How Do We Get Along? International Economic Law and the Nation-State

(A Review Essay of Dani Rodrik’s Straight Talk on Trade)

(for Michigan Law Review)

By Gregory Shaffer

How do we get along? International lawyers still mostly focus on international law and institutions in splendid isolation of national law and policy, as if they were a separate ring. Yet the two are inextricably, gravitationally enmeshed. International law and institutions affect domestic politics and law; and domestic politics recursively affects international relations and thus international law. The 2008 financial crisis, the ensuing rise of Donald Trump and the populist right, the decline of the European Union (E.U.), and the threat of escalating trade wars illustrate the links. Dani Rodrik was the first leading economist to highlight this basic point regarding the implications of economic globalization and international economic law for the nation-state and the social contract. In 1997, Rodrik wrote a seminal book with a question mark, Has Globalization Gone Too Far? He warned that it had. Now, in his newest book Straight Talk on Trade, he addresses trade and economic integration in light of the political fallout of Trump’s election and the resurgence of nativism in Europe. The book calls for striking a different, better balance—a reweighing of the scales—between economic globalization and the nation-state. It castigates the economics profession for too frequently expressing unabashed support in the media for globalization and trade agreements without necessary caveats, constituting bad economics.

The book interweaves theory, empirics, and proposals in the tradition of economic pragmatism. It is an important read not only for international trade and international law scholars, but also for those interested in international law theory and method, as well as legal theory generally. It is written in an empirical, pragmatist vein, focused on institutions, social context, and the importance of innovative, adaptive practice, reflecting the new legal realism in legal scholarship.

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1 Chancellor’s Professor, University of California, Irvine School of Law.
2 By international economic law, I refer to international trade, investment, monetary, and financial law, but focus on international trade law, followed by monetary and investment law, as does Rodrik.
3 The book builds from Rodrik’s wide-ranging work over time, including his previous books and his monthly column in the Project Syndicate. The book’s title is a slight misnomer since the book is not just about trade, but about economic globalization, the nation-state, and the role of the economics profession more broadly. The publisher likely highlighted “Trade” in the title given Trump’s emphasis on trade, although Rodrik too has focused particular attention on international trade law. DANI RODRIK, STRAIGHT TALK ON TRADE: IDEAS FOR A SANE WORLD ECONOMY (2017) [hereinafter, RODRIK, STRAIGHT TALK ON TRADE]
The book’s twelve chapters can be broken down into three parts, respectively addressing the relation of globalization and the nation-state; the role of theory and method; and prescriptions for change in the current crisis. Chapters 1-4 introduce the relation of national sovereignty, democracy, and economic globalization, highlighting the institutional choices at stake. The chapters stress the critical role of the nation-state for social solidarity, economic prosperity, and democratic governance, and the risks posed when economic globalization and domestic governance fall out of balance. Chapters 5-8 address the role of economic theory and methods to build empirical understanding and make policy recommendations. It holds critical lessons for legal theory and legal scholarship. Chapters 9-12 propose what should be done and avoided in response to current crises. Decrying the risks to the “liberal international order” is not enough. We must also address the mistakes made so as to enhance policy space for nation-states. Otherwise economic integration could catalyze further social disintegration.

This essay addresses and responds to these arguments in relation to international economic law and legal theory. Part 1 assesses the book’s first part in light of transnational legal theory, which analyzes the recursive relation of international and domestic law in an interconnected world. Part 2 examines part 2 of the book in terms of its lessons for legal theory from a new legal realist perspective. Part 3 calls for the combining of economic and legal analysis to address current challenges in international economic law and policy so that international economic law becomes less of a substitute for domestic law, and more of a complement to support domestic institutions in building the rule of law and assuring economic prosperity and social inclusion. The message is clear. We need to bolster healthier democratic polities if we are to ensure better international cooperation through law.

I. Transnational Legal Ordering and the Nation-State

International agreements are transnationally and recursively linked with law, governance, and social relations within states.\(^5\) Through recursive processes of interaction, legal norms are uploaded and downloaded, imported, and exported, and developed in one domain to contest and shape those in another.\(^6\) Actors engage in diagnostic struggles and paper over differences, giving rise to contradictions and indeterminacies in legal texts. These processes can lead to normative settlements comprising new working equilibria regarding the appropriate legal norms and institutions to order particular issues. But they also can spur contestation and resistance in light of competing diagnostics, legitimacy deficits, internal contradictions, changed context, inflexibility,


distributive bias, competition, and ineffectiveness.\textsuperscript{7} Over time, normative consensus can erode so that a transnational legal order declines.

The term “transnational” does not connote the withdrawal or disappearance of states as major actors in transnational governance, but rather that states participate in their own transformations in transnational context. To understand transnational legal ordering, one assesses the interaction of lawmakers and practice across different levels of social organization, from the transnational to the local, involving both state and non-state actors, including transnational capital and international organizations. As states delegate greater public powers and informal norm-making to international organizations and transgovernmental networks, states can become agencies that implement rules of extra-state origin.\textsuperscript{8} These processes are particularly pronounced regionally in the E.U., but are also developing elsewhere, and notably through trade and economic integration agreements.

