctrines) is not necessary for growth. The failure of so many Latin American countries that attempted to follow neoliberal dictates provides evidence that the model is not sufficient for growth. And the repeated crises confronting economies that have adopted that model—of which the current crisis is the most recent and most devastating—shows that whatever growth is produced may not be sustainable and that the “model” is subject to high levels of instability, imposing costs that few developing countries can afford.

Critics of the neoliberal legal movement have gone further, even questioning whether the paradigmatic “best practice” legal forms actually do characterize the American economy. The global financial crisis has shown, for instance, real weaknesses in America’s ability to address the legal issues posed as so many debtors are unable or unwilling to meet their obligations. The legal and economic system allowed conflicts of interest to arise between holders of first and second

mortgages, and between service providers—conflicts that impaired efficient restructurings of the mortgages.

But even if America's "best practice" legal structures worked well for America at one time, there is no presumption that they will be well designed for another. Questions have also been raised about whether these legal forms can really be made universal, rooted as they are in quite specific cultural and political commitments. Notions such as "best practices" and the ability to transplant legal frameworks from one society—where it might indeed have worked well—to another have all come to be questioned.

All of this raises questions about whether neoliberal legal orthodoxy is at all appropriate for China today—or even provides an appropriate point of departure. To answer that question, it is important to grasp the extent to which the intellectual underpinnings of the neoliberal orthodoxy have also been theoretically and analytically eroded.

The economic critique

The most straightforward and well-known theoretical critique of the neoliberal policy orthodoxy came from within economics. The foundation for the policy prescriptions of the neoliberal tradition was a set of hypotheses about how markets work. The most important of these is the presumption that they are (Pareto)-efficient. The *economic model* was shown to be badly flawed and its conclusions dependent on highly unrealistic assumptions. Slight changes in those assumptions, especially in the direction of increased realism, lead to markedly different results. Even slight frictions could, for instance, lead to highly noncompetitive outcomes. Advances in economics (theoretical and empirical), including the development of game theory and theories of asymmetric information, have provided alternative frameworks, with strikingly different conclusions and markedly different policy implications.

The broad resistance to regulation associated with neoliberal orthodoxy has been criticized by economists as the underlying economic presumptions have been undermined by research over the past three decades. If markets are not in general efficient (which they are not), then there is a role for the state, in addition to *supporting* the market—a market-"correcting" role. Today, almost all societies understand that markets by themselves lead to unacceptable environmental degradation. There is a need for environmental regulation—something that China too has recognized. But, contrary to the neoliberal view, "market failures" are pervasive.

Moreover, while the neoliberal orthodoxy focuses on efficiency, standard economic theory never provided any presumption that market outcomes were "socially acceptable," consistent with any principle of social justice or solidarity. Nor was there any presumption that a Pareto-efficient equilibrium would generate development or lead to growth. The underlying theoretical separation of efficiency from other considerations has been undermined by critiques of the neoclassical model stretching back more than thirty years. It is now clear that in establishing the institutional structure for a market economy, more than efficiency is of concern. The neoliberal legal model was not only based on a flawed economic

Introduction

9

model—its tenets did not necessarily lead to overall economic efficiency—but even more importantly, it left out critical issues of equity and social justice, that we believe need to be at the heart of a country’s legal system.

Not surprisingly, given the lack of robustness of the model, the policy conclusions—including for the design of legal and institutional frameworks—were also shown not to be robust. Chicago School reasoning had, for instance, led to skepticism about whether predatory pricing could occur, with the result that the US Supreme Court imposed a heavy burden on anyone attempting to bring a predatory pricing case under the competition laws. Anyone schooled in the new and more robust theories would have come to quite different conclusions. Not only did the newer theories show that markets are not in general (Pareto)-efficient, but they also explained why one cannot separate out issues of equity and efficiency.⁵ Choices still need to be made.

The Chicago School ideas about economics have come under particular criticism in the aftermath of the Great Recession of 2008, with leading policymakers (such as Alan Greenspan) and leading thinkers (such as Richard Posner) engaging in what appears to be at least a partial recantation.⁶ After all, the neoliberal orthodoxy had helped shape not only the legal framework, but also the behavior of regulators and regulatory policy—and even affected the behavior of investors and banks.

