

# The Birth of a Legal Economy: Lawyers and the Development of American Commerce

JUSTIN SIMARD†

## INTRODUCTION

Despite well-documented struggles encountered during the recent economic downturn, American lawyers maintain a dominant presence in American life.<sup>1</sup> There are more lawyers in the United States than in any other country in the world.<sup>2</sup> This continuing economic dominance has roots more than two centuries old. This Article shows that lawyers helped lay the foundation for capitalism in the early Republic. At a time when both federal and state governments held little power, lawyers stepped in to fill the gap. Private lawyers served basic economic roles: they established legal institutions and markets on the frontier, generated liquidity before the federal government printed money, and provided

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1. See Bryant G. Garth, *Crises, Crisis Rhetoric, and Competition in Legal Education*, 24 STAN. L. & POL'Y REV. 503, 527–28 (2013) (concluding that profession's response to the economic crisis illustrates its strength).

2. Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEX. L. REV. 645, 646 (1992) (discussing statistics on number of lawyers in U.S.); Dietrich Rueschemeyer, *Comparing Legal Professions Cross-Nationally: From a Professions-Centered to a State-Centered Approach*, 11 AM. B. FOUND. RES. J. 415, 418 (1986).

the security that their clients needed to participate in volatile national markets. The profession grew alongside capitalism, and it built a culture and developed institutions, such as law firms, that solidified the connection between lawyers and commerce. These lawyers formed the basis of the modern profession and the modern American economy.

These findings are new. Although the political importance of lawyers in the early Republic is well-known, the role of private lawyers in building capitalism has been mostly undocumented. Part of this oversight stems from an unjustified emphasis on lawyers' work in court. It is relatively easy to find out what lawyers said in briefs and what judges said in opinions; it is harder to reconstruct what legal practice actually looked like in 1800. This Article exploits a new set of sources—legal account books—that, along with the correspondence of lawyers and other materials, paint a detailed, day-to-day portrait of legal practice in the early nineteenth century. In these books, lawyers recorded information about their clients, their work, and their fees. They are especially revealing because they were designed to be used day in and day out; they were not presented and curated for posterity. They are valuable, in other words, because they show what lawyers did, not what they said they did.

These candid sources reveal that the American legal profession drove commerce at the birth of the Republic. Lawyers created early American monetary policy, alleviating a liquidity crisis by writing and enforcing promissory notes; expanded eastern markets by enforcing property rights as land agents on the frontier; enriched clients in New York City by building trust in a volatile market; and knit together the northern and southern economies with long-distance debt collection services.<sup>3</sup> In short, the routine work of

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3. My current research analyzes all of these economic interventions, but the profession's work on the frontier and New York City will be the focus of this Article.

lawyers was integral to the development of American capitalism. Their presence was vital during the nineteenth century, helping create conditions for economic growth that economist Douglass North has identified as relatively rare in world history.<sup>4</sup>

This Article uses two case studies. The first, an analysis of lawyers' work on the western frontier demonstrates that lawyers played essential roles in the construction and expansion of a modern economic framework. The second, a study of lawyers in New York City, shows that the profession remained crucial to the functioning of an American capitalist economy, even after that framework was well established. Nineteenth-century American lawyers not only built the American economy but also ensured themselves (and their successors) a place in it. Lawyers embraced the routine commercial work that allowed the nascent market to function. In the early nineteenth century, private law work was a fact of life; fifty years later, it was a calling. That calling still motivates lawyers today.

This Article tells the story of how American lawyers built the system that necessitates their participation. It therefore not only contributes to an understanding of the birth of modern American capitalism but also to a broader literature on the role of lawyers in economic life. First, it shows that lawyers accomplished far more than standard economic accounts of their work acknowledge: they not only managed transactions, but supplied basic structures required for the economy to function. Second, it illustrates the role lawyers played in the early Republic in providing the formal and informal constraints that institutional economists and economic historians believe are essential to economic growth. Third, this Article builds on and extends the work of scholars

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4. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 8–9 (James Alt & Douglass North eds., 1990). North, however, does not idealize the nineteenth-century American economy as other less nuanced thinkers do. He acknowledges that it was “admixed with some adverse consequences” for its participants. *Id.* at 9.

of the legal profession, showing that such day-to-day study of lawyers' work is fruitful for historians and revealing that the powerful role of lawyers in American life is not a recent phenomenon brought on by the rise of regulation and the administrative state. Finally, this Article contributes to debates about the causes of long-term economic development, showing that private lawyers can provide the institutions that, according to many political economists, explain why some countries are richer than others. A better understanding of this role helps explain the continuing importance of lawyers to the American economy.

This Article begins in Part I by analyzing the scholarly literature on the role of lawyers in American economic life. It finds—after reviewing literature from economists, legal scholars, historians, and others—that scholars tend to underestimate the importance of the legal profession. Close historical study of the profession is necessary to show its central role in the development of capitalism. Part II begins this close study. Using legal account books and correspondence, this Part examines the day-to-day practice of legal work on the Ohio frontier in the early nineteenth century. These sources illustrate that by working as agents of eastern businessmen, lawyers not only encouraged land sales but also laid a framework for the capitalist development of Ohio. Their seemingly private legal work had dramatic public effects. In Part III, this Article examines another set of legal practitioners: elite commercial lawyers in mid-nineteenth-century New York City. Account books show that top New York lawyers devoted their practices to routine commercial work. This seemingly quotidian work built the confidence that encouraged exchange in a risky market. In addition to building confidence, New York's lawyers also built institutions. Part IV analyzes the law firms that grew out of the bar's devotion to commercial work and the way that these firms solidified the connections between the legal profession and commerce. Finally, Part V concludes by calling for both scholars and lawyers to take the

relationship between commercial legal work and economic governance seriously.