Rodrik’s core argument is that processes involving international trade and economic integration agreements in support of globalization have excessively constrained national policy space. They have done so through a web of multilateral, regional, plurilateral, and bilateral trade, investment, and economic integration agreements. The World Trade Organization (WTO) lies at the pinnacle of trade governance, but it is just the big meatball in a spaghetti bowl of agreements.\textsuperscript{9} Economists generally agree that trade liberalization is in a state’s self-interest because it raises aggregate national welfare.\textsuperscript{10} Yet “trade” and economic integration agreements have expanded in scope far beyond the reduction of tariffs and the elimination of quotas. They regulate intellectual property rights, health and safety, the establishment of services such as finance, and administrative process.\textsuperscript{11} In some cases, they require the removal of all capital controls.\textsuperscript{12} At times, they grant businesses direct rights to sue states, such as through investor-state dispute settlement (ISDS) that

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\item[\textsuperscript{7}] Terence Halliday & Gregory Shaffer, Reseaching Transnational Legal Orders, in TRANSNATIONAL LEGAL ORDERS (eds. Terence Halliday & Gregory Shaffer, 2015).
\item[\textsuperscript{8}] Patrick Glenn, A transnational concept of law. In THE OXFORD HANDBOOK OF LEGAL STUDIES, eds. M Tushnet, P Cane, 839 (2005).
\item[\textsuperscript{9}] The spaghetti bowl metaphor was coined by Jagdish Bhagwati. See JAGDISH N. BHAGWATI, US TRADE POLICY: THE INFATUATION WITH FTAS (1995). Rodrik goes further in his critique of the WTO than I would, calling it the “crowning achievement” of hyperglobalization. \textbf{Rodrik, STRAIGHT TALK ON TRADE, supra} note..., at 28. I think WTO rules generally can, and have been, interpreted (in ways that continue GATT practice) to focus on “non-discrimination” as the organizing principle, such that states retain policy space to pursue legitimate regulatory objectives. I also think there are important reasons to address non-tariff barriers to trade so as to uphold commitments made through tariff reductions, and that the WTO Agreement on Technical Barriers to Trade and WTO Agreement on Sanitary and Phytosanitary Measures can be, and are largely being, interpreted in that way. Cf. \textbf{Rodrik, STRAIGHT TALK ON TRADE, supra} note..., at 34. I nonetheless agree with his general approach and the need to rettool trade law to ensure social inclusion. See Gregory Shaffer, \textit{Retooling Trade Agreements for Social Inclusion}, U. ILL. L. REV. (forthcoming 2019) [hereinafter Shaffer, \textit{Retooling}].
\item[\textsuperscript{10}] There are some caveats such as regarding “optimal tariffs” when a country exercises monopsonistic power, but there is general consensus with which Rodrik agrees.
\item[\textsuperscript{11}] Thus, trade economists need to be wary of the nuances of the legal texts of trade agreements before declaring their support for them.
\item[\textsuperscript{12}] The Organization for Economic Cooperation and Development requires all of its members to remove capital controls, the International Monetary Fund pushed for their removal in the 2000s, and the E.U. includes the free movement of capital as one of its “four freedoms.” See RAWI ABDELAL, CAPITAL RULES: THE CONSTRUCTION OF GLOBAL FINANCE (2007).
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can chill regulation.\(^{13}\) Increasingly, empirics show these agreements’ adverse distributive impacts on the working and middle classes in the United States and Europe. In short, these international agreements transnationally and recursively link with law, governance, and social relations within states.

The problem with unqualified support of these agreements in support of globalization (or what Rodrik calls “hyperglobalization”) is two-fold. First, advocates tend to view economic integration as a one-way endeavor, rather than a question of balance in light of these agreements’ impacts within nation-states. This stance is captured in the famous “bicycle theory” of trade liberalization, which contends that an open trading system will be maintained only if forward momentum for trade liberalization continues, or otherwise the bicycle will fall over.\(^{14}\) Second, while this approach recognizes that trade creates losers as well as winners, and while many trade liberals support compensating social policies at the national level (although often not with the same vociferousness and urgency), it fails to address how economic globalization implicates domestic politics and social relations, which affects states ability and willingness to do so. Economic globalization supported by international economic law creates bargaining leverage for capital over labor, while constraining states’ ability to tax mobile capital.\(^{15}\) Unlike national law, moreover, international trade treaties lock in requirements that are difficult to undue because all parties’ agreement is required, even though preferences within countries change in light of politics, experience, and changing conditions. In contrast, redistributive policies at the national level are easily undone.\(^{16}\) The result within industrialized countries has been stagnant wages, job insecurity, and growing inequality.\(^{17}\)

This loss of balance between the unidirectional nature of liberalized trade policy and the lack of compensating domestic policy became salient following the 2008 financial crisis. The financial crisis resulted more from the free flow of capital than trade, and liberal trade economists long warned that their theories did not apply to capital.\(^{18}\) Yet trade was not wholly innocent. Empirical studies show that it hast increased risks to many communities in the United States and

\(^{13}\) See, e.g., \textit{Tobacco: Last Week Tonight with John Oliver} (HBO television broadcast Feb. 15, 2015), \textit{See generally Kyla Tienhaara, Regulatory Chill and the Threat of Arbitration: A View from Political Science, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION} 606, 606 (Chester Brown & Kate Miles eds., 2011) (arguing that regulatory chill is an important problem “inadequately addressed and often prematurely dismissed by legal scholars”).


\(^{15}\) Shaffer, \textit{Retooling, supra note...}


Europe. The political fallout invigorated populist politics playing off nativist, racialized fear of migrants and citizens of color.

