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# HOW DO WE GET ALONG? INTERNATIONAL ECONOMIC LAW AND THE NATION-STATE

Gregory Shaffer\*

STRAIGHT TALK ON TRADE: IDEAS FOR A SANE WORLD ECONOMY. By Dani Rodrik. Princeton and Oxford: Princeton University Press. 2018. Pp. xiii, 274. \$29.95.

## INTRODUCTION

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 (EU), and the threat of escalating trade wars illustrate the links. Dani Rodrik<sup>1</sup> 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.<sup>2</sup> In 1997, Rodrik wrote a seminal book with a question mark: *Has Globalization Gone Too Far?* He warned that it had.<sup>3</sup> Now, in his newest book, *Straight Talk on Trade: Ideas for a Sane World Economy*, he addresses trade and economic integration in light of the political fallout of Trump's election and the resurgence of nativism in Europe.<sup>4</sup> The book calls for striking a different, better balance—a reweighing of the scales—between economic globalization and the nation-state. It casti-

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1. Ford Foundation Professor of International Political Economy, John F. Kennedy School of Government, Harvard University.

2. By international economic law, I refer to international trade, investment, monetary, and financial law, but I focus on international trade law, followed by monetary and investment law, as does Rodrik.

3. See DANI RODRIK, *HAS GLOBALIZATION GONE TOO FAR?* 2 (1997).

4. The book builds from Rodrik's wide-ranging work over time, including his previous books and his monthly column in the *Project Syndicate*. See Dani Rodrik, PROJECT SYNDICATE, <https://www.project-syndicate.org/columnist/dani-rodrik> [<https://perma.cc/VSZ9-2M3A>]. 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.

gates 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. Its focus on institutions, social context, and the importance of innovative, adaptive practice reflects new legal realism in legal scholarship.<sup>5</sup>

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 One to Four introduce the relation of national sovereignty, democracy, and economic globalization, highlighting the institutional choices at stake. Those chapters stress the critical role of the nation-state for social solidarity, economic prosperity, and democratic governance, as well as the risks posed when economic globalization and domestic governance fall out of balance. Chapters Five to Eight address the role of economic theory and methods to build empirical understanding and make policy recommendations. They hold critical lessons for legal theory and legal scholarship. Chapters Nine to Twelve 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 Review addresses and responds to these arguments in relation to international economic law and legal theory. Part I 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 II examines the second part of the book in terms of its lessons for legal theory from a new legal realist perspective. Part III calls for the combining of economic and legal analysis to address current challenges in international economic law and policy. In particular, it maintains that international economic law should become 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.

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5. See Howard Erlanger et al., *Foreword: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335; Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61 (2009); Gregory Shaffer, *The New Legal Realist Approach to International Law*, 28 LEIDEN J. INT'L L. 189 (2015); Gregory Shaffer, *Legal Realism and International Law*, in INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS (Jeffrey L. Dunoff & Mark A. Pollack eds., forthcoming 2019) [hereinafter Shaffer, *Legal Realism and International Law*].

## I. TRANSNATIONAL LEGAL ORDERING AND THE NATION-STATE

International law and institutions are transnationally linked with law, governance, and social relations within states.<sup>6</sup> Actors and institutions upload, download, import, and export legal norms, and they develop them in one domain to contest and shape those in another.<sup>7</sup> They engage in diagnostic struggles and paper over differences, giving rise to contradictions and indeterminacies in legal texts. Over time, transnational processes can lead to normative settlement at the international and national levels, comprising new working equilibria regarding the appropriate legal norms and institutions to order particular issues. But these processes also spur contestation and resistance in light of competing diagnostics, legitimacy challenges, internal contradictions, inflexibility, distributive bias, competition, and ineffectiveness.<sup>8</sup> Over time, normative consensus can erode so that a transnational legal order declines.

The term “transnational” does not imply the withdrawal, decline, or disappearance of states as major actors in law and governance. Rather, states participate in their own transformations.<sup>9</sup> To understand transnational legal ordering, one must assess the *interaction* of lawmaking and practice across different levels of social organization, from the international to the local. These processes involve both state and nonstate actors, including transnational capital and international organizations. As states delegate greater public powers and informal norm making to international organizations and transgovernmental networks, they often implement rules of extrastate origin.<sup>10</sup> These processes are particularly pronounced regionally in the EU but are also developing elsewhere, including through trade and economic integration agreements.<sup>11</sup>

Rodrik’s core argument is that international trade and economic integration agreements in support of globalization have excessively constrained national policy space (pp. 13–14). They have done so through a web of mul-

6. On the enmeshment of national and international law, see Gregory Shaffer, *Transnational Legal Process and State Change*, 37 L. & SOC. INQUIRY 229 (2012) [hereinafter Shaffer, *Transnational Legal Process*], and Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS 3 (Terence C. Halliday & Gregory Shaffer eds., 2015). On the impact of WTO law on national regulatory governance, see Gregory Shaffer, *How the World Trade Organization Shapes Regulatory Governance*, 9 REG. & GOVERNANCE 1 (2015).

7. BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE 431 (2d ed. 2002); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 204 (1996); Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 721–22 (2010).

8. Terence C. Halliday & Gregory Shaffer, *Researching Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS, *supra* note 6, at 475, 507–11.

9. Shaffer, *Transnational Legal Process*, *supra* note 6, at 244, 247.

10. H. Patrick Glenn, *A Transnational Concept of Law*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 839, 845 (Peter Cane & Mark Tushnet eds., 2003).