## I. LAWYERS IN AMERICAN ECONOMIC LIFE

For generations, scholars have debated whether and how the presence of lawyers affects economic growth. Their studies range from the theoretical to the practical and rely on methodologies from economics to sociology. Some have argued that the United States has too many lawyers, that law creates inefficiencies, and that businessmen dislike using lawyers. Others have claimed that lawyers are valuable to commercial transactions, that they serve important roles in and out of court, and that changes in legal doctrine have spurred economic growth. Neither group, however, has understood the depth to which the day-to-day practice of lawyers is essential to the functioning of the American economy.

### A. *Economic Literature*

Economists are often critical of lawyers. Spurred on by popular skepticism of the profession, scholars have attempted to measure the effect of lawyers on American economic growth by comparing the United States to other countries with fewer lawyers.<sup>5</sup> Stephen Magee, the most prominent academic critic of the role of lawyers in American economic life, has argued based on international economic data that the United States is oversaturated with lawyers and that the profession's excessive numbers hinder economic

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5. See Frank B. Cross, *Lawyers, the Economy, and Society*, 35 AM. BUS. L.J. 477, 478–79 (1998) (noting the “widespread sense that lawyers are frustrating business activity” and that “politicians have called for sweeping legal reforms in response to the perceived effects of lawyers on the economy”); see also Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 648–51 (1994) (discussing critiques). For more recent examples see, PHILIP K. HOWARD, *LIFE WITHOUT LAWYERS: RESTORING RESPONSIBILITY IN AMERICA* (2009); PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (2011).

growth.<sup>6</sup> Like other critics, he points to problems with tort law and excessive regulation, blame for which he places at the feet of lawyers. In response, Charles Epps has criticized Magee's data set and theoretical approach and found "no support for the claim that lawyers in whole or part impair economic growth."<sup>7</sup> Magee, however, refused to concede the point.<sup>8</sup> Other scholars, such as Frank B. Cross, have parsed data differently, concluding that lawyers have "no substantial identifiable economic effect."<sup>9</sup>

In addition to these far-reaching quantitative studies, scholars with a narrower focus have relied on the insights of Ronald Coase to examine the effect of legal rules on specific types of exchanges.<sup>10</sup> Others have pointed out the

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6. See Stephen P. Magee, *The Optimum Number of Lawyers: A Reply to Epp*, 17 LAW & SOC. INQUIRY 667, 667 (1992) (stating that "the United States has 40% too many lawyers; and that lawyer participation in U.S. politics advances their interests at the expense of the U.S. economy"). Magee's article appeared after a debate on the editorial pages of the *Wall Street Journal*. See Charles R. Epp, *Let's Not Kill All the Lawyers*, WALL ST. J., July 9, 1992, at A15; Stephen P. Magee, Letter to the Editor, *How Many Lawyers Ruin an Economy?*, WALL ST. J., Sept. 24, 1992, at A17.

7. Charles R. Epp, *Do Lawyers Impair Economic Growth?*, LAW & SOC. INQUIRY 585, 586 (1992).

8. See Magee, *supra* note 6, at 668; Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U.L. REV. 77, 82 (1993) (criticizing Magee's study); see also George L. Priest, *Lawyers, Liability, and Law Reform: Effects on American Economic Growth and Trade Competitiveness*, 71 DENV. U.L. REV. 115, 124-25 (1993) (criticizing assumptions made in these studies); Kevin M. Murphy et al., *The Allocation of Talent: Implications for Growth*, 106 Q.J. ECON. 503, 529 (1991) (concluding, based on empirical study, that law schools take talented students away from more economically productive occupations such as engineering).

9. Cross, *supra* note 5, at 512. See also Philip Keefer, *Lawyers and Economic Growth—A Red Herring?*, 17 LAW & SOC. INQUIRY 645, 645 (1992) (arguing that the number of lawyers is a "poor proxy" for measuring the legal system's effect on the economy); Dean Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 FORDHAM L. REV. 275, 275-77, 283-97 (1992) (detailing recent growth of profession and reviewing theories for why the number of lawyers has increased); Peter B. Pashigian, *The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers*, 20 J.L. & ECON. 53, 81 (1977) ("The findings of this study suggest the economic status of the legal profession is closely tied to the performance of the economy and not to the scale of government regulation.").

10. Ronald Coase provides a framework for examining the efficiency of legal

superfluousness of lawyers in commerce. Stewart Macaulay, for example, used interviews with law firms and businessmen to highlight the ability of businesses to deal with disputes informally, outside of the legal system, and without involving a lawyer.<sup>11</sup> Robert C. Ellickson has found similar attitudes and practices among California cattle ranchers,<sup>12</sup> and Larry Ribstein has explained why the involvement of law and lawyers can limit trust between contracting parties, increasing transaction costs.<sup>13</sup>

The profession also has economic defenders. Gillian Hadfield, for example, argues that lawyers offer numerous benefits for their clients, but that prohibitive fee structures prevent many from receiving legal services at reasonable rates.<sup>14</sup> Others defend the profession's current structure. As

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systems. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). For an overview of this literature, see Frank B. Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737, 1769–70 (2002); Cross, *supra* note 2, at 647 (analyzing criticisms of lawyers and arguing that the case against lawyers “remains unproved”). For specific examples, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 92–93 (1989) (using transaction cost approach to argue for importance of default rules); Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1033 (1995) (encouraging use of liability rules to “induce both *more contracting* and *more efficient contracting* than property rules”); Keith N. Hylton, *A Missing Markets Theory of Tort Law*, 90 NW. U.L. REV. 977, 977–78 (1996) (analyzing tort law and finding that abnormally dangerous activity doctrine fails to achieve its specified ends).

11. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61–62 (1963) (discussing hesitancy of businessmen to turn to lawsuits and involve lawyers).

12. Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 628 (1986) (noting that “potential disputants [sometimes] ignore the formal law” in favor of informal norms); *see generally* ROBERT C. ELICKSON, *ORDER WITHOUT LAW* (1991). For more on the importance of informal norms, see David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 L. & SOC. R. 551, 553–54 (1984) (describing hesitancy of community members to turn to the law).

13. Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 576 (2001).

14. *See, e.g.*, Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43 (2014); Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts*

Nelson Miller points out, despite recent talk of the glut of lawyers on the market, there has been an impressively consistent demand for legal services.<sup>15</sup> Another study found that spending on legal aid lawyers significantly benefited a community's economy.<sup>16</sup> Nearly all of this work, both criticism and praise, is ahistorical, and it can benefit from being put in context.

Institutional economists tend to be more interested in historical context, but they generally ascribe little significance to lawyers and focus instead on other constraints that make markets work.<sup>17</sup> In his classic work on institutions, North identifies two such limitations. The first, which he labels "formal constraints," are explicit rules of conduct such as laws. The second, which he labels "informal constraints," are extensions of these formal rules, including socially sanctioned norms and internally enforced standards of conduct.<sup>18</sup> North argues that both of these constraints are necessary. Law alone, in other words, is not enough to build

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*Regulate Legal Markets*, DÆDALUS, Summer 2014, at 83; see also Benjamin H. Barton, *Economists on Deregulation of the American Legal Profession: Praise and Critique*, 2012 MICH. ST. L. REV. 493, 494 (2012). As Barton points out, Adam Smith originated many of these critiques in the *Wealth of Nations*. See *id.* at 495–96 (citing ADAM SMITH, *THE WEALTH OF NATIONS* 136–40 (Modern Library Paperback ed. 2000) (1776)).

15. Nelson P. Miller, *Lawyers as Economic Drivers—The Business Case for Legal Services*, 37 J. LEGAL PROF. 67, 71 (2012) (noting that unemployment for lawyers was lower than the national average and that the number of people employed in legal work had grown consistently over the last decade).

16. See Linda Lund, *The Economic Impact and Social Return on Investment of Alabama's Legal Aid Providers*, 76 ALA. LAW. 164, 165 (2015) (finding that the "total Net Social Return on Investment for Alabama's legal aid programs during the 2014 fiscal year was 884 percent"); see also Al Jones, *Lawyers a Boon to Local Economic Development*, MONT. LAW., Feb. 1995, at 7, 8 ("Local small business start-up and expansion are the real drivers of economic growth for communities and all need a variety of lawyers with specialized skills."). Still others question whether contributing to economic growth is even a valid measure of the profession's impact. See David W. Barnes, *The Litigation Crisis: Competitiveness and Other Measures of Quality of Life*, 71 DENV. U.L. REV. 71, 73 (1993) (calling for thinking about goals of legal system in broader terms).

17. See NORTH, *supra* note 4, at 33.

18. *Id.* at 36–53.

a functional market. The more complex an economy, the more necessary both types of constraints.

North wrote little about lawyers; this Article builds on his theoretical work to highlight the important role that the legal profession plays in not only enforcing private agreements—formal constraints—in courts but also in providing the informal constraints that made the market work outside of the courtroom.

Other contributors to the literature on lawyers and economic development have helped to show—at least on a theoretical level—the way that lawyers contribute to institutional capacity in their out-of-court work. David Driesen and Shubha Gosh, for example, argue that the legal transaction costs that lawyers add that many scholars understand as “evils that should be minimized or even eliminated” are actually vital to exchange in a free market.<sup>19</sup> Because markets are imperfect, information costs money. Legal transaction costs, they argue, purchase information. Viewed through this lens, transaction costs are not necessarily burdensome fees that hinder exchanges that would have happened anyway; they are instead essential to the transaction. Some transactions that might happen if transaction costs were systematically reduced might actually make the parties worse off. Removing regulation or discouraging the consultation of lawyers in transactions, for example, might lead parties to buy or sell something whose benefit or cost they underestimate.

Pierre Schlag similarly argues that the focus on transaction costs hides the essential role that law and legal regimes play in economic exchange.<sup>20</sup> When framing the debate in terms of transaction costs, scholars idealize a

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19. David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 ARIZ. L. REV. 61, 62 (2005).

20. Pierre Schlag, *Coase Minus the Coase Theorem—Some Problems with Chicago Transaction Cost Analysis*, 99 IOWA L. REV. 175, 203 (2013).

model market, one without a legal regime. But as Schlag points out, a legal regime affects the way exchange happens. Trying to understand what parties would do without first “specif[ying] . . . their legal entitlements” results in an artificially constrained perspective.<sup>21</sup> A focus on transaction costs, by idealizing a market that exists outside of a legal regime, encourages actions in the name of “efficiency” that would actually be better classed as “subsidization” of a certain set of principles about how a market should function. In essence, discussions in terms of transaction costs naturalize markets. As an alternative, Schlag calls for a recognition that law plays a “constitutive role in the performance of markets” and a scholarly legal analysis of markets that builds on this insight.<sup>22</sup>

This Article shows that lawyers, not just laws themselves, are constitutive of the market. It also shows that lawyers have played a much broader economic role than even Driesen, Ghosh, and Schlag have identified. The profession’s historical roots thus demand that scholars rethink conceptions of the role that government and law plays in the market. Lawyers have not only assisted their clients but also have provided basic controls central to market function.