The legal critique

Within the legal academy, the attack was complementary and, in some ways, deeper. To start, it is critical to understand that the background rules structuring market arrangements are not natural entitlements—they are social arrangements designed to promote social objectives. This is most obvious in the case of newer legal innovations such as “intellectual property” or “limited liability corporations.” These are social constructions, the merits and designs of which have to be constantly evaluated and reevaluated. But it is no less true of “property” and “contract.” In every market economy, each is a complex legal regime reflecting a history of social, political, and economic conflict and debate.

In practice, the legal and institutional structures provide some of the most important “social protections” in modern societies. In every market economy, the particular form of these structures reflects social as well as economic considerations. This is also the case in China. Inattention to the relationship between economic opportunities and social outcomes can have terrible consequences that are difficult or impossible to correct through the political process. The regulatory failures of the financial system in America have resulted in wiping out a significant fraction of the wealth of America’s poorest families, unlikely to be made up for by redistributions. The institutional framework has, simultaneously, played an important role in the creation of large inequalities—again, not typically offset by political action. Laws allowing financial firms to engage in predatory lending, combined with new bankruptcy laws, have created a new class of partially indentured servants—people who may have to give as much as 25 percent of what they earn for the rest of their lives to the banks.

In many societies, the place of social responsibilities in the legal architecture for the economy is being rethought. In some nations this has occurred at the constitutional level. South Africa's Constitution incorporated new social and economic rights, including rights relating to housing which have been given new meanings and importance by the judiciary. India's Supreme Court has expanded rights to include environmental protection and access to food. American courts have long supported certain rights to education. Many countries recognize rights to health care. What is entailed by these social and economic rights—how expansive they are—has been a major source of debate. These debates are visible when they play out at the constitutional or legislative level, but they are equally significant in the elaboration of background norms structuring the market itself. Where, as in China, those foundational legal arrangements are being established or altered, the same social considerations come into play.

The legal structure of property and contract, like that of corporate authority and finance, everywhere reflects a complex series of trade-offs among social interests. There is no particular set of rules that is Pareto-optimal—best for all stakeholders—as many economic policymakers influenced by the Chicago School sometimes seem to suggest. Even if there were such a set of rules, there is no assurance they would be Pareto-optimal at another time or in another place. Sometimes rights conflict—unfettered property rights exercised by one individual may conflict with others' right to the environment. Legal frameworks specify how these rights are to be balanced. Establishing a regime of background rules distributes power and resources among various potential market players. There are winners and losers. Background rules often institutionalize these initial gains and losses in ways that compound differences over time. Different institutional designs can lead to quite different outcomes.

In a deeper sense, neoliberal policy orthodoxy ignores a set of basic truths about transforming economic ideas into legal institutions and about the nature of legal reasoning itself. The central distinctions upon which the neoliberal orthodoxy rests turn out to be extremely difficult to maintain when translated into legal terms. The boundary between “market-supporting” and “market-distorting” legal arrangements is notoriously hard to draw. The more you look at it, the harder it is to distinguish private entitlements enforced by the state from regulations imposed by legislation or administrative action. Moreover, distributional choices are built into all these legal rules and institutions that affect both efficiency and equity. More broadly, legal frameworks are both conceptually and sociologically more complex, with more room for choice among alternative legal arrangements than was appreciated by many Chicago School economists who became interested in law as a development tool.

Indeed, a “law and economics” tradition has long existed in the American legal academy, which begins with the necessity to attend to precisely these choices and complexities. Within the legal academy, even those who find the neo-classical economics of the Chicago School largely compelling recognize that when turned into a vernacular for policy, the Chicago School has carried with it unwarranted assumptions about the legal rules that structure a market. Economic actors bargain in the shadow of background rules that distribute bargaining power amongst them. Those initial distributions matter to both efficiency as well as equity, given the transaction costs associated with reallocation.

Introduction

11

In the simplistic economic models underlying the Chicago School approach, as we have seen, issues of equity and efficiency are neatly separated. The crude implication for policy is often to assume that distribution can wait—the first objective ought to be efficiency. For development, of course, distribution often cannot wait—efficiency may be less a sure recipe for growth than a ticket to another low-level equilibrium. Focusing on the legal regime, however, brings distribution back into the story right from the start. The background rules of property and contract that undergird market transactions reflect distributional choices that cannot be divided, either sociologically or conceptually, between those which concern efficiency and equity. After all, prices emerge from bargains among people with different entitlements—the structure of those entitlements will affect those bargains.⁷