11. *See id.*

tilateral, regional, plurilateral, and bilateral trade, investment, and economic integration agreements.<sup>12</sup> 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.<sup>13</sup> Economists generally agree that trade liberalization is in a nation-state's self-interest because it raises aggregate national welfare.<sup>14</sup> Yet "trade" and economic integration agreements have expanded in scope far beyond the reduction of tariffs and elimination of quotas. They regulate intellectual property rights, health and safety, the establishment and operation of services such as finance, and the administrative process more generally.<sup>15</sup> In some cases, they require the removal of all capital controls.<sup>16</sup> At times, they grant businesses direct rights to sue states, such as through investor-state dispute settlement (ISDS), which can chill regulation.<sup>17</sup> Increasing-

12. See p. 11.

13. The spaghetti bowl metaphor was coined by Jagdish Bhagwati. See Jagdish Bhagwati, *US Trade Policy: The Infatuation with FTAs* 1–20 (Columbia Univ. Dep't of Econ., Discussion Paper Series No. 726, 1995). Rodrik goes further in his critique of the WTO than I would, calling it the "crowning achievement" of hyperglobalization. P. 28. I think WTO rules generally can be, and have been, interpreted (in ways that continue GATT practice) to focus on "nondiscrimination" as the organizing principle, such that states retain policy space to pursue legitimate regulatory objectives. I also think there are important reasons to address nontariff barriers to trade in order 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. pp. 34–35. Overall, however, I agree with Rodrik's general approach and the need to retool trade law to ensure social inclusion. See Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 U. ILL. L. REV. (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3217392](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3217392) [<https://perma.cc/N8LJ-P7YC>].

14. There are some caveats, such as regarding "optimal tariffs" when a country exercises monopsonistic power, but there is general consensus with which Rodrik agrees. Dani Rodrik, *What Do Trade Agreements Really Do?*, J. ECON. PERSP., Spring 2018, at 73, 76, [https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/what\\_do\\_trade\\_agreements\\_really\\_do.pdf](https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/what_do_trade_agreements_really_do.pdf) [<https://perma.cc/NK8D-RRXA>].

15. On regulatory governance, for example, the U.S. has attempted to export its administrative model of cost-benefit analysis and notice and comment, while the EU has attempted to export its model of harmonized standard setting combined with mutual recognition, subject to the precautionary principle. See Gregory Shaffer, *Alternatives for Regulatory Governance Under TTIP: Building from the Past*, 22 COLUM. J. EUR. L. 403, 411–12 (2016).

16. The Organization for Economic Cooperation and Development requires all its members to remove capital controls, the International Monetary Fund pushed for their removal in the 2000s, and the EU includes the free movement of capital as one of its "four freedoms." See RAWI ABDELAL, CAPITAL RULES: THE CONSTRUCTION OF GLOBAL FINANCE 65–68, 88–89, 138–61 (2007); see also *Capital Movements*, EUR. COMMISSION, [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/capital-movements\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/capital-movements_en) [<https://perma.cc/V6M4-MZGE>].

17. See, e.g., LastWeekTonight, *Tobacco: Last Week Tonight with John Oliver* (HBO), YOUTUBE (Feb. 15, 2015), <https://www.youtube.com/watch?v=6UsHHOCH4q8>. 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").

ly, empirics show that these agreements contribute to adverse distributive impacts on the working and middle classes in the United States and Europe.<sup>18</sup> 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 is twofold. First, advocates tend to view economic integration as a one-way endeavor, rather than a question of balance in light of the 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; otherwise the bicycle will fall over.<sup>19</sup> Second, while this approach recognizes that trade creates losers as well as winners,<sup>20</sup> and while many trade liberals support compensating social policies at the national level (although often not with the same vociferousness and urgency),<sup>21</sup> it fails to address how economic globalization implicates domestic politics and social relations, affecting 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.<sup>22</sup> Unlike national law, moreover, international trade treaties lock in requirements that are difficult to undo because they require all parties' agreement, even though preferences within countries change in light of politics, experience, and changing conditions. In contrast, redistributive policies at the national level (including but not limited to trade adjustment assistance) are more easily undone.<sup>23</sup> Technology and changes in corporate culture may be more important factors for stagnant wages, job insecurity, and growing inequality, but these factors are not isolated from economic globalization and trade; they are linked.<sup>24</sup>

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18. See *infra* notes 26–27 and accompanying text.

19. I.M. Destler & Marcus Noland, *Constant Ends, Flexible Means: C. Fred Bergsten and the Quest for Open Trade*, in C. FRED BERGSTEN AND THE WORLD ECONOMY 15, 17–18 (Michael Mussa ed., 2006).

20. See Shaffer, *supra* note 13.

21. See *id.*

22. *Id.* at 7, 10–11.

23. Timothy Meyer, Essay, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985 (2017).

24. See Shaffer, *supra* note 13, at 14–15, 27–28 (discussing the link between technology and trade); see also EUR. TRADE UNION INST., BENCHMARKING WORKING EUROPE 2018 (2018); BRANKO MILANOVIC, GLOBAL INEQUALITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION (2016); ORG. FOR ECON. CO-OPERATION AND DEV., OECD EMPLOYMENT OUTLOOK 2018 (2018), <https://doi.org/10.1787/19991266> [<https://perma.cc/R5XT-CTXD>]; WOLFGANG STREECK, BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM (Patrick Camiller & David Fernbach trans., 2d ed. 2017); WOLFGANG STREECK, RE-FORMING CAPITALISM: INSTITUTIONAL CHANGE IN THE GERMAN POLITICAL ECONOMY (2009); Jay Shambaugh & Ryan Nunn, *Why Wages Aren't Growing in America*, HARV. BUS. REV. (Oct. 24, 2017), <https://hbr.org/2017/10/why-wages-arent-growing-in-america> [<https://perma.cc/YZ4Y-VPCU>].