### B. *Close Study of Legal Work*

This Article’s close historical study of lawyers’ day-to-day work also contributes to a related literature that attempts to understand the role of lawyers in commerce by analyzing in detail the kind of work private attorneys undertake.<sup>23</sup> Ronald Gilson’s classic study of business

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21. *Id.* at 200. As Schlag points out, Coase recognized this as well. *See id.* at 218 (“[I]f we bracket the Coase Theorem, we find in Coase’s article some profound critiques of the neoclassical model. The challenge was to revise the neoclassical model altogether, so as to better recognize the ways in which law and legal regimes help establish the *identity* and *costs* of production factors.”).

22. *Id.* at 203.

23. *See, e.g.,* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984) [hereinafter *Value Creation*];

lawyers refers to them as “transaction cost engineers.”<sup>24</sup> He argues that rather than adding transaction costs, lawyers help to create optimal “transactional structure[s],” which ensure that their clients are really buying or selling what they think they are, resulting in “more accurate . . . pricing.”<sup>25</sup> Gilson suggests that lawyers (as opposed to other professionals) assume this role because they are especially attuned to the regulatory environment in which transactions occur.<sup>26</sup> Lawyers end up working on non-regulatory matters because of “economies of scope.”<sup>27</sup> More recent studies have bolstered this account. Mark Suchman’s research on Silicon Valley lawyers, for example, finds that “general business counseling, not intellectual property practice, drove the growth of Silicon Valley’s law firms.”<sup>28</sup> And, with Mia Cahill, he has concluded that the lawyers at these firms continue to play a vital role not only as dealmakers and counselors but also as intermediaries

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Ronald J. Gilson, *How Many Lawyers Does It Take to Change an Economy?*, 17 LAW & SOC. INQUIRY 635, 638–39 (1992) (explaining necessity of understanding what lawyers do in order to assess their economic impact); Richard H. Sander, *Elevating the Debate on Lawyers and Economic Growth*, 17 LAW & SOC. INQUIRY 659, 664 (1992) (calling for close study of lawyers); see also DAVID HOWARTH, LAW AS ENGINEERING: THINKING ABOUT WHAT LAWYERS DO (2013); George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279, 281 (2009) (revisiting Gilson’s piece and arguing that business lawyers perform a broader set of tasks than Gilson noted); Elizabeth Pollman, *Value Creation by Business Lawyers: Where Are We and Where Are We Going?*, 15 U.C. DAVIS BUS. L.J. 13, 15–19 (2014) (providing summary of recent literature on the work of business lawyers).

24. *Value Creation*, *supra* note 23, at 243.

25. *Id.* at 255.

26. *Id.* at 298. Not all scholars view the negotiation as a net positive for economic transaction. See, e.g., Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 280–83 (2010) (arguing that “regulatory arbitrage” leads to some firms bearing a disproportionate share of regulatory costs).

27. *Value Creation*, *supra* note 23, at 298.

28. Mark C. Suchman, *Dealmakers and Counselors: Law Firms as Intermediaries in the Development of Silicon Valley*, in UNDERSTANDING SILICON VALLEY: THE ANATOMY OF AN ENTREPRENEURIAL REGION 71, 78 (Martin Kenney ed., 2000); see generally PAUL GOMPERS & JOSH LERNER, THE VENTURE CAPITAL CYCLE (2d ed. 2004).

between venture capitalists and start-ups.<sup>29</sup> Silicon Valley lawyers, they argue, spend most of their time preventing rather than fomenting disputes, relying on customs rather than law.<sup>30</sup> Similarly, Karl Okamoto finds that one of the reasons that modern businesses rely on lawyers is that they can serve as “reputational intermediaries,” building relationships between businesses making deals.<sup>31</sup> In her study of Japanese lawyers involved in financial transactions, the legal anthropologist Annelise Riles finds that they too serve roles that have been overlooked by prior scholars.<sup>32</sup> Their “knowledge practices,” routines, and technical expertise, serve to standardize, familiarize, and govern financial transactions.<sup>33</sup>

Although this work is important, it is rarely historical, and it therefore cannot highlight the formative role the American legal profession played in making capitalism work. Thus, it cannot refute the “golden age” hypothesis that argues that the significant role of lawyers is a relatively recent (and harmful addition) to the American economy. Additionally, because these scholars work on contemporary lawyers, they have limited access to the work and communication of the lawyers they study. Historical sources provide a fuller picture of legal practice. Finally, aside from Riles, who studies lawyers outside of the United States, none of these scholars recognize the important role that the legal

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29. See generally Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 L. & SOC. INQUIRY 679 (1996).

30. See *id.* at 682 (“[N]either an elevation of rights consciousness nor a disruption of commercial conviviality are inevitable consequences of an assertive legal profession.”).

31. See Karl S. Okamoto, *Reputation and the Value of Lawyers*, 74 OR. L. REV. 15, 18 (1995). But see Michael Bradley et al., *Lawyers: Gatekeepers of the Sovereign Debt Market?*, 38 INT’L REV. L. & ECON. 150, 151–52 (2014) (arguing that hiring outside law firms is actually viewed negatively by the market).