This might matter less if entitlements could be costlessly rearranged by the market. Indeed, one often finds reference to this idea in the neoliberal economic literature, attributed to Ronald Coase.⁸ Unfortunately, things are not this simple. First, as Coase himself recognized, transaction costs are ubiquitous and matter for the assignment of property rights. A long tradition of legal analysis has focused on the implications of this recognition for policy—the ways in which the assignment of property rights might affect the size and impact of transaction costs.⁹ Second, the market through which these entitlements might be rearranged must itself also be legally constituted. The power of actors, whether individuals or firms, must be established, their authority with respect to various entitlements specified, the conditions for the enforcement of contracts to rearrange entitlements spelled out, and so forth. In short, from a legal perspective there must be entitlements before there is a market for entitlements, allocating bargaining power and affecting transaction costs in ways that may matter for efficiency as well as equity.

Interestingly, on the “economics” side of neoliberal orthodoxy about development policy, these legal qualifications have often gone unnoticed. The importance of transaction costs has often been ignored or relegated to a footnote, with the implication that, to a first-order approximation, the assignment of property rights made no difference. The importance of background norms to bargaining power and the centrality of distribution to the legal structure of a market have been downplayed. Ironically, this has occurred at the same time advances in economics recognized the importance of these frictions, especially those associated with information costs and asymmetries.¹⁰

Among economists, there was often an oversimplification of “property rights,” a failure to note the responsibilities that might be associated with these rights (an owner of property may be responsible for making sure his property is not used to dump toxic wastes); a failure to note the multiple dimensions of property (in many countries, the owner of a property does not have the rights to the mineral resources below the ground—these remain properties of the state); or a failure to note restrictions (e.g. reservations about rights of way) and the variety of possible “bundles of rights” compatible with a legal regime protecting property. These qualifications become even more important as property rights get extended from real estate to intellectual property: should the owner of these property rights have the right of exclusion, or only the right to collect fair rents from those who “trespass” on his property?

The book aims to bring together the strands of criticism and qualification that have developed among both economists and legal scholars in the wake of the neoliberal orthodoxy's ascendance for development policymakers late in the last century. Our discussions have sought to develop an alliance between increasingly well-known criticisms of neoliberal economic orthodoxy—from which China has been an important dissenting voice and alternative model—and less well-known criticisms of neoliberal *legal orthodoxy*, which has had a far more successful run of late in Chinese policy circles. By bringing those two discussions together, we hope to foster a discussion between alternative economic and legal analytics, set in the context of Chinese experience. By doing so, we hope to contribute to our understanding of fundamental issues about the relationship between economic life and the rule of law. The task going forward is to develop the concrete implications of this alternative view for the design of legal and institutional arrangements in the Chinese context.

OUTLINE OF THIS BOOK

As a general matter, this volume leans against the view that “neoliberal” legal or economic orthodoxy ought to guide Chinese reform. Our project began before the Great Recession, and until the global economic crisis, a number of variants of “market fundamentalism” held sway among some economic and financial “experts” in China, and there appeared to be a risk that these ideas would become embedded into the legal and regulatory framework. We enter the examination of current Chinese development policy and regulatory practice informed by the history of these debates about the relevance of North American and Western European models and the legacy of criticism among economists and lawyers about the usefulness of neoliberal policy prescriptions.

The book is divided into three sections. In the first, we develop the conceptual foundations for our discussions by reviewing debates about both the nature of Chinese economic policy in light of the Eleventh and Twelfth Five-Year Plans, and the potential for a productive engagement between economic and legal criticisms of neoliberal orthodoxy. The third chapter illustrates some of the general themes by looking at two alternative approaches to supporting credit to the poor—the formal “property rights” approach associated with De Soto and the more informal microcredit approach associated with Yunus and his Grameen Bank. There have been many contexts in which the latter approach has been far more successful than the former in promoting development, and especially the well-being of the poorest. The chapter explains why that is so, and the circumstances under which one or the other is more likely to be more effective.

The second part focuses on selected elements in current Chinese economic policy, exploring the relationship between institutional forms and patterns of economic life and development within the emerging Chinese market economy. In thinking about “economic policy” it is conventional to focus on areas that are—or might be—subject to one or another type of *regulation* or administrative action. At the same time, we need to recognize that the legal/institutional framework includes not just regulations, but the laws that relate to property, contracts, tort

(liabilities), competition, corporate governance—indeed almost every aspect of a modern economy. We open this section, therefore, with reflections on debates within the West about the nature and desirability of property rights and regulation and, more broadly, governmental engagement in a market economy.