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.<sup>25</sup> Yet trade was not wholly innocent. Empirical studies show that it has increased risks to many communities in the United States and Europe.<sup>26</sup> The political fallout invigorated populist politics, playing off nativist, racialized fears and the loss of a sense of superior status in relation to others, such as foreigners, migrants, and citizens of color.<sup>27</sup>

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 (p. 66). He contends that we can have any two of them, but not all three.<sup>28</sup> 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 EU apart—most saliently with Brexit but also with the rise of nativist politics across EU countries (p. 76). We can have economic integration and sovereignty, he maintains, but then we must give up on democracy. That was the case under the gold standard in the nineteenth 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 to-

25. See JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (2004); Jagdish Bhagwati, Comment, *The Capital Myth: The Difference Between Trade in Widgets and Dollars*, FOREIGN AFF., May/June 1998, at 7.

26. Most notably, see David H. Autor et al., *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AM. ECON. REV. 2121 (2013), cited in p. 125. See also Clément Malgouyres, *The Impact of Chinese Import Competition on the Local Structure of Employment and Wages: Evidence from France*, 57 J. REGIONAL SCI. 411 (2017); Stefan Thewissen & Olaf van Vliet, *Competing with the Dragon: Employment Effects of Chinese Trade Competition in 17 Sectors Across 18 OECD Countries*, POL. SCI. RES. & METHODS (2017), <https://www.cambridge.org/core/journals/political-science-research-and-methods/article/competing-with-the-dragon-employment-effects-of-chinese-trade-competition-in-17-sectors-across-18-oecd-countries/780191280EDEC31B8452EDA7C8C1A2FB> [<https://perma.cc/B4ZB-QWHG>].

27. See Italo Colantone & Piero Stanig, *The Trade Origins of Economic Nationalism: Import Competition and Voting Behavior in Western Europe*, 62 AM. J. POL. SCI. 936 (2018); Tom Jacobs, *Research Finds that Racism, Sexism, and Status Fears Drove Trump Voters*, PAC. STANDARD (Apr. 24, 2018), <https://psmag.com/news/research-finds-that-racism-sexism-and-status-fears-drove-trump-voters> [<https://perma.cc/GA7M-JNGF>] (citing work of Diana Mutz and others); Daniel Trilling, Opinion, *The Irrational Fear of Migrants Carries a Deadly Price for Europe*, GUARDIAN, (June 28, 2018, 1:00 AM), <https://www.theguardian.com/commentisfree/2018/jun/28/migrants-europe-eu-italy-matteo-salvini> [<https://perma.cc/FVA2-KPM5>]; see also ADAM TOOZE, CRASHED: HOW A DECADE OF FINANCIAL CRISES CHANGED THE WORLD 576 (2018) (“Even an issue such as trade was saturated with racial markers.”).

28. Rodrik developed the theory in DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY 200–05 (2011).

day (pp. 68–70). Or, he argues, we can have sovereignty and democracy, but then we must limit economic integration.

The trilemma model 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.<sup>29</sup> It foregrounds the question of how much of each we desire given their tradeoffs.<sup>30</sup> What Rodrik argues is that “we need to place the requirements of liberal democracy ahead of those of international trade and investment” (p. 12). 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 game in town when it comes to providing the regulatory and legitimizing arrangements on which markets rely.”<sup>31</sup> 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 (p. 24). 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.<sup>32</sup> The rise of nationalism prom-

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29. To the extent that Rodrik theorizes the trilemma in either/or terms, the theory should be modified in terms of what balance should be reached. Cf. p. 66 (“We must choose two among the three.”).

30. Some international law scholars 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 H. JACKSON, *SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW* (2006) (conceptualizing sovereignty in terms of power allocation and tradeoffs).

31. P. 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. Pp. 20–22, 24.

32. See Michael J. Abramowitz, *Democracy in Crisis*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/freedom-world-2018> [https://perma.cc/386U-EU4Q]; *What’s Gone Wrong with Democracy*, ECONOMIST (Mar. 1, 2014), <https://www.economist.com/news/essays/21596796-democracy-was-most-successful-political-idea-20th-century-why-has-it-run-trouble-and-what-can-be-do> [https://perma.cc/D2M2-CNR7].



ises 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. State institutions more likely reflect preferences of national stakeholders and are thus more attentive to national and local contexts. Moreover, national diversity creates benefits in terms of experimentation (from which learning occurs) and resilience for the global economy (when things go wrong in any one jurisdiction). This is a basic point of federalist theory, which—in the words of Justice Louis Brandeis—sees the benefit of decentralized governance where states serve as laboratories of democracy.<sup>33</sup> It is particularly important at the international level because international institutions are even less attuned to local context, given their distance from local stakeholders (pp. 42–44). Global and regional economic integration can lead to increases in efficiency; however, those gains may be marginal in contrast to the risks to social inclusion and democracy.

#### A. *The Challenge for the European Union*

The EU has gone furthest with economic integration, most notably with a single currency—the euro.<sup>34</sup> In the 1990s and early 2000s there was triumphalism in the EU with its expanding membership and increasing scope and depth of policy coverage, thus combining widening with deepening of EU law. In retrospect, the EU went too far, especially with the euro.

Rodrik starts his chapter on Europe by discussing the gold standard at the start of the twentieth century (p. 48). Under the gold standard, the values of countries' currencies were linked to the price of gold, so 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 recognized the need to liberate states from this straightjacket (p. 49). The parallel in Europe today is the euro. What has been sacrificed is national autonomy, with Greece in particular having to follow EU dictates for “structural reforms” in return for financial bailouts (pp. 60–61). 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 EU

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33. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

34. Formally, EU member states are to join the euro once they meet defined economic criteria, and they are to adopt economic policy in order to meet those criteria. George Soros rightly recommends that EU treaties be amended 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, 3:00 AM), <https://www.marketwatch.com/story/george-soros-explains-his-audacious-plan-to-save-europe-2018-05-29> [https://perma.cc/3HCT-92SM].

members have had to adopt austerity policies as part of EU requirements (p. 269), limiting their ability to apply Keynesian policies to stimulate their economies (p. 62). The results have been draconian. Greece's GDP declined 25 percent between 2009 and 2015.<sup>35</sup> Backlash against the European Union ensued.