32. See ANNELISE RILES, *COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS* (2011).

33. *Id.* at 20, 57–68.

profession plays in governance.

### C. *Law and Development*

Scholars of economic development are much more interested in governance, but their work would benefit from more attention to the day-to-day work of lawyers. Most of this vein of scholarship attempts to isolate the factors that encourage relatively quick economic growth in some countries like the United States but discourage growth in others.<sup>34</sup> Stanley Engerman and Kenneth Sokoloff, for example, argue that differences in climate and agriculture influenced the development of growth-encouraging institutions. Whereas European colonies near the equator tended to grow crops such as sugar cane that relied on slave labor and generated inequality, European colonies in North America tended to develop smaller farms that encouraged mixed agriculture and relatively equal societies.<sup>35</sup> This relative equality, in turn, fostered democratic institutions and “broad participation in the commercial economy.”<sup>36</sup> Nathan Nunn’s work on economic growth in Africa, also argues that slavery, and especially the slave trade, was one of the primary reasons economic development in parts of Africa has proceeded slowly.<sup>37</sup> Daron Acemoglu, Simon

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34. For a broader overview of this literature see Cross, *supra* note 5, at 481 (“Studies have found relative national economic growth rates explained by too large a government share, too small a government share, fertility rates, education, culture, various components of government spending, savings rates, inflation, composition of exports, civil instability, luck, and other factors. A review of the literature indicated that ‘over 50 variables have been found to be significantly correlated with growth in at least one regression.’ After subjecting these studies to sensitivity analysis, the authors of the review found that most associations were ‘fragile,’ and probably spurious.”) (internal citations omitted); see also Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895, 897 (2008) (noting uptick in interest in studying role of law in development).

35. Stanley Engerman & Kenneth Sokoloff, *Factor Endowments, Inequality, and Paths of Development Among New World Economies*, 3–4 (Nat’l Bureau of Econ. Research, Working Paper No. 9259, 2002).

36. *Id.* at 4, 35.

37. See Nathan Nunn, *The Long Term Effects of Africa’s Slave Trades*, 123

Johnson, and James Robinson, in a similar vein, argue that it was the presence of colonial settlers and the institutions they brought with them that allowed North American colonies to develop economic institutions that encouraged growth.<sup>38</sup>

These broad accounts of the long-term importance of institutions are important, but none of them specify in detail how institutions, and especially legal institutions, actually contribute to growth. This Article's findings build on these macro-level works to provide micro-level detail on the role of lawyers in building the institutions necessary for economic growth. In that sense, this Article follows in the tradition of political scientists who have identified particular social institutions that may help promote good governance. For example, Lily Tsai's work on rural China finds that local accountability can improve governance and "maintain social stability," sometimes promoting public goods that would spur economic development.<sup>39</sup>

This Article builds on these accounts with a historical, qualitative analysis of the important role of lawyers in American economic development. That account adds to this literature by emphasizing the central role of the legal profession in building legal institutions and making markets function; in broader accounts, the legal profession is typically only as a footnote in the institutional analysis.<sup>40</sup> Moreover,

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Q.J. ECON. 139, 141 (2008) ("My results show that not only was the use of slaves detrimental for a society, but the production of slaves, which occurred through domestic warfare, raiding, and kidnapping, also had negative impacts on subsequent development.").

38. See Daron Acemoglu, Simon Johnson & James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. R. 1369, 1395-96 (2001).

39. Lily Tsai, *Solidary Groups, Informal Accountability, and Local Goods Provision in Rural China*, 101 AM. POL. SCI. R. 355, 355, 370 (2007) (noting, however, that "economic development is not necessarily correlated with political or institutional development").

40. The studies do not even consider numbers of lawyers, much less the work that lawyers do. See Cross, *supra* note 5, at 480 n.12. If lawyers are talked about in this literature it is usually because of the role they play using law to promote

this Article begins a larger project of adding to this literature what Frank Cross has identified as the “essential” input of scholars trained in the law, who are better equipped to understand the real-world operation of law and legal institutions.<sup>41</sup>

#### D. *History*

This Article also provides a new perspective for historical scholarship, which has focused on the doctrine and discourse of lawyers rather than legal practice. Historical studies of the legal profession in the nineteenth century have been relatively rare. When discussing the profession, historians tend to emphasize the roles its members play as politicians, judges, and advocates.<sup>42</sup> Robert Ferguson, for example, describes a culture of elite lawyers in the early nineteenth century who shared a vision of their profession as “republican intellectual[s]” capable of acting as “guardians”

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change, rather than in directly contributing to growth. *See* Davis & Trebilcock, *supra* note 34, at 901 (discussing traditional understanding of role of lawyers in development literature); *see also id.* at 916–17 (discussing obstacles lawyers can present to legal change).

41. *See* Cross, *supra*, note 10 at 1737 (“There remains a relative paucity of academic legal research about the big picture. What particular mix of laws and legal institutions encourage the ultimate overall economic welfare of society?”). Cross calls for the kind of work this article undertakes. *See id.* at 1739 (“Legal academics should build upon and enhance the existing economic research and help discern the laws and legal institutions that facilitate the economic well-being of nations.”).