The contributions that follow assess the role of various regimes of “rights” in the Chinese economic transition. We start with the role of property rights, primarily in land, in the economic development of both agricultural and urban areas during the transition. We then expand the focus to intellectual property rights as a component in the Chinese innovation system, and to the rights of corporations (including the internal entitlements of various stakeholders in their governance) and of labor, particularly in the context of the Hukou system. All rights regimes entail social compromise and have social consequences. We foreground the significance of social considerations in the Chinese context through examination of the minimum livelihood guarantee policy and the intergenerational content of social spending. Our objective in this part, taken as a whole, is to heighten awareness of the interactions and parallels among institutional and legal arrangements that seem to concern different areas of economic life or express different overall commitments. Development policy is every bit as complex and significant in the establishment of property rights as in social spending for health care—and they are related.

The interactions among seemingly divergent fields of regulation and entitlement make the institutional framework for considering and reconsidering development policy particularly important.

In the third part, we focus on two issues that have been central to discussions of the appropriate form for the Chinese state in light of the nation’s development challenges: the relationship between central and local authority and the relationship between judicial and other modes of legal interpretation, legislation, and enforcement.

CONCLUDING REMARKS

We are convinced that political, social, and cultural values—including concerns about social harmony and the harmony between humans and nature—must drive economic strategy and shape the form of the market economy that China builds for itself in the coming decades. The appropriate legal question is what regulatory and institutional forms are appropriate for China’s own evolving economic and political strategy.

We hope that this volume will be of help to those in China as they strive to continue their move to a market economy within a harmonious society, to those in developing countries trying to create an institutional framework consistent with equitable and sustainable development, and to those within the advanced industrial countries trying to reform their institutional and regulatory systems about which the global financial crisis has raised such fundamental questions. As those responsible for making decisions about these institutional arrangements make their choices, and consider the consequences of those choices for their societies, we hope that they will consider the available alternatives to the “neoliberal

orthodoxy,” alternatives that hold out the promise of higher and more sustainable growth and greater equity.

NOTES

1. After the UN Commission on Legal Empowerment of the Poor, headed by former US Secretary of State Madeleine Albright and Hernando de Soto, issued its report “Making the Law Work for Everyone: Volume I” in June 2008, the UNDP established its Initiative for Legal Empowerment of the Poor. To view all reports and documents published by the Commission see <<http://www.undp.org/LegalEmpowerment/reports/concept2action.html>>.
2. We use the terms “Chicago School” or “neoliberal orthodoxy” as shorthand for the related economic and legal orthodoxies that arose with neoliberalism and continue to preoccupy much debate about development policy. This legal orthodoxy has not been reflected in the best “law and economics” work in the legal field that emerged from the seminal contributions of Coase and his legal followers. That work has often focused precisely on the complexities and ambiguities that are inherent in any legal system but which seem strangely absent among those who now prescribe one or another caricatured “rule of law” best practice as a route to development. For an analysis of the various vernacular ideas about the “rule of law” that have animated development thinking, see Santos (2006). Within economics, the Chicago or neoliberal tradition has often been closely associated with the emphasis on institutions in development, exemplified by the important work of Douglass C. North (see Davis and North 1971; North 1981 and 1990), for which he received the Nobel Prize along with Robert William Fogel in 1993. Of course, North was far from the first to emphasize the importance of institutions. Indeed, a major battle of ideas in mid-twentieth-century economics was between the old institutionalists (such as John R. Commons) and analytic neoclassical economics. Hardly had neoclassical economics won that battle when former disciples of that school began once again emphasizing the importance of institutions, exemplified by Stiglitz’s work on sharecropping (1974). There was a heated debate between Stiglitz and the Chicago School economist Steven N. S. Cheung, where the latter claimed that sharecropping made no difference to the equilibrium (see Cheung 1969a and 1969b). Income and output would be exactly the same with or without sharecropping. Stiglitz explained how incomplete contracts and markets, and asymmetries of information gave rise to the institution of sharecropping and that Cheung’s conclusions were valid only under assumptions of perfect information and perfect markets—assumptions in which the institution itself would not have existed. It is interesting to note that these ideas have had a very different uptake in legal scholarship.
3. Financial support from the Brooks World Poverty Institute for the first set of meetings was especially critical. The dialogues were organized by the Initiative for Policy Dialogue at Columbia University, with financial support from the Hewlett and Ford Foundations and from the Rockefeller Brothers Fund. Financial support from Columbia University and its Committee on Global Thought is also gratefully acknowledged. Logistical support for meetings in China was provided by the China Development Research Council Foundation, and financial support for the 2009 meeting of the China Task Force at Peking University by the Research Center for Property Exchange at Peking University is also gratefully acknowledged.
4. There is a large literature—mainly from Americans—arguing for the economic superiority of the American legal model. While this empirical literature has been widely debunked, one need only note that correlation is not causation. Moreover, apparently

