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978-1-107-00485-6 - The Economic Dynamics of Law
David M. Driesen
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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.

David M. Driesen is University Professor at Syracuse University, the thirteenth person in the university's history to hold this campus-wide position. He is the author of *The Economic Dynamics of Environmental Law*, winner of the Lynton Keith Caldwell award, and *Environmental Law: A Conceptual and Pragmatic Approach*, 2nd edition (with Robert Adler and Kirsten Engel), and is the editor of *Economic Thought* and *U.S. Climate Change Policy* and *Beyond Environmental Law* (with Alyson Flournoy). His articles have appeared in *Cornell Law Review*, *Ecology Law Quarterly*, *Harvard Environmental Law Review*, *Virginia Journal of International Law*, and other leading journals. He was an attorney with the Natural Resources Defense Council before entering academe.

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CAMBRIDGE UNIVERSITY PRESS
 Cambridge, New York, Melbourne, Madrid, Cape Town,
 Singapore, São Paulo, Delhi, Mexico City
 Cambridge University Press
 32 Avenue of the Americas, New York, NY 10013-2473, USA
www.cambridge.org
 Information on this title: www.cambridge.org/9781107004856

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First published 2012

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Driesen, David M.
 The economic dynamics of law / David M. Driesen.
 p. cm.
 Includes bibliographical references (p.) and index.
 ISBN 978-1-107-00485-6 (hardback)
 1. Law and economics. I. Title.
 K487.E3D75 2012
 340.1-dc23 2011050683

ISBN 978-1-107-00485-6 Hardback

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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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[More information](#)

Contents

<i>Preface</i>	<i>page</i> ix
1 An Introduction to the Economic Dynamics of Law	1
PART ONE	
2 Neoclassical Law and Economics	19
3 The Economic Collapse of 2008	36
4 The Economic Dynamic Theory	50
5 Financial Regulation	79
PART TWO	
6 Contract Law’s Inefficiency	99
7 Property Law: A Macroeconomic View	121
8 Intellectual Property: Economic Dynamic Scholarship and Neoclassical Legal Change	137
9 Size Matters: Antitrust, Empowerment, and Systemic Risk	156
10 On the Dangers of Ignoring the Economic Dynamics of National Security	181
11 Climate Disruption: An Economic Dynamic Approach	203
12 Conclusion: On Economic Dynamics’ Value and Limits	223
<i>Index</i>	235

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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

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.

I would also like to thank Myriah Jaworski, Meredith Lee-Clark, and Maria Scandia for research assistance; Christy Ramsdell for administrative support; and John Berger for his support and encouragement. Syracuse University made such an ambitious book possible by offering me a University Professor position, which provides enormous support for research, so I thank Vice-Chancellor Eric Spina and Law School Dean Hannah Arterian for that. I also benefited from a research leave offered specifically to support this project. Finally, I am grateful to the staff of the H. Douglas Barclay Law Library at Syracuse University College of Law for their prompt responses to my never-ending stream of requests.

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