42. *See generally, e.g.*, PAUL D. CARRINGTON, AMERICAN LAWYERS: PUBLIC SERVANTS AND THE DEVELOPMENT OF A NATION (2012); RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC (1971); 1 JULIUS GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE UNITED STATES SUPREME COURT (Paul A. Freund ed., 1971); 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL 1801–1815, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE UNITED STATES SUPREME COURT (Paul A. Freund ed., 1981); CRAIG EVAN KLAFTER, REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT (1993); ELLEN HOLMES PEARSON, REMAKING CUSTOM: LAW AND IDENTITY IN THE EARLY AMERICAN REPUBLIC (2011); G.S. ROWE, EMBATTLED BENCH: THE PENNSYLVANIA SUPREME COURT AND THE FORGING OF A DEMOCRATIC SOCIETY (1994); G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES (3d ed. 2007).

of law and the country.<sup>43</sup> Other historians have described the political activities of lawyers, noting the importance of law in the build-up to the American Revolution and the prevalence of lawyers in government in the early Republic.<sup>44</sup> This focus is reflected in the way that some think about the profession today. They idealize “good lawyers,” like the framers of the Constitution, while heaping scorn on “bad lawyers,” whose private work adds transaction costs and seemingly throttles market interactions.

Because of the focus on lawyers as judges and politicians, most historical literature on U.S. economic development tracks the evolution of legal doctrine. Morton Horwitz’s work is a classic exemplar of this approach. In *The Transformation of American Law: 1780–1860*, he argues that nineteenth-century American judges used the discretion provided to them by the common law to “favor the active and powerful elements in American society.”<sup>45</sup> By using law as an instrument of economic development, Horwitz contends that the courts helped to further inequalities and establish an

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43. ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 25, 84 (1984) (quoting Letter from Daniel Webster to Chancellor Kent (June 5, 1832), in MEMOIRS AND LETTERS OF JAMES KENT 235–36 (William Kent ed., 1838)).

44. See, e.g., JACK GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION 154–55, 157 (2011); DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 205–06 (2005); John M. Murrin, *The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts*, in COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT (Stanley Katz & John M. Murrin eds., 3d ed. 1983). Twenty-five of the fifty-six signers of the Declaration of Independence were legally trained, as were thirty-one of the fifty-five members of the Constitutional Convention. See FERGUSON, *supra* note 43, at 12 (arguing that lawyers held a “virtual monopoly as republican spokesm[e]n”). Contemporary observers agreed with this assessment. See Milton M. Klein, *New York Lawyers and the Coming of the American Revolution*, in COURTS AND THE LAW IN EARLY NEW YORK 88 (Leo Hershkowitz & Milton M. Klein eds., 1978) (“In no country, perhaps, in the world is the law so general a study. The profession itself is numerous and powerful, and in most provinces it takes the lead.”) (quoting Edmund Burke, *Speech on Conciliation with the Colonies*, (Mar. 22, 1775)).

45. MORTON J. HORWITZ, TRANSFORMATION OF AMERICAN LAW: 1780–1860, at 108 (1977).

economic system that benefited businessmen and harmed working people.<sup>46</sup> This work has continued to strongly influence histories of American economic development.<sup>47</sup> Thus, Charles Sellers writes in his classic work on the development of a national market that “[b]y taking control of the state courts and asserting through them their right to shape the law to entrepreneurial ends, lawyers/judges during the first half of the nineteenth century fashioned a legal revolution.”<sup>48</sup>

Recent scholarship challenges Horwitz’s perspective, arguing that lawyers played an important role in regulating, rather than accelerating, the market’s growth. Most notably, William Novak argues that common law legal precepts and local regulation reigned in the worst excesses of capitalism.<sup>49</sup>

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46. See *id.*; see also JAMES WILLARD HURST, *LAW AND THE CONDITION OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* (1956) (arguing that law was mobilized to release individual creative energy and to mobilize resources to create economic opportunity); BRUCE H. MANN, *NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT* (1987) (arguing for a similar change in eighteenth-century Connecticut); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830* (1975) (tracking development of American legal system from community-oriented colonial legal system to one better equipped to handle transactions in a developing economy).

47. See JOHN LAURITZ LARSON, *THE MARKET REVOLUTION IN AMERICA: LIBERTY, AMBITION, AND THE ECLIPSE OF THE COMMON GOOD* (2009) 23–25 (arguing that American law developed “to favor enterprise and innovation at the expense of vested rights or ancient customs”). Even very recent work on the history of capitalism focuses on lawyers as law makers. See, e.g., JONATHAN LEVY, *FREAKS OF FORTUNE: THE EMERGING WORLD OF CAPITALISM AND RISK IN AMERICA* 18 (2012) (noting that judges played an important role in setting legal ground rules for insurance, futures trading, and other economic developments).

48. CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815–1846*, at 48 (1991) (“By taking control of the state courts and asserting through them their right to shape the law to entrepreneurial ends, lawyers/judges during the first half of the nineteenth century fashioned a legal revolution.”).

49. See, e.g., WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 42 (1996) (arguing that the maxims *salus populi* and *sic utere tuo* “were the common law blueprints for governance in a well-regulated society.”). See also DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 559 (2007) (citing Novak and discussing importance of common law principles in the nineteenth century). This focus on law as discourse avoids some of the problems caused by

Brian Balogh, too, has drawn attention to the influence of lawyers in organizing courts and in “develop[ing] a discourse that was shared across the states, and influenced the very way that many Americans defined political issues.”<sup>50</sup> Despite their differences with Horwitz, these scholars also focus on lawyers’ roles as litigators, legislators, and judges, not as practitioners.