- paradoxical examples abound. For instance, one of the most successful countries in Africa—one of the few without extractible natural resources—has been Mauritius, which lies within the French legal tradition. East Asia has been the most successful region in the world, with few countries adhering to the Anglo-American tradition.
5. For instance, when land is inequitably distributed, some form of tenancy evolves—most commonly sharecropping. Sharecropping greatly attenuates work incentives. Standard (old) theory assumed that lump sum redistributions were possible, but in fact all redistributions entail distortionary taxes. See, for instance, Stiglitz (1994).
 6. See, in particular, Posner's recent books (2009, 2010) and Greenspan's *mea culpa* before Congress (cited in Stiglitz 2010: 149).
 7. Perhaps one of the reasons that the neoliberal Chicago School placed so little emphasis on these issues is that they focused on a model in which there were so many players in every market that *no one* had bargaining power. But even if there are many firms in the economy and many workers, particular workers bargain with particular firms over wages and working conditions. Transactions costs (including those associated with information imperfections) mean that different firms and workers are not perfect substitutes for each other. At the micro-level, bargaining power matters.
 8. See Coase (1937 and 1960).
 9. See, for instance, Calabresi and Melamed (1972), reprinted with commentary and a brief history of the "law and economics" movement within the legal academy in Kennedy and Fisher (2006: 401–45).
 10. For instance, standard exposition highlighted how assignments of property rights could even resolve problems of externalities. If smokers exerted a negative externality on nonsmokers, an efficient solution could be obtained by assigning property rights either to smokers or to nonsmokers. In one case, the smokers would attempt to bribe the nonsmokers; in the other, the nonsmokers would bribe the smokers. If the sums of the consumer surpluses enjoyed by the smokers as a result of smoking exceeded the losses to the nonsmokers, the equilibrium would entail smoking. But implementing such a scheme required knowledge of the smokers' consumer surpluses, something that could not be easily observed. If the smokers had to actually compensate the nonsmokers, each had an incentive to pretend that his own consumer surplus was low, to free ride on the compensation provided by others. See Farrell (1987).

REFERENCES

- Calabresi, Guido and Douglas Melamed (1972), "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *Harvard Law Review*, 85/6: 1089–128.
- Cheung, Steven N. S. (1969a), *The Theory of Share Tenancy* (Chicago: University of Chicago Press).
- (1969b), "Transaction Costs, Risk Aversion, and the Choice of Contractual Arrangements," *Journal of Law and Economics*, 12/1: 23–42.
- Coase, Ronald H. (1937), "The Nature of the Firm," *Economica*, 4/16 (November): 386–405.
- (1960), "The Problem of Social Cost," *Journal of Law and Economics*, 3 (October): 1–44.
- Davis, Lance E. and Douglass C. North (1971), *Institutional Change and American Economic Growth* (Cambridge: Cambridge University Press).
- Farrell, Joseph (1987), "Information and the Coase Theorem," *Journal of Economic Perspectives*, 1/2: 113–29.
- Kennedy, David and William W. Fisher III (2006), *The Canon of American Legal Thought* (Princeton, NJ: Princeton University Press).

- North, Douglass C. (1981), *Structure and Change in Economic History* (New York: W. W. Norton).
- (1990), *Institutions, Institutional Change, and Economic Performance* (New York: Cambridge University Press).
- Posner, Richard (2009), *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression* (Cambridge, MA: Harvard University Press).
- (2010), *The Crisis of Capitalist Democracy* (Cambridge, MA: Harvard University Press).
- Santos, Alvaro (2006), “The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development,” in David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press), 253–300.
- Stiglitz, J. E. (1974), “Incentives and Risk in Sharecropping,” *Review of Economic Studies*, 41/2: 219–55.
- (1994), *Whither Socialism?* (Cambridge, MA: MIT Press).
- (2010), *Freefall: America, Free Markets, and the Sinking of the World Economy* (New York: W. W. Norton).