The challenge for the EU is not to see economic integration as a one-way street, requiring ever more regulation at the European level. Rather, the EU needs to find complementary ways of leaving policy to diverse EU members in light of their citizen demands, contexts, and experience. With the expansion of EU membership, the EU needs to provide more, not less, space for national economic and regulatory governance.<sup>36</sup>

The political cost of the economic crisis hit not only Europe but also the United States, in turn giving rise to U.S. populism that creates new challenges for the EU. 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 United States from a great depression.<sup>37</sup> 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. In turn, Trump's populism, economic nationalism, and isolationism have called into question the transatlantic alliance of liberal democracies such that the U.S. president now views the EU as a "foe," and members of his administration have openly supported anti-EU parties, creating further challenges for EU institutions.<sup>38</sup>

### B. *The Challenge for Developing Countries*

In Chapter Four (entitled "Work, Industrialization, and Democracy"), Rodrik addresses economic development. He contends that there is no one way to spur economic development, so diagnostics and experimentation need to be attuned to local contexts (pp. 89–93). 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

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35. P. 54; Liz Alderman et al., *Explaining Greece's Debt Crisis*, N.Y. TIMES (June 17, 2016), <https://www.nytimes.com/interactive/2016/business/international/greece-debt-crisis-euro.html> (on file with the *Michigan Law Review*).

36. 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), <https://www.project-syndicate.org/onpoint/how-to-save-europe-by-george-soros-2018-05> [<https://perma.cc/37H3-894L>].

37. TOOZE, *supra* note 27.

38. See *id.* at 594; Chas Danner, *Trump Says European Union Is America's Biggest 'Foe,'* N.Y. MAG.: INTELLIGENCER (July 15, 2018), <http://nymag.com/daily/intelligencer/2018/07/trump-says-european-union-is-americas-biggest-foe.html> [<https://perma.cc/FD7K-SYKH>]; Caroline Houck, *"I Think the European Union Is a Foe," Trump Says on Eve of Putin Summit*, VOX (July 15, 2018, 4:41 PM), <https://www.vox.com/2018/7/15/17573836/trump-european-union-americas-foe> [<https://perma.cc/J5FU-ELU7>].

contexts of developing countries, as third world approaches to international law have critiqued.<sup>39</sup> Law needs local buy-in and must respond to local contexts. Transnational transplants of law and policy that do not engage with bottom-up processes attentive to local situations will be resisted, whether the transplants come directly from former colonizing countries or through international institutions.<sup>40</sup> The problem, in part, is that transplants such as intellectual property rights reflect the interests of Northern capital more than local stakeholders.<sup>41</sup>

The key challenge for economic growth is to facilitate structural change in nation-states. Traditionally, this change has spurred individuals to move from agriculture to manufacturing and societies to build democratic institutions to channel capitalism and ensure that the benefits of economic growth are distributed more broadly (pp. 83–85). 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 service economies (pp. 89–90). 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 (p. 92).

Rodrik stresses that economic development is not just about creating property rights, but fundamentally about institutions (pp. 93–94). 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 transition toward a market economy, starting in agriculture in the 1980s with the creation of township and village enterprises.<sup>42</sup> China developed new institutions in light of local context, rather than simply taking forms from advanced economies in the Global North.<sup>43</sup>

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,

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39. James Gathii, *Third World Approaches to International Law*, in INTERNATIONAL LEGAL THEORY, *supra* note 5.

40. Daniel Berkowitz et al., *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165 (2003); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062.

41. See, e.g., Gregory Shaffer, *Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?*, 23 WIS. INT'L L.J. 643 (2005).

42. P. 94; Jiahua Che & Yingyi Qian, *Institutional Environment, Community Government, and Corporate Governance: Understanding China's Township-Village Enterprises*, 14 J.L. ECON. & ORG. 1, 22 (1998).

43. See Che & Qian, *supra* note 42, at 17.

although there are exceptions.<sup>44</sup> Statistically, there is evidence that democracies perform better economically, likely because of the effects of participation.<sup>45</sup> 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.<sup>46</sup> This authoritarian turn could impede needed input and create backlash, affecting social stability and economic growth.

Ultimately, spurring economic growth is an empirical and pragmatic question that starts with diagnostics, followed by trial and error. Rodrik and his colleague Ricardo Hausmann 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 breaks down possibilities branch by branch (pp. 57–59). 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.<sup>47</sup>

## II. ECONOMIC PRAGMATISM AND THE NEED FOR A NEW LEGAL REALISM

We need theories 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.<sup>48</sup> The new legal realism has two core aspects—empiricism and pragmatism.<sup>49</sup> It builds theory empirically from studying the world in its varied contexts.<sup>50</sup> From these contexts, it builds

44. Cf. pp. 87–88 (maintaining that this need not be the case); Sharun Mukand & Dani Rodrik, *The Political Economy of Liberal Democracy* 27–29 (Nat'l Bureau of Econ. Research, Working Paper No. 21540, 2015), <http://www.nber.org/papers/w21540> [<https://perma.cc/3Y9Z-CQC4>] (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 “[t]he rarity of liberal democracy”).

45. See Daron Acemoglu et al., *Democracy Does Cause Growth* (Nat'l Bureau of Econ. Research, Working Paper No. 20004, 2014), <http://www.nber.org/papers/w20004> [<https://perma.cc/WRF6-MT5U>].