Any policy is subject to tradeoffs and Rodrik captures these tradeoffs with his theory of a trilemma forcing policymakers to choose among national sovereignty, economic globalization, and democracy. He contends that we can have any two of them, but not all three. We can have economic integration and democracy at the global level, but then we give up sovereignty. That is what Europe has tried, leading to forces pulling the E.U. apart, most saliently with Brexit, but also with the rise of nativist politics across E.U. countries. We can have economic integration and sovereignty, but then we must give up on democracy. That was the case under the gold standard in the 19th century when countries adjusted economically through reduced wages to the detriment of the working classes who had no right to vote. It is likewise the case of Greece under the Euro today. Or we can have sovereignty and democracy, but then we must limit economic integration.

It is a model that should not be viewed in terms of either/or choices, but rather in terms of which balance to choose among them, taking account of the interactive effects between economic globalization and domestic law and politics. It foregrounds the question of how much of each we desire given their tradeoffs. What Rodrik argues is that “we need to place the requirements of liberal democracy ahead of those of international trade and investment.” If, despite the gains from trade, economic globalization puts liberal democracy at risk, then we need to readjust the balance in favor of more domestic policy space and less economic integration facilitated by international economic law.

Markets require rules to facilitate economic exchange, create stability, and provide a sense of legitimacy. Rodrik makes the case for the nation-state as “the only games in town when it comes to providing the regulatory and legitimizing arrangements on which markets rely.”


22. Some international law scholars re theorize sovereignty in terms of what we gain in sovereignty when we get others to cooperate with us. Nonetheless, there are tradeoffs and something is given up. See John Jackson, Sovereignty, the WTO, and Changing Fundamentals of International Law (2006) (conceptualizing sovereignty in terms of power allocation and tradeoffs).

23. Rodrik, Straight Talk on Trade, supra note…, at 12.

24. Rodrik, Straight Talk on Trade, supra note, at 13. Rodrik recognizes that it is provocative to speak in terms of “nation-states,” as opposed to “states,” which are political/institutional entities, since the concept of a nation has nativist resonances. He understands that it is the state that creates the nation (however imperfectly), and not vice versa. However, the concept of the nation, albeit a political construction, becomes real when it affects people’s identities, as evidenced by polls of self-perceptions around the world. Id., at 24.
Economically, the state enables the mobility of resources, enhancing efficiency and increasing productivity essential for economic growth and social welfare. Politically, the state fosters the spread of participatory, representative institutions, giving rise to liberal democracy. And legally, the state creates public order through laws and institutions that reduce violence and uphold the social contract.\textsuperscript{25} The nation-state is central for financial stability (put at risk by capital liberalization), social solidarity (threatened by growing inequality abetted by economic globalization), and economic prosperity (put in jeopardy by the prospect of trade wars and constraints on experimental development strategies). Through the early 2000s, liberal democracies were on the increase, but they are now under challenge and in retreat.\textsuperscript{26} The rise of neo-nationalism promises to bring back the nation-state with a vengeance, but not in a liberal democratic form.

When it comes to market regulation, global governance is no substitute for the state, but is best viewed as a complement. The national level is much more likely to reflect preferences of national stakeholders in differing national contexts. And national diversity creates benefits in terms of experimentation (from which learning occurs) and resilience (when things go wrong). This is a basic point of federalist theory, which, in the words of Justice Louis Brandeis, views states as “laboratories of democracy.”\textsuperscript{27} It is particularly important at the global level because global governance is even less attuned to local context given its distance from local stakeholders.\textsuperscript{28} Global and regional economic integration purport to lead to increases in efficiency, but those gains are marginal in relation to the risks of financial instability (in terms of capital) and to social inclusion and democracy (in terms of capital and trade).

The Challenge for the European Union. The E.U. has gone furthest with economic integration most notably with a single currency—the Euro.\textsuperscript{29} In the 1990s and early 2000s there was triumphalism in the E.U. with its expanding membership and increasing scope and depth of policy coverage, thus combining widening with deepening of E.U. law. In retrospect, the E.U. went too far.

Rodrik starts his chapter on Europe by discussing the gold standard at the start of the 20\textsuperscript{th} century. Under the gold standard, the value of countries’ currencies was linked to the price of gold so that the only way to adjust to a financial crisis was to lower the cost of production, namely through laying off workers and reducing wages. This worked fine when workers had no right to vote but once democracy spread through Europe, it was no longer tenable. John Maynard Keynes

\textsuperscript{25} RODRIK, STRAIGHT TALK ON TRADE, supra note, at 24.
\textsuperscript{27} New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).
\textsuperscript{28} RODRIK, STRAIGHT TALK ON TRADE, supra note, at 30–33.
\textsuperscript{29} Formally, E.U. member states are to join the Euro once they meet defined economic criteria and they are to adopt economic policy so as to meet those criteria. George Soros recommends that E.U. treaties be amended so as to eliminate requirements to join the Euro given the experience with it. See George Soros, Opinion: George Soros Explains his Audacious Plan to Save Europe, MARKETWATCH, May 30, 2018, https://www.marketwatch.com/story/george-soros-explains-his-audacious-plan-to-save-europe-2018-05-29/print.
recognized the need to liberate states from its straightjacket. The parallel in Europe today is the Euro. What has been sacrificed is national autonomy, with Greece in particular having to follow E.U. dictates for “structural reforms” in return for financial bailouts. What Greece requires is either massive financial transfers from Northern Europe (which are not forthcoming) or freedom from the shackles of the Euro. By adopting the Euro, Greece can no longer devalue its currency to work itself out of its economic crisis. Greece and other E.U. members have had to adopt austerity policies as part of E.U. requirements, limiting their ability to apply Keynesian policies to stimulate their economies. The results have been draconian. Greece’s GDP declined 25% since 2009. Backlash against the European Union ensued.