Historical scholarship on the role of doctrine and discourse has opened up important avenues of research, but by focusing on what lawyers said, wrote, and published rather than what they did in their day-to-day practice, this scholarship provides a limited portrait of the profession’s role in American life.<sup>51</sup> For every major, doctrinally shifting appellate case, judges made hundreds of simple trial court decisions. And for every one of those, lawyers performed dozens of actions on behalf of their clients out of court. Some elite lawyers championed a broad ideal of the profession as guardians of the state, but the papers, account books, and writings of lawyers reveal that lawyers had already adopted a narrower, private-law-focused vision of the profession by the late eighteenth century.<sup>52</sup> Most lawyers, even those

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the older, instrumental approach.

50. BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* 13 (2009).

51. A few scholars have written about the practice of individual lawyers, but this work does not put their practice in conversation with the work on economic development. See, e.g., GORDON MORRIS BAKKEN, *PRACTICING LAW IN FRONTIER CALIFORNIA* 51–113 (1991); MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776–1876*, at 148–50 (1976); Maxwell Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830–1860)*, 12 *AM. J. LEGAL HIST.* 306–23 (1968).

52. Scholars of frontier lawyers have noticed the technical proficiency of frontier lawyers but like the historians who have written about law in settled regions, they tend to focus on courts rather than the day-to-day work of lawyers, they therefore miss the state building that took place in private practice. Lawrence Friedman’s brief treatment in *A History of American Law* has had outsized influence in shaping the literature. Friedman takes a dim view of the frontier bar and judiciary. “Polish and legal skill,” he writes “were in short supply.” LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 108 (3d ed. 2005) (1973). In this view, Friedman seconds Anton Chroust, who writes of a “discouragingly primitive” bar dominated by uneducated, illiterate judges. 2

actively engaged in politics and constitutional theorizing, earned a living through the practice of private law, especially on behalf of commercial clients. This technical vision was fully embraced by even elite members of the bar by the 1830s. Although lawyers continued to serve as politicians and judges, political engagement was no longer seen as an essential component of professional identity. Instead, mastery of the legal tools of commerce took center stage.

To provide a broad view of the role of the legal profession in the nineteenth century, this Article analyzes the work of lawyers in two different places at two different times: first, on the Ohio frontier in the first two decades of the nineteenth century, where lawyers worked as land agents for eastern speculators; second, in mid-nineteenth-century New York City, where lawyers worked for the most active businessmen in the United States. On the Ohio frontier, the lawyers who were some of the first easterners to settle in the West provided essential services that allowed for the division and sale of western land. Their approach to these land transactions and other problems faced by their clients led them to expand eastern legal and economic norms west. Their practice shows the importance of their work to the establishment of a capitalist market on a relatively unpopulated frontier. In New York City, a study of the practice of lawyers reveals that lawyers were not only critical

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ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 92–93 (1965). Most of the literature on frontier lawyers is focused on refuting this impression. See, e.g., Elizabeth Gaspar Brown, *The Bar on a Frontier: Wayne County, 1796–1836*, 14 AM. J. LEGAL HIST. 136, 156 (1970) (finding that Michigan’s early judges “performed their duties in a meet and proper manner”); Elizabeth Gaspar Brown, *Frontier Justice: Wayne County 1796–1836*, 16 AM. J. LEGAL HIST. 126, 135, 137 (1972) (concluding that lawyers were “craft-conscious practitioners” who demonstrated “genuine reliance on legal authorities”); Kermit L. Hall, *Hacks and Derelicts Revisited: American Testimonial Judiciary, 1789–1959*, 12 W. HIST. Q. 273, 280 (1981) (arguing that territorial judiciary was composed of an “educated elite”); see generally Maxwell Bloomfield, *Western Lawyers and Judges: Image and Reality*, 24 J.W. 15 (1985) (discussing bar in California); Anita S. Goodstein, *Leadership on the Nashville Frontier, 1780–1800*, 35 TENN. HIST. Q. 175 (1976) (discussing bar in Nashville); C. ROBERT HAYWOOD, *COWTOWN LAWYERS: DODGE CITY AND ITS ATTORNEYS, 1876–1886*, at 46–68 (1988) (discussing bar in Kansas).

to the expansion of commerce but also to its daily functioning. Together the two case studies illustrate the pervasiveness of the commercial work of lawyers along with the diverse roles they established for the profession in American economic life.

## II. OHIO

The absentee land speculators who owned most of northeastern Ohio needed expert assistance inspecting and managing their land, drafting transactions, ensuring that buyers paid their mortgages, collecting when they did not, accounting for transactions, verifying the accuracy of deeds, examining titles, paying taxes, suing and defending suits, and more.<sup>53</sup> Lawyers did all of these things. Not only as attorneys-at-law but also as de facto accountants, managers, salesmen, and bankers, they facilitated the market for land in Ohio, expanding the boundaries of American capitalism west. In so doing, they staked out essential commercial roles. Understanding the work of these lawyers is important not only because it helps to explain the growth and the development of Ohio—which transformed from an isolated territory in 1800 to a fast-growing state of 937,903 in 1830—but also because it reveals that lawyers were intertwined with commerce even at the beginning of the Republic.<sup>54</sup>

Lawyers on the Western Reserve encouraged

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53. Because living on the frontier was difficult and often unpleasant, land speculators expressed little interest in settling there. Instead, they planned to divide that land and then sell it at great profit to migrants. See R. DOUGLAS HURT, *THE OHIO FRONTIER: CRUCIBLE OF THE OLD NORTHWEST, 1720–1830*, at 168–78 (1996).