46. *Feeling the Stones: Local Experiments with Reform Are Becoming Rarer Under Xi Jinping*, *ECONOMIST* (Aug. 18, 2018), <https://www.economist.com/china/2018/08/18/local-experiments-with-reform-are-becoming-rarer-under-xi-jinping> (on file with the *Michigan Law Review*).

47. Nourse & Shaffer, *supra* note 5, at 94; see CHRISTOPHER K. ANSELL, *PRAGMATIST DEMOCRACY: EVOLUTIONARY LEARNING AS PUBLIC PHILOSOPHY* (2011).

48. Nourse and Shaffer, *supra* note 5, at 64–65.

49. Victoria Nourse & Gregory Shaffer, *Empiricism, Experimentalism, and Conditional Theory*, 67 *SMU L. REV.* 141 (2014).

50. Nourse & Shaffer, *supra* note 5, at 84 (“[C]ontextualists ground their theory on the Jamesian/Deweyan pragmatist insight that theory must come from the world; that only theory

conditional theory. It then uses methods from which new analytics can emerge and innovations be tried.

As does the new legal realism, Rodrik calls for a methodology that builds conditional theory from context.<sup>51</sup> Applying the famous trope of Isaiah Berlin, he distinguishes foxes from hedgehogs in economics (p. 157). 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 simple rational actor model). An example is the idea that contract law norms should apply equally regardless of context, such as among commercial actors, businesses and consumers, and companies and workers. Legal realists, such as Karl Llewellyn, stressed the importance of breaking down legal categories as a function of context.<sup>52</sup>

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 involve both science and craft. The science entails the creation and application of models based on differing assumptions. The craft lies in choosing among the models given the suitability of the assumptions and the question and context at issue (pp. 118, 144). 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.<sup>53</sup> But as Ronald Coase warned, the world of frictionless markets is a myth.<sup>54</sup> The assumption of perfectly competitive markets is always inaccurate, because of, among other things, 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 United States and Alibaba and Ten-

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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. Pp. 114–15, 128; cf. Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1 (2012) (on conditional theory in international law). This part of *Straight Talk* is further developed in Rodrik’s earlier book, *DANI RODRIK, ECONOMICS RULES: THE RIGHTS AND WRONGS OF THE DISMAL SCIENCE* (2015).

52. See Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931) (“This is connected with the distrust of verbally simple rules—which so often cover dissimilar and non-simple fact situations.”).

53. See Arthur Allen Leff, *Commentary, Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 457 (1974) (“[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.”).

54. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960) (“[A] very unrealistic assumption.”).

cent in China.<sup>55</sup> We live in a world that “is always second-best at best,”<sup>56</sup> involving highly imperfect institutions.<sup>57</sup>

The global financial crisis of 2008 illustrated a loss of craft among economists. It is not as if models predicting the financial crisis did not exist (p. 118). It is that the vast majority of economists stuck with one model—the efficient-market hypothesis (p. 118). Problems occur when economists confuse a model with being “the” model (p. 142). 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.<sup>58</sup> If they are not adjusted or replaced, they can lead to errors not only 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 (p. 142). The economics profession needed a bit more sociological awareness, as does the legal profession.<sup>59</sup>

For legal realists, a combination of science and craft is also central.<sup>60</sup> 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 to which they apply legal categories. Just as there are multiple models that must be compared for economic decisionmaking, so too are there multiple legal frames, rules, exceptions, and interpretive canons for legal decisionmaking that require legal craft when applied to contextual situations.

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 (pp. 122–23), just as legal realists complain about

55. See, e.g., Moran Cerf et al., *Commentary: There’s Still Time to Stop the Tech Monopoly Takeover*, FORTUNE (Mar. 8, 2018), <http://fortune.com/2018/03/08/privacy-data-collection-facebook-google-amazon-apple-microsoft/> [<https://perma.cc/Q4HK-7PEE>]; Raymond Zhong, *Worried About Big Tech? Chinese Giants Make America’s Look Tame*, N.Y. TIMES (May 31, 2018), <https://www.nytimes.com/2018/05/31/technology/china-tencent-alibaba.html> (on file with the *Michigan Law Review*).

56. P. 215 (citing economist Avinash Dixit).

57. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

58. Problems also occur where the data, which represent simplifications of complexity, are inaccurate or otherwise misleading. Pp. 141–48.

59. Such sociological awareness should involve not only the risks of using one model as “the” model but also those 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. See pp. 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.

60. See Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 610 (2007); Shaffer, *Legal Realism and International Law*, *supra* note 5.

formalist depictions of law as if jurisprudence is “mechanical.”<sup>61</sup> 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.<sup>62</sup> In economics, the choice of models can reflect ideological dispositions, and not purely reason (p. 118). Thus, it is essential to pay close attention to the empirics behind assumptions to check for biases in the economic models used (p. 165). The models themselves will not 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.<sup>63</sup> Their counterparts in international law are rational choice theorists, including international relations realists such as Jack Goldsmith and Eric Posner.<sup>64</sup> Their work is of great value for calling into question formal and ideal theories of law. But ideas are also central since perceptions of interests change through social interaction.<sup>65</sup> Economics and law cannot be reduced solely to interests, as Keynes famously quipped regarding the impact of the ideas of defunct economists.<sup>66</sup> It is because ideas matter as well as interests that there is no one model that provides “the” model; differences in economic and legal models reflect differences in ideas.<sup>67</sup> Legal reasoning, whether of

61. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

62. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Circuit J.).

63. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

64. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); cf. ERIC A. POSNER & ALAN O. SYKES, *ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW* (2013).

65. Just witness Republicans’ changed perceptions 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> (on file with the *Michigan Law Review*) (“40% of Republicans say Russia is an ally or friendly, up from 22% in 2014.”).