The challenge for the E.U. is not to see economic integration as a one-way street, requiring ever more Europe. Rather, the E.U. needs to find complementary ways of leaving policy to diverse E.U. members in light of their citizen demands, contexts, and experience. With the increase in E.U. membership, the E.U. needed to provide more, not less space, for national economic and regulatory governance.

The political cost of the economic crisis hit not only Europe but also the United States. As Adam Tooze writes, Obama administration officials like Treasury Secretary Timothy Geitner may have been technocratically astute in responding to the 2008 great recession by rescuing banks, saving the U.S. from a great depression. But by propping up capital instead of the poor and middle classes who lost their homes, the Obama administration opened the way for Trumpian populism and its risks of authoritarianism, calling into question a transatlantic alliance of liberal democracies. Under Trump, the E.U. has suddenly become the “foe.”

The Challenge for Developing Countries. In chapter 4 (entitled “Work, Industrialization, and Democracy”), Rodrik addresses economic development. He contends that there is no one way to spur economic development, and so experimentation is required in light of diagnoses of problems in local contexts. There are lessons here for international lawyers regarding law’s role in development. International law and legal scholarship frequently do not take account of the experiences and contexts of developing countries, as third world approaches to international law critique. Law needs local buy-in and must respond to local contexts. Transnational transplants of law and policy, whether from former colonizing countries or through international institutions,

30 RODRIK, STRAIGHT TALK ON TRADE, supra note, at 49.
31 RODRIK, STRAIGHT TALK ON TRADE, supra note, at 62.
32 RODRIK, STRAIGHT TALK ON TRADE, supra note at 54.
33 To accommodate EU member state differences, Soros speaks of a shift to a “multi-track” Europe where members have greater choice over policies to pursue. See George Soros, How to Save Europe, PROJECT SYNDICATE, May 29, 2018.
34 TOOZE, CRASHED, supra note.
will be resisted if they fail to engage with bottom-up processes attentive to local contexts.\textsuperscript{37} The problem, in part, is that transnational legal transplants, such as intellectual property rights, reflect the interests of Northern capital more than local stakeholders.\textsuperscript{38}

The key challenge for economic growth is to facilitate structural change in particular national contexts so that individuals move from agriculture to manufacturing and societies build democratic institutions to channel capitalism and ensure that the benefits of economic growth are distributed more broadly. Today, however, because of globalization and technology, this path of economic development may no longer be available, pressing developing countries to skip the manufacturing stage and become services economies.\textsuperscript{39} Services, however, may not catalyze productivity growth as manufacturing did in countries that made structural transformations, such as Japan, Korea, and China. This creates new challenges for policymakers and requires experimentation involving trial and error.\textsuperscript{40}

Rodrik stresses that economic development is not just about creating property rights, but fundamentally about institutions. Focusing on property rights is not enough, as exemplified when elites profit from state privatization programs, embedding crony capitalism. Economic transformation rather depends on institutions and experimentation in light of economic context. China provides an example with its gradual change toward a market economy, starting in agriculture in the 1980s with the creation of township and village enterprises.\textsuperscript{41} China developed new institutions in light of local context rather than simply taking forms from highly developed economies.

A second challenge for economic development is institutionalizing democracy and with it civil, political, and social rights. The advantage of democracy is that it provides input to elites regarding preferences. The historical pattern is that democracy and labor rights come after industrialization, but there are exceptions.\textsuperscript{42} Statistically, there is evidence that democracies perform better economically, likely because of the effects of participation.\textsuperscript{43} The test case will be China, which experimented with new democratic forms at the local level, but where there has been retrenchment under President Xi’s regime.\textsuperscript{44} This could impede needed input and create backlash, affecting social stability and economic growth.


\textsuperscript{39} Rodrik, Straight Talk on Trade, supra note…, at 89.

\textsuperscript{40} Rodrik, Straight Talk on Trade, supra note…, at 92.

\textsuperscript{41} Rodrik, Straight Talk on Trade, supra note…, at 57; 94.

\textsuperscript{42} Cf. Rodrik, Straight Talk on Trade, supra note…, at 88 (maintaining that need not be the case); and Sharun Mukand & Dani Rodrik, The Political Economy of Liberal Democracy, NBER Working Paper 21540 (Sept. 2015) (contending that states that arose from decolonization often are beset by identity cleavages that are less conducive than class cleavages to settlements giving rise to “the rarity of liberal democracy”).


\textsuperscript{44} ECONOMIST, Local Experiments with Reform are Becoming Rarer Under Xi Jinping, ECONOMIST, Aug. 18, 2018.
Ultimately, spurring economic growth is an empirical and pragmatic question that starts with diagnostics, followed by trial and error. Rodrik and his colleague Ricardo Haussman have developed a decision tree that begins with diagnostics of a growth problem, such as whether the key problem lies on the supply or demand side, and then further breaking down possibilities branch by branch. This enables policymakers to identify specific problems and adopt tools to overcome them. If the diagnostics or tools turn out to be wrong, then new programs can be started, building from prior experience. There is no guarantee of success. Rather, there is learning by doing in light of recursive processes of diagnostics, policy initiatives, and empirical appraisals. It is an approach that resonates with the experimentalist democratic theory of John Dewey, which is foundational for legal realist theory, but this time in a transnational context.

