THE ECONOMIC DYNAMICS OF LAW

This book offers a dynamic theory of law and economics focused on change over time, aimed at avoiding significant systemic risks (like financial crises and climate disruption), and implemented through a systematic analysis of law's economic incentives and how people actually respond to them. This theory offers a new vision of law as fundamentally a macro-level enterprise establishing normative commitments and a framework for numerous private transactions, rather than as an analogue to a market transaction. It explains how neoclassical law and economics sparked decades of deregulation culminating in the 2008 financial collapse. It then shows how economic dynamic theory helps scholars and policymakers make wise choices about how to avoid future catastrophes while keeping open a robust set of economic opportunities, with individual chapters addressing the law and economics of financial regulation, contract, property, intellectual property, antitrust, national security, and climate disruption.

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The Economic Dynamics of Law

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To my parents, George and Sue Driesen, who have always worked hard to make the world a better place, for me, my siblings, and everybody else.
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Preface

Many scholars have criticized neoclassical law and economics. But very few have proposed viable alternatives. This book presents an alternative economic approach to law, the economic dynamic approach.

My work on economic dynamic theory began with a previous book, The Economic Dynamics of Environmental Law (MIT Press, 2003). Although that book developed the theory in the context of environmental law, it also claimed that the theory applied to law more generally and used it to analyze the law of regulated industries, an area different from environmental law, to demonstrate the theory’s generality.

That book won the Lynton Keith Caldwell Award in 2004, but that award goes to the best book on environmental policy and politics. The book’s claim that the theory applied more generally did not matter in that context and the book’s readers came from the world of environmental policy.

I realized that the theory required explicit application to a variety of subject matter areas before readers would appreciate its generality. But I found the task of applying it to a large number of areas, many of which I am not an expert in, rather daunting.

After the 2008 economic crisis, a number of prominent economists began to sound a lot like proponents of economic dynamic theory. Paul Krugman, Joseph Stiglitz, and many others took neoclassical economics to task for creating the intellectual climate that led to disastrous deregulation. This linking of neoclassical law and economics to unwise deregulation echoed a theme of The Economic Dynamics of Environmental Law and my edited volume, Economic Thought and U.S. Climate Change Policy (MIT Press, 2010). Also, policymakers had spared the world’s economy a much more prolonged and deeper debacle, at least temporarily, only because they responded to the crisis in an economic dynamic way. The time had come to make the economic dynamic theory’s generality and value apparent to a wider audience. Thus, the
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The current volume aims to establish the generality of the theory more firmly by demonstrating how it has implicitly influenced the law and legal scholarship in a number of fields and how recognizing the theory explicitly might help us advance law and scholarship further.

As I thought about the theory anew, I also perceived the need to develop it further. A major change involves identifying the avoidance of systemic risk (while keeping open a robust set of economic opportunities) as a normative goal for economic dynamic theory. The presentation in *The Economic Dynamics of Environmental Law* had argued for a focus on change over time and for the use of economic dynamic analysis as an analytical technique, but the embrace of an explicit normative goal is new to this book. I have further developed the method of economic dynamic analysis that I argued for in the earlier book, principally by embracing scenario analysis as a way of understanding and preparing for the future without creating the illusion that we know its precise contours. So the theory has evolved.

The world currently copes with a number of problems, such as climate disruption, terrorism, and a fragile economy, that require the long-term focus at the heart of the economic dynamic theory. Yet the United States in particular has often employed a myopic approach to the problems confronting us, often ignoring or clumsily responding to potential long-term threats in a way that reflects an excessive preoccupation with short-term costs and benefits and a failure to think about long-term economic dynamics. In the absence of any theory or method for thinking about change over time, the polity too often divides into warring factions based on people’s faith (or lack thereof) in markets and governments, respectively. The economic dynamic theory calls for a serious focus on the shape of change over time and provides tools to make efficacious policy choices in addressing long-term problems. We do not want society to efficiently drive itself off a cliff. Instead, we need it to look ahead, see where it is going, and steer in an appropriate direction to avoid disasters and get to a reasonably pleasant place. Hence, this book embraces a macroeconomic approach to law that sees law as a force shaping society’s overall direction, rather than as a mere set of resource-allocating transactions.

As I wrote the book, though, I found that economic dynamic theory already plays a surprisingly robust role in the law and legal scholarship. Furthermore, it plays this role not only in the public law, but also in common law areas such as property and contract. Yet, in recent years, a narrow short-term view of the law as a set of either efficient or inefficient transactions has tended to dominate legal scholarship and guide policy change, with some disastrous results. This book provides a systematic way of using neoclassical law and economics’ key insight about economic incentives’ importance in order to achieve important...
and appropriate societal goals, such as preventing catastrophes. I hope readers will make use of the book's insights to help guide society to a better and less contentious future.

As I wrote this book I benefited greatly from informal peer reviews, including several from experts in the fields that I was learning about for the first time or at least revisiting for the first time since law school. I thank the following readers of the book proposal, the book itself, articles destined to become book chapters, or individual chapters: Aviva Abromovsky, Rakesh Anand, William C. Banks, Keith Bybee, Peter Carstensen, Shubha Ghosh, James Hackney, Douglas Kysar, Andrew Long, Robin Malloy, David Popp, Eric Posner, Lynn Stout, Spencer Waller, and participants in a Syracuse University College of Law Workshop. I take responsibility for any errors.

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