66. Pp. 162–63. Keynes wrote, “Practical men, who believe themselves to be quite exempt from any intellectual influences, 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.” JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY* 383 (1936).

67. See p. 143 (“Economics is really a toolkit with multiple models—each a different, stylized representation of some aspect of reality. The contextual nature of its reasoning means that there are as many conclusions as potential real-world circumstances.”).

the rational choice or legal formalist variety, becomes circular when a category determines the outcome irrespective of the factual situation.<sup>68</sup>

At one point, Rodrik himself confuses “legal realists” with international relations realists.<sup>69</sup> It is an understandable error given the impact of international relations realists’ work critiquing legal liberalism.<sup>70</sup> 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 on 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.<sup>71</sup> 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 norms and reason. It views law in terms of the interaction of internal and external, and legal and extralegal factors such as reason and power, legal craft and empirics, and legal tradition and the demand for progress.<sup>72</sup> Law consists of the tensions between these internal and external factors. Legal realists thus reject both “purist alternatives” of law as power and law as reason.<sup>73</sup>

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.<sup>74</sup> Just as pragmatic economists engage with the world to improve it, help stabilize economies, and help policymakers identify means to break through structural barriers impeding development, so too do legal realists. As Justice Benjamin Cardozo wrote, law is subject to an “endless process of testing and retesting.”<sup>75</sup> 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

68. See Cohen, *supra* note 61, at 815 (“The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value . . . depends upon the extent to which it will be legally protected.”); Leff, *supra* note 53, at 457–58 (discussing Richard Posner’s original version of law and economics).

69. P. 168 (citing Jack Goldsmith and Eric Posner’s *The Limits of International Law* as legal realism).

70. See GOLDSMITH & POSNER, *supra* note 64. For the seminal early work on realism, see HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 211 (1948).

71. See ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* (2009).

72. Dagan, *supra* note 60, at 610.

73. *Id.* at 637.

74. Nourse & Shaffer, *supra* note 49, at 145–46, 152 (on emergent analytics).

75. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 179 (1921).



scholars highlight, problems are solved through iterative processes encouraging learning and thereby allowing new emergent analytics to arise.<sup>76</sup>

### 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.<sup>77</sup> International trade law is in crisis as the United States frontally ignores WTO rules, raising tariffs at an irascible president's discretion through authority delegated from Congress a half century ago.<sup>78</sup> Affected countries then retaliate without waiting for WTO authorization.<sup>79</sup> 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.<sup>80</sup>

What is to be done? How do we get out of this mess?<sup>81</sup> 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

76. See Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 79, 93 (2011).

77. Pp. 76–78. EU member states still provide a model in having the lowest income gaps in world, but it is one under threat as growth stagnates and the societies become more polarized. See p. 76.

78. Chad P. Bown et al., *Trump's Latest \$200 Billion Tariffs on China Threaten a Big Blow to American Consumers*, PETERSON INST. FOR INT'L ECON. (July 13, 2018, 12:15 PM), <https://piie.com/blogs/trade-investment-policy-watch/trumps-latest-200-billion-tariffs-china-threaten-big-blow> [<https://perma.cc/3HZ5-XQ6S>]. 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. *Id.* Rodrik wrote the book at a time when the tariffs had yet to be implemented, but they since went into effect. P. 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.”).

79. Shawn Donnan & Jim Brunsten, *EU Retort to Trump's Tariffs Risks Breaching WTO Rules*, FIN. TIMES (Mar. 6, 2018), <https://www.ft.com/content/e3771a6e-20cb-11e8-a895-1ba1f72c2c11> (on file with the *Michigan Law Review*).

80. See, e.g., GRAHAM ALLISON, *DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES'S TRAP?* (2017).

81. For a comic but accurate description of the mess, see LastWeekTonight, *Trade: Last Week Tonight with John Oliver* (HBO), YOUTUBE (Aug. 19, 2018), <https://www.youtube.com/watch?v=etkd571PfPU>.

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 that the relation of domestic law and politics, on the one hand, and economic globalization or "hyperglobalization," on the other, has become imbalanced.<sup>82</sup> While economies globalize, politics remain local. International economic law, Rodrik argues, needs to empower, and not disempower, nation-states to regulate the economy (pp. 222–26). The risks are real. Although Rodrik at times writes on a more optimistic note—" [f]ortunately, fascism, communism, and other forms of dictatorships are passé today" (p. 6)—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).<sup>83</sup> 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.<sup>84</sup>

One reaction to President Trump's policies is to highlight the good that the American-created liberal international economic order brought.<sup>85</sup> But one also needs to address its flaws in privileging capital in relation to the rest of us, or the order could collapse.<sup>86</sup> Revolutions in information and communication technology, complemented by trade, investment, and economic partnership agreements, facilitate offshoring of production tasks. 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 where support for those harmed is left to the national level.<sup>87</sup> But in practice the support is not forthcoming, and the backlash continues. One alternative is to increase regulation at the global level. Cross-border regulatory cooperation is required to address common challenges, and it can be developed in a

82. Pp. 13–14. 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).

83. See David Emery, *Was 'America First' a Slogan of the Ku Klux Klan?*, SNOPE (Feb. 9, 2018), <https://www.snopes.com/fact-check/america-first-ku-klux-klan-slogan/> [https://perma.cc/V4CD-ZHXU].

84. Kim Lane Scheppele, *Worst Practices and the Transnational Legal Order (or How to Build a Constitutional "Democratship" in Plain Sight)*, in GREGORY SHAFFER ET AL., *CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER* (forthcoming 2019).