II. Economic Pragmatism and the Need for a New Legal Realism

We need theory and models that simplify complexities so that we can better understand patterns, problems, and opportunities for change. Rodrik builds economic theory in a manner that has parallels to what in the legal academy is called the new legal realism. The new legal realism has two core aspects—empiricism and pragmatism. It builds theory empirically from studying the world in its varied contexts. From these contexts, it builds conditional theory. In parallel, it uses methods from which new analytics can emerge and innovations be tried.

As the new legal realism, Rodrik calls for a methodology that builds conditional theory from context. Applying the famous trope of Isaiah Berlin, he distinguishes foxes from hedgehogs in economics. Hedgehogs search for a single economic model that explains everything. Foxes develop and choose among a plurality of models applicable to differing contexts. The analogue to a hedgehog in law is a single norm—such as freedom of contract—and a single theory—such as a single rational actor model—that purports to apply equally regardless of context, such as among commercial actors, private persons, franchisers and franchisees, insurers and insurees, businesses and consumers, and companies and workers.

45 Rodrik, Straight Talk on Trade, supra note…, at 58.
46 Nourse & Shaffer, Varieties, supra note; Christopher K. Ansell, Pragmatist Democracy: Evolutionary Learning as Public Philosophy (2011).
47 See Rodrik, Straight Talk on Trade, supra note…
48 Victoria Nourse & Gregory Shaffer, Empiricism, Experimentalism, and Conditional Theory, 67 SMU L. Rev. 101 (2014) [hereinafter Nourse & Shaffer, Empiricism].
49 Nourse & Shaffer, Varieties, supra note… On contextualism and legal realism, see Nourse and Shaffer (“[C]ontextualists ground their theory on the Jamesian/Deweyan pragmatist insight that theory must come from the world; that only theory that works has established its truth; and that there is no way to divorce theory from fact: indeed, this is a false dichotomy, as John Dewey once insisted.”).
51 Rodrik, Straight Talk on Trade, supra note…, at 157.
In economics, more foxes are needed just as they are in international economic law. Rodrik stresses that useful economic analysis requires choices among models that involves both science and craft. The science involves the creation and application of models based on differing assumptions. The craft lies in choosing among the models in light of the suitability of the assumptions and the question and context at issue. The simple deductive model used by Richard Posner in early law and economics will always come out with the same answer in favor of markets and against government intervention. But as Ronald Coase warned, the world of frictionless markets is a myth. The assumption of perfectly competitive markets is always inaccurate because of asymmetric information costs, other transaction costs, and bargaining power. Much of the digital economy, for example, is controlled by a few monopolists, such as Apple, Amazon, Google, Facebook, and Microsoft in the U.S. and Alibaba and Tencent in China. We live in a world that “is always second-best at best” involving highly imperfect institutions.

The global financial crisis of 2008 illustrated a loss of craft among economists. It was not as if models predicting the financial crisis did not exist. It is that the vast majority of economists stuck with one model—the efficient market hypothesis. Problems occur when economists confuse a model with being “the” model. Models help policymakers assess the world and make choices within it, but the models are based on assumptions. The assumptions need to be adjusted or the models replaced in light of underlying empirics that call into question their justifiability. If they are not adjusted or replaced, they can lead not only to errors of omission, but also of commission where the profession becomes complicit in advancing bad policy that potentially can be catastrophic, as the financial crisis illustrated. The economics profession needed a bit more sociological awareness, just as does the legal profession.

53 Rodrik, Straight Talk on Trade, supra note…, at 118, 144.
54 See Leff, Commentary, supra note…, at 457 (“[I]t must immediately be noted, and never forgotten, that [Judge Posner’s] basic propositions are really not empirical propositions at all. They are all generated by ‘reflection’ on an ‘assumption’ about choice under scarcity and rational maximization. . . . Nothing merely empirical could get in the way of such a structure because it is definitional. That is why the assumptions can predict how people behave: in these terms there is no other way they can behave.”).
56 Rodrik, Straight Talk on Trade, supra note…, at 215 (citing economist Avinash Dixit).
58 Rodrik, Straight Talk on Trade, supra note…, at 118.
59 Rodrik, Straight Talk on Trade, supra note…, at 142.
60 Problems also occur where the data, which represents a simplification of complexity, are inaccurate or otherwise misleading.
61 Rodrik, Straight Talk on Trade, supra note, at 142
62 Such sociological awareness should involve not only the risks of using one model as “the” model, but also of one’s social position. For example, most international economic law scholars have benefited from economic globalization and are more likely to have cosmopolitan identities, in contrast to working and middle-class citizens. Cf. Rodrik, Straight Talk on Trade, supra note…, at 20–23 (polls on individual identity). They also are more likely to be based in the United States or Europe and have less understanding and appreciation of developing country contexts.
For legal realists, a combination of science and craft is also central. Legal craft builds from legal tradition, involving choices among different legal categories, rules, exceptions, and canons of statutory interpretation. Yet legal decisionmakers also must be aware of underlying facts—the empirics and contextual situations—to which they apply them. Just as there are multiple models that must be compared for economic decision making, so there are multiple legal frames, rules, exceptions, and interpretive canons for legal decision making that require legal craft.