54. See *id.* (discussing importance of division of land by speculators); Christopher Clark, *The Ohio Country in the Political Economy of Nation Building*, in *THE CENTER OF A GREAT EMPIRE: THE OHIO COUNTRY IN THE EARLY AMERICAN REPUBLIC* 146, 150 (Andrew R.L. Cayton & Stuart D. Hobbs eds., 2005) (arguing that division into small parcels of land led to growth); Walter Licht, *Envelopment*, 103 (May 7, 2014) (unpublished manuscript, on file with author) (“[T]he transfer of federal lands to private interests represents perhaps the greatest input of the federal government to the growth and development of the U.S. economy in the nineteenth century.”).

transaction. By organizing, officiating, and overseeing economic transactions, they provided the organization that capitalism needed to function. During the first half of the nineteenth century, Ohio was critical to the development of American industry, agriculture, and commerce in the United States, and it became the “center of a great empire.”<sup>55</sup> Lawyers were at the center of that center. The study of law on the frontier thus shows that the seemingly unencumbered free market did not begin to function until it was encumbered by lawyers; law and the legal profession, in other words, were constitutive elements of the economy. In terms of the debate about the role of lawyers in American economic life, a study of Ohio’s first lawyers illustrates that, as Gilson and others have argued, lawyers make transactions possible. It shows, however, they were essential to commercial transaction even before the rise of the twentieth-century administrative state. To understand why there are so many lawyers in the United States now we must first understand why there were so many on the frontier.

#### A. *Sources*

Part of the reason that the private work of lawyers has drawn little attention from scholars is that this work is difficult to see—unlike legislation or appellate opinions, most of it was unpublished. Although frontier lawyers kept records of their practice, most of these have not survived. Reconstructing the practices of frontier lawyers from letters, account books, and vignettes by later members of the bar is difficult.

Elisha Whittlesey’s papers provide a rare window into the day-to-day practice of law on the Ohio frontier. Whittlesey moved to the Western Reserve, a roughly hundred-mile stretch of land located in northeastern Ohio, in 1806. Whittlesey’s account books, correspondence, and other

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55. ANDREW R. L. CAYTON, *Introduction*, in *THE CENTER OF A GREAT EMPIRE*, *supra* note 54, at 2.

papers offer a picture of the extensive transactional work that lawyers undertook once they arrived on the Reserve. Account book entries for clients offer statements of Whittlesey's work and the amount his clients paid him. They show him charging \$0.25 for "drawing an article,"<sup>56</sup> receiving a \$10.50 "[c]ommission for selling \$350 worth of land to C. Fitch,"<sup>57</sup> and earning \$0.50 "commission on collecting \$10."<sup>58</sup> Letters with clients illustrate Whittlesey partitioning land into segments of unverifiable size,<sup>59</sup> repossessing land for unspecified prior debts,<sup>60</sup> and transferring deeds to be given to anonymous purchasers.<sup>61</sup>

Whittlesey's legal career shared much in common with the careers of other elite lawyers on the Reserve.<sup>62</sup> Like Whittlesey, most lawyers moved to Ohio to improve their financial standing and because they believed that economic development of the frontier would soon take off.<sup>63</sup> And like

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56. See Elisha Whittlesey, Ledger (1807–1817) (on file with the W. Reserve Historical Soc'y) (recording charge for Hermon of Canfield for \$0.25).

57. Elisha Whittlesey, Ledger (1811–1814) (on file with the W. Reserve Historical Soc'y).

58. *Id.*

59. See Letter from E.D. Whittlesey to Elisha Whittlesey (June 1, 1816) (on file with the W. Reserve Historical Soc'y) (discussing difficulties with dividing land, difficulties with transportation, requesting Whittlesey "to proceed immediately to partition," and granting power of attorney "to convey my part of the location").

60. See Letter from Tucker & Carter to Elisha Whittlesey (June 5, 1818) (on file with the W. Reserve Historical Soc'y) (requesting redemption of \$700 debt with land).

61. See Letter from Elisha Whittlesey to Elisha Sterling (Oct. 2, 1807) (on file with the W. Reserve Historical Soc'y) ("[I] inclose to you my deed . . . thereby approving of the contract you made with him.").

62. See generally Marc Harris, *Social Entrepreneurs: Economic Enterprisers and Social Reformers on Ohio's Western Reserve, 1795–1845* (1983) (unpublished Ph.D. dissertation, John Hopkins University). Most frontier lawyers, however, did have a more comprehensive education than Whittlesey.

63. Whittlesey wrote that he moved to the frontier because he believed "that [a] young man, with good habits . . . and industry, with good practical common sense . . . might make a living in a new country and be respected." Elisha Whittlesey, quoted in Kenneth Edwin Davison, *Forgotten Ohioan: Elisha Whittlesey, 1783–1863* at 14 (1983) (unpublished Ph.D. dissertation, Western

Whittlesey, most lawyers spent most of their time working on matters related to land sales.<sup>64</sup> A study of Cleveland lawyers in the 1810s found that when lawyers came to court, they spent most of their time partitioning land.<sup>65</sup> Court records reveal that legal work in Trumbull County, the home of Warren and Youngstown, two of the most important cities on the Reserve, was also dominated by land. In one 1815 session of the Trumbull County Court of Common Pleas, the court heard petitions for a Sheriff's conveyance of land, petitions for partitions, and trespass actions.<sup>66</sup> The only non-land cases on the docket were debt cases. Because notes and

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Reserve University). Lawyers on the East Coast faced intense competition and they instituted fee schedules that forced young lawyers to charge the same amount as their more experienced colleagues. See