85. See *Why We Should Preserve International Institutions and Order*, N.Y. TIMES, July 28, 2018, at A7 (published as advertisement and later reproduced at <https://docs.google.com/forms/d/e/1FAIpQLSesHdZWxp13plS4nkLOSMHv4Dg1jaksBrCC6kWv6OfVAmO5g/viewform> [https://perma.cc/E66X-PL5F]); Stephen M. Walt, *Why I Didn't Sign Up to Defend the International Order*, FOREIGN POL'Y (Aug. 1, 2018, 2:03 PM), <https://foreignpolicy.com/2018/08/01/why-i-didnt-sign-up-to-defend-the-international-order/> [https://perma.cc/XPA5-K94Z].

86. See, e.g., Shaffer, *supra* note 13, at 2; Jeff D. Colgan & Robert O. Keohane, Essay, *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.").

87. Shaffer, *supra* note 13, at 2–3.

pragmatist vein that complements national regulatory initiatives.<sup>88</sup> Yet, when rules are negotiated behind closed doors, powerful interests, such as transnational commercial interests, are more likely to have input than most citizens and thus can enroll and socialize state officials to act on their behalf.<sup>89</sup> As a result, regulation in the form of global rules, as in the case of intellectual property, tends to reflect the interests of powerful actors and not local preferences. It thus is often inappropriate for local contexts. The opposite approach is to focus on the domestic economy through crass protectionism, as illustrated in Trumpism, which is currently unchallenged by some liberals<sup>90</sup> 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.<sup>91</sup> Rodrik notes the case for trade agreements that have been successful in reducing tariffs and instituting the principle of nondiscrimination, but he shows how they have gone much further in granting special protections for large multinational businesses, such as in the areas of intellectual property rights and investment law (pp. 211–12). In the process, because of the great unbundling of production facilitated by revolutions in information and communication technologies,<sup>92</sup> trade agreements have helped shift bargaining leverage in favor of capital in relation to labor, contributing to job insecurity and stagnant wages

88. For important work on this, see Bernard Hoekman & Douglas Nelson, *Twenty-First-Century Trade Agreements and the Owl of Minerva*, 10 ANN. REV. RESOURCE ECON. 161 (2018), and Bernard Hoekman & Charles Sabel, *Trade Agreements, Regulatory Sovereignty and Democratic Legitimacy*, (Eur. Univ. Inst. Robert Schuman Ctr. Advanced Studies, Working Paper 2017/36, 2017) (differentiating bottom-up regulatory cooperation initiatives from top-down “regulatory coherence” ones that impose a single model for regulatory policy). For earlier work, see JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000). Rodrik does not seem to disagree with Hoekman’s and Sabel’s approach, which can be developed on an ad hoc basis outside of trade agreements, but he does not directly address their approach when critiquing existing trade agreements.

89. See BRAITHWAITE & DRAHOS, *supra* note 88, at 490.

90. Robert Skidelsky, *Protectionism for Liberals*, PROJECT SYNDICATE (Aug. 14, 2018), <https://www.project-syndicate.org/commentary/protectionism-for-liberals-by-robert-skidelsky> [<https://perma.cc/UGT8-GUZP>] (“Liberals should certainly exercise their right to attack Trumpian politics. But they should refrain from criticizing Trumpian protectionism until they have something better to offer.”). In the U.S. Democratic Party, for example, see Zeeshan Aleem, *The Democrats’ New Trade Platform Sure Does Sound a Lot like Trump*, VOX (Aug. 3, 2017, 8:50 AM), <https://www.vox.com/policy-and-politics/2017/8/3/16084132/democrats-trade-schumer-china-trump> [<https://perma.cc/Y3UX-7GP8>].

91. See 26 JOHN MAYNARD KEYNES, *Speech by Lord Keynes in Moving to Accept the Final Act at the Closing Plenary Session, Bretton Woods, 22 July 1944*, in THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES 101, 102 (Donald Moggridge ed., 1980) (describing lawyers as the poets of Bretton Woods).

92. RICHARD BALDWIN, *THE GREAT CONVERGENCE: INFORMATION TECHNOLOGY AND THE NEW GLOBALIZATION* (2016).

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 diplomas by 24 percent, while the incomes of the super-rich soared.<sup>93</sup> Not surprisingly, the political backlash against elites threatens to tear societies apart.<sup>94</sup>

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 the long-standing guiding principle of nondiscrimination (p. 250). 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.<sup>95</sup> 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.<sup>96</sup> In the area of capital regulation, states should be granted significant discretion to take prudential measures involving capital controls.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> International institutions can adopt transparen-

93. See Colgan & Keohane, *supra* note 86, at 38; see also THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 340 (Arthur Goldhammer trans., 2014).

94. See, e.g., Christopher Groskopf, *European Politics Is More Polarized Than Ever, and These Numbers Prove It*, QUARTZ (Mar. 30, 2016), <https://qz.com/645649/european-politics-is-more-polarized-than-ever-and-these-numbers-prove-it/> [<https://perma.cc/W4ZD-78UJ>]; Janet Hook, *Political Divisions in U.S. Are Widening, Long-Lasting, Poll Shows*, WALL STREET J. (Sept. 6, 2017, 8:39 AM), <https://www.wsj.com/articles/political-divisions-in-u-s-are-widening-long-lasting-poll-shows-1504670461> (on file with the *Michigan Law Review*); *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/Y9QV-LHAH>] (“Republicans and Democrats are more divided along ideological lines—and partisan antipathy is deeper and more extensive—than at any point in the last two decades.”).

95. Shaffer, *supra* note 13.

96. See Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT’L L. 361 (2018) (discussing the role of “complementarity,” focusing first on domestic institutions, combined with institutional choice in light of context).

97. Bhagwati, *supra* note 25.

98. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 248 (2d ed. 1997); JOHN H. JACKSON ET AL., *INTERNATIONAL ECONOMIC RELATIONS* 476–77, 833–35 (6th ed. 2013).

99. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 177–88, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998); Gregory

cy mechanisms to cast sunlight on national measures.<sup>100</sup> 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.<sup>101</sup> The key challenge is managing the relationship between the United States and China. Here, Rodrik suggests a different response than many defenders of the current international economic legal order.<sup>102</sup> A common response has been that for the WTO to work, China must become “more like us.”<sup>103</sup> 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

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Shaffer, *Power, Governance, and the WTO: A Comparative Institutional Approach*, in *POWER IN GLOBAL GOVERNANCE* 130, 153–55 (Michael Barnett & Raymond Duvall eds., 2005).

100. Gregory Shaffer et al., *Can Informal Law Discipline Subsidies?*, 18 J. INT’L ECON. L. 711 (2015).

101. What is unexpected is that the United States, the architect of the liberal international economic order, is now the one frontally attacking it—not China, India, and other emerging economies that, despite their complaints about the WTO in the past, now defend it. See, e.g., *BRICS Nations Call for ‘Open’ Trade, Decry ‘Protectionism,’* RADIO FREE EUR./RADIO LIBERTY (July 26, 2018, 2:19 PM), <https://www.rferl.org/a/brics-nations-call-for-open-global-trade-decry-protectionism-/29392362.html> [<https://perma.cc/WTJ6-S6LA>]. They have learned how to defend their interests legally in the system, and they understand both how they have benefited from it and the risks of its demise. See, e.g., Gregory Shaffer & Henry Gao, *China’s Rise: How It Took on the U.S. at the WTO*, 2018 U. ILL. L. REV. 115; Gregory Shaffer et al., *State Transformation and the Role of Lawyers: The WTO, India, and Transnational Legal Ordering*, 49 LAW & SOC’Y REV. 595 (2015); Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil’s Success*, 41 CORNELL INT’L L.J. 383 (2008); see also MILANOVIC, *supra* note 24, at 11, 18–19 (elephant curve showing the benefit to the middle classes in emerging economies, and notably China and India).

102. 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 in 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 United States for U.S. consumers. But it also has helped catalyze growing inequality in the United States, 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 pp. 135–36.

103. See Kurt M. Campbell & Ely Ratner, *The China Reckoning: How Beijing Defied American Expectations*, FOREIGN AFF., March/April 2018, at 60.

capitalism thrives but the state remains prominent.<sup>104</sup> 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.<sup>105</sup> 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 how to manage the interface between different economic systems to protect domestic social bargains. The WTO already contains rules that permit the United States to apply tariffs on Chinese goods when they give rise to injury to U.S. industries—namely safeguard rules,<sup>106</sup> antidumping rules,<sup>107</sup> and countervailing duty rules against subsidies.<sup>108</sup> More can be added, such as specific rules to protect against social dumping.<sup>109</sup> In parallel, as China develops economically, the United States will demand reciprocal market access, bring claims, and retaliate against China where it takes U.S. intellectual property or otherwise pressures U.S. high-tech companies to release it. Yet, the United States also will need to increase public investment in science and technology, as well as in policies for social inclusion.<sup>110</sup> Indeed, while Rodrik stresses the role for public investment in developing countries, more is needed in the United States as well (pp. 250, 254–55).

Following the great recession’s chagrining of the U.S. economic model, the United States 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 should support the development of clean energy alternatives. China has done so with solar energy.<sup>111</sup> The United States, in response, has raised tariffs on Chinese solar panels, increasing the cost of

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104. Cf. NICHOLAS R. LARDY, *MARKETS OVER MAO: THE RISE OF PRIVATE BUSINESS IN CHINA* (2014); Mark Wu, *The “China, Inc.” Challenge to Global Trade Governance*, 57 HARV. INT’L L.J. 261 (2016).

105. 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. Pp. 131–32. Today, that pencil would be produced in China with its complex hybrid of state-led and market form of capitalism. Pp. 131–32.

106. Shaffer, *supra* note 13, at 12.

107. *Id.*

108. *Id.*

109. *Id.* at 36.

110. *Id.* at 17–19.

111. Keith Bradsher, *China Looks to Capitalize on Clean Energy as U.S. Retreats*, N.Y. TIMES (June 5, 2017), <https://www.nytimes.com/2017/06/05/business/energy-environment/china-clean-energy-coal-pollution.html> (on file with the *Michigan Law Review*).

clean energy in the United States and thus contributing to global warming.<sup>112</sup> In a world of second best where both governments and markets are highly imperfect, the role of the state will vary over time and in context, but it will remain important for economic development, social and environmental policy, and social solidarity.

International economic law and institutions are essential for states and their citizens to get along. They 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.<sup>113</sup> 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.

#### 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.

Such economic pragmatism finds reflection in the new legal realism in law. Both call for empirical study of context, combined with pragmatic experimentalism.<sup>114</sup> In this way, a more resilient international economic order can be sustained, one grounded in diversity rather than a single model. Oliver Wendell Holmes's *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 science and empirics,<sup>115</sup> grounded in experience, history, and struggle.<sup>116</sup> We must learn from our experience, retooling trade

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112. Pp. 259–60; Timothy L. Meyer, *Energy Subsidies and the World Trade Organization* (Univ. of Ga. Sch. of Law Research Paper Series, Paper No. 2013-27, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2340692](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2340692) [<https://perma.cc/43MU-G7MS>].

113. See pp. 11–12.

114. See Nourse & Shaffer, *supra* note 49.

115. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (“For the rational study of the 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.”).

116. *Id.* at 465, 469 (“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 an en-

agreements so we can better ensure social inclusion. It is by enhancing social integration within states that we facilitate international cooperation among them.

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lightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules.”); *see also* OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Am. Bar Assoc. 2009) (1881) (“The life of the law has not been logic: it has been experience.”).