Rodrik complains about the loss of nuance when economists talk to the public about trade economics, where all the complications hashed out in economic seminars get lost, just as legal realists complain about formalist depictions of law as if jurisprudence is “mechanical.” Recall the mystification of law when Chief Justice Roberts used the baseball metaphor of calling balls and strikes as if judges have no control over defining the strike zone through legal categories. In economics, the choice of models can reflect ideological dispositions, and not purely reason. Thus, it is essential to pay close attention to the empirics behind assumptions to check for biases in the economic models used. The models themselves won’t check for bias. So also for law. Legal decisionmakers need to heed underlying factual contexts in relation to legal doctrine before choosing among legal categories, rules, and exceptions in issuing legal decisions.

Economists theorizing the political economy of trade often focus on interests. Their counterparts in international law are rational choice theorists, including international relations realists reflected in the work of Jack Goldsmith and Eric Posner. There is great value in this work in calling into question formal and ideal theories of law. But ideas are also central since perceptions of interests change through social interaction. Economics and law cannot be reduced to interests, as Keynes famously quipped regarding the impact of the ideas of defunct economists. It is because ideas also matter that there is no one model that provides “the” model. Legal reasoning, whether of the formalist or the rational choice variety, becomes circular when a single formal model determines the outcome irrespective of the factual situation.

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65 See CNN, Roberts: ‘My Job is to Call Balls and Strikes and Not to Pitch or Bat’, CNN, Sept. 12, 2005.
68 Just witness changed perceptions among Republicans of Russia and its President Vladimir Putin since the election of Donald Trump. See RJ Reinhart, Republicans More Positive on U.S. Relations with Russia, GALLUP (July 13, 2018, https://news.gallup.com/poll/237137/republicans-positive-relations-russia.aspx) (“40% of Republicans say Russia is an ally or friendly, up from 22% in 2014.”).
69 RODRIK, STRAIGHT TALK ON TRADE, supra note…, at 162. Keynes wrote, “Practical men who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back.”
70 See Cohen, Transcendental Nonsense, supra note , at; Leff, Commentary, supra note , at.
At one point, Rodrik himself confuses “legal realists” with international relations realists. It is an understandable error given the impact of international relations realists’ work critiquing legal liberalism. But legal realism differs from international relations realism in a way important to Rodrik’s analytics. International relations realists are hedgehogs using a single model as “the” model to understand international relations. In contrast, legal realists are foxes that focus on context and how pragmatic experimental ideas and action can respond to and, in turn, shape the context. Legal realism is not ideal theory as in the caricature of legal liberalism. Rather, it attends closely to the role of actors, interest, and power in relation to legal processes. Yet, it does not reduce law to power so that law becomes epiphenomenal. Rather, it stresses the parallel role of ideas and reason. It views law in terms of the interaction of internal and external, legal and extra-legal factors such as reason and power, legal craft and empirics, and legal tradition and the demand for progress. Law consists of the constitutive tensions between these internal and external factors. Legal realists thus reject both “purist alternatives” of law as power and law as reason.

For legal realists, there is thus an important role for reason and ideas in policymaking through engaging law. Legal realists stress the need for imagination and emergent analytics grounded in empirics. Just as pragmatic economists engage with the world to improve it, to help stabilize economies and help policymakers identify means to break through structural barriers impeding development, so with legal realists. As Benjamin Cardozo wrote, law is subject to an “endless process of testing and retesting.” Law develops through engaging with precedent (the analogue to models) while developing and adapting it in light of changing conditions and contexts (the analogue to pragmatic innovation). As new governance experimentalist legal scholars highlight, problems are solved through iterative processes encouraging learning in which new emergent analytics may arise.

III. Legal Prescription from Problem-Centered Analysis

The empirics today are stark. Inequality is rising and with it a new populism that threatens the international legal order that long provided stability and enhanced the prospects for peace. Europe is in crisis as the Eurozone cripples the promise of Europe as a progressive model of economic integration, combining economic growth with liberal, egalitarian societies.
International trade law is in crisis as the U.S. frontally ignores WTO rules, raising tariffs at the President’s discretion through authority delegated from Congress a half century ago.\(^8\) In turn, affected countries retaliate without waiting for WTO authorization.\(^8\) These dynamics could have long-term implications, undermining trust grounded in respect for international economic law and institutions. The trend represents a historic pivot toward increased conflict that could lead to war.\(^8\)

What is to be done? How do we get out of this mess?\(^8\) A response requires social scientists and lawyers to work together to develop ideas to reform and retool the international economic legal order in ways that win broad public support. First, we need diagnostics to determine how we got here. Then we need to address legal reform of international economic law regarding capital, trade, and investment. This calls for a law and economics that takes account of social and political context and thus the relation of international law and institutions to the nation-state. One then can adopt pragmatic policies to spur economic growth while maintaining economic stability and cooperative trade relations supported by law, all of which requires a balance of national and international rules and authority.

Rodrik’s diagnosis is the problem of “hyperglobalization” that has created an imbalance between free-flowing capital in the global economy and domestic law and politics.\(^8\) While economies globalize, politics remain local. International economic law, Rodrik argues, needs to empower and not disempower nation-states to regulate the global economy. The risks are real. Although Rodrik at times writes on a more optimistic note—“fortunately, fascism, communism and other forms of dictatorship are passé today”\(^8\)—there is reason for concern. Trump’s “America First” slogan has a checkered legacy (having been used by isolationist, anti-Semitic, and white supremacist groups).\(^8\) Elsewhere authoritarian leaders have found ways to work within the formal framework of liberal democratic constitutions while systematically undermining the spirit of constitutional democracy and entrenching their power.\(^8\)

\(^8\) The steel and aluminum tariffs were imposed under Section 232 of the 1962 Trade Act, and further tariffs on Chinese goods under Section 301 of the 1974 Trade Act. Rodrik wrote the book at a time when the tariffs had yet to be implemented, but they sense went into effect. Rodrik, Straight Talk on Trade, supra note, at 11 ("So far, however, there are few signs that governments are moving decidedly away from an open economy. President Trump may yet cause trade havoc, but his bark has proved worse than his bite").

\(^8\) Shawn Donnan & Jim Brunsden, EU Retort to Trump’s Tariffs Risk Breaching WTO Rules, Fin. Times, (Mar. 5, 2018, https://www.ft.com/content/e3771a6e-20cb-11e8-a895-1ba1f72c2c11).

\(^8\) See, e.g., Graham T. Allison, Destined for War: Can America and China Escape Thucydides’s Trap? (2017).

\(^8\) For a comic but accurate description of the mess, see Trade: Last Week Tonight with John Oliver (HBO television broadcast Aug. 19, 2018).

\(^8\) This parallels what resulted from the risks of hyperglobalization and increased economic inequality in the first half of the twentieth century. See Karl Polanyi, The Great Transformation (1944).

\(^8\) Rodrik, Straight Talk on Trade, supra, at 6.


One reaction to President Trump’s policies is to highlight the good that the American-created liberal international economic order brought. But one also needs to address its flaws, in particular in privileging capital, or it could collapse. Revolutions in information and communication technologies facilitate outsourcing, as do trade, investment, and economic partnership agreements. As more tasks in the production chain become outsourced abroad, more jobs are at risk. In response, trade liberals have argued for the two-step model in which distributive policies are left to the national level. Yet, in practice, such redistribution is not occurring. Something must be done or the backlash will continue. One alternative is to increase regulation at the global level, but such regulation is likely to reflect the interests of powerful actors (as illustrated in the domain of intellectual property protection) and thus be inappropriate for local contexts. When rules are negotiated behind closed doors, powerful interests, such as transnational commercial interests, are more likely to have input than most citizens, enrolling powerful states. The opposite approach is to focus on the domestic economy through crass protectionism, as illustrated in Trumpism, which is currently unchallenged by some liberals, but could lead to increased conflict undermining international cooperation and risking war.

The question becomes how to save the international legal order from its excesses. To do so, economists and lawyers will need to join forces in redesigning the rules, just as they did when they created the liberal international economic order at Bretton Woods after World War II. Rodrik addresses the case for trade agreements that have been successful in reducing tariffs and instituting the principle of non-discrimination. However, they have gone much further by granting special protections for large multinational businesses, such as in the areas of intellectual property rights and investment law. In the process, trade agreements have shifted bargaining leverage in favor of capital in relation to labor, contributing to job insecurity and stagnant wages in the United States and Europe. In just over forty years between 1974 and 2015, the real median income of Americans without high school diplomas fell by around 20 percent and those with high school

89 See, e.g., Jeff D. Colgan & Robert O. Keohane, The Liberal Order is Rigged: Fix It Now or Watch It Wither, FOREIGN AFF., May/June 2017, at 36, 44 (“Absent such changes, the global liberal order will wither away.”) (hereinafter Colgan & Keohane, Liberal Order); Shaffer, Retooling, supra note, at .
90 See RODRIK, STRAIGHT TALK ON TRADE, supra note, at .
diplomas by 24 percent, while the incomes of the super-rich soared. 93 Not surprisingly, the political backlash against elites threatens to tear societies apart. 94

Prudence dictates a more modest approach, one in which international law does not aim to restructure states, but rather to complement and support their policies, under a guiding principle of non-discrimination. 95 Trade agreements should be retooled to provide policy space for countries to ensure social inclusion, such as by integrating policies to combat harmful tax avoidance and deter social dumping. 96 Investment treaties should be modified so that the fundamental guiding principle is enhancing the rule of law for foreign and domestic stakeholders alike (rather than privileging foreign investors), which will depend on strengthening domestic institutions and should be tailored to different national contexts. 97 In the area of capital regulation, states should be granted significant discretion to take prudential measures involving capital controls. 98 In each case, lawyers are needed to help design international and domestic rules.

Because states adopt policies that can have adverse effects on each other, there remains an important role for international institutions and international law to manage the interface. 99 International economic law can require domestic procedural rules that provide for due process for foreigners and domestic stakeholders, as the WTO Appellate Body held in the famous U.S.-Shrimp-turtle case. 100 International institutions can adopt transparency requirements to cast sunlight on national measures. 101 In doing so, they can provide assurance to foreign trading partners and domestic stakeholders. Overall, the role of trade agreements must be to support domestic democracy and social bargains, while creating mechanisms to manage adverse effects of domestic policy on outsiders.

With the economic rise of the Global South, there will be growing tensions about how to manage the interface of domestic policies. 102 The key challenge is managing the relationship

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93 See Colgan & Keohane, Liberal Order, supra note; see also Thomas Piketty, Capital in the Twenty-First Century 340 (2014).
95 See, e.g., Rodrik, Straight Talk on Trade, supra note, at 216.
96 Shaffer, Retooling, supra note.
102 What is unexpected is that the U.S., the architect of the liberal international economic order, is now frontally attacking it, and not China, India and other emerging economies that, despite their complaints about the WTO in the
between the United States and China. Here Rodrik suggests a different response than many defenders of the current international economic legal order. A common response has been that for the WTO to work, China must become “more like us.” The problem with this analysis is that there is no one way to structure economies to enhance their development. The proper relation of the state and the market for development will always be uncertain and contentious. Traditionally, U.S. policymakers trumpeted a U.S. model in which the state plays a minimal role. China, in contrast, adopted a developmental state model in which capitalism thrives but the state remains prominent. China does not need to become “like us” in terms of its regulatory model, nor us like them. What is needed is a diversity of models in competition with each other, with variation occurring in relation to different preferences, development contexts, and experimental strategies. There is no one development model. And a plurality of models will make for a more resilient global economy. As a counterfactual, just think if China had been “just like us” at the time of the 2008 global financial crisis, rather than providing a market of last resort when U.S. style capitalism imploded.

The key question thus becomes managing the interface between different economic systems to protect domestic social bargains. The WTO already contains rules that permit the U.S. to apply tariffs on Chinese goods when they give rise to injury to U.S. industries—namely safeguard rules, antidumping rules, and countervailing duty rules against subsidies. More can be


Trade liberals traditionally lambast mercantilism because of the role of the state, leading to losses in consumer welfare. Today China is labeled the arch-mercantilist. But in reality, there are many different variations of the relation of the state and the market. Nowhere does a pure market alternative exist and the market needs the state to function. What is frequently called mercantilism, Rodrik argues, can be viewed in terms of different relations of the state and the market. From this perspective, trade liberals focus on the demand/consumer side, arguing that a country’s standard of living depends on what consumers may consume. China, in contrast, has focused on the production/supply side through tax incentives, low cost loans, and input subsidies, together with management of its currency. In the process, it has not done well for Chinese citizens, and has reduced prices in the U.S. for U.S. consumers. But it also has catalyzed growing inequality in the U.S., as U.S. capital has taken advantage of lower Chinese wages and production costs. The interface of the Chinese and American models, in the process, has led to increased political tensions, which need to be managed carefully or both economies and their citizens will suffer. See RODRIK, STRAIGHT TALK ON TRADE, supra note , at 135–36.


106 With irony, Rodrik notes Milton Friedman’s characterization of the government as “the enemy” when proclaiming the magic of the market, pointing to what goes into the making of a pencil. Today, that pencil would be produced in China with its complex hybrid of state-led and market form of capitalism. RODRIK, STRAIGHT TALK ON TRADE, supra note, at 131–32.
added, such as specific rules to protect against social dumping. In parallel, the U.S. will need to focus on insuring greater public investment in support of social inclusion. Indeed, while Rodrik stresses the role for public investment in developing countries, more is needed in the U.S. as well.

Following the great recession’s chagrining of the U.S. economic model, the U.S. should not view itself only as a purveyor of advice to others; it must also be open to learning. To protect against climate change, for example, the government can support the development of clean energy alternatives. China has done so with solar energy. The U.S., in response, has raised tariffs on Chinese solar panels, increasing the cost of clean energy in the United States and thus contributing to global warming. In a world of second best where both government and markets are highly imperfect, the role of the state will vary over time and in context, but it will remain important for social policy, economic development, and social solidarity.

International economic law and institutions are essential for states and their citizens to get along. It can enhance consciousness of our shared fates and the plight of others. But international law and institutions will more likely do so if they support broad-based social inclusion at home, rather than facilitate its unraveling. In this way, global markets will be legitimated. Otherwise, populist anger against elites and center-left parties, which became too close to financial capital in the 1990s and 2000s, will continue. If international rules do not accommodate and support greater national policy space, international order could erode. It has done so before. The erosion may come in a different guise, but it will not be pretty.

IV. Conclusion

Rodrik’s *Straight Talk on Trade* is a model of how to combine theory, empirics, and pragmatic innovative proposals in a sophisticated but accessible way. Intelligent policymaking, in law as in economics, should be grounded in empirics and pragmatic responses to them. It demands modesty, in which one does not purport to have the model, but rather uses judgment in selecting among models. It requires understanding that the national and international are linked with each other, and that we need to assess their reciprocal and recursive relationship. It calls for understanding tradeoffs and assuming responsibility for pragmatic action in light of them.

His economic pragmatism finds reflection in the new legal realism in law. Both call for empirical study of context, combined with pragmatic experimentalism. In this way, a more resilient international economic order can be sustained, one grounded in diversity rather than a single model. Oliver Wendell Holmes’ *The Path of the Law*, among the most cited articles in law, was a forerunner to legal realism. In it, Holmes maintained that law’s future must harness social

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107 Shaffer, *Retooling*, supra note
108 *Id.; Rodrik, Straight Talk on Trade*, supra note, at 229?
109 *Rodrik, Straight Talk on Trade*, supra note, at 250, 255.
111 See Nourse & Shaffer, *Empiricism*, supra note…
science and empirics,\textsuperscript{112} grounded in experience, history, and struggle.\textsuperscript{113} We must learn from our experience, retooling trade agreements so we can better ensure social inclusion. It is by enhancing social integration within states that we facilitate international cooperation among them.

\textsuperscript{112} Oliver Wendell Holmes, Jr., \textit{The Path of the Law}, 10 Harv. L. Rev. 457 (1897) ("[F]or the rational study of law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics").

\textsuperscript{113} Id. at... ("The fallacy to which I refer is the notion that the only force at work in the development of the law is logic…. The rational study of law is still to a large extent the study of history…. It is a part of the rational study, because it is the first step toward and enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules"); see also OLIVER WENDELL HOLMES, THE COMMON LAW (1881) ("[T]he life of the law has not been logic; it has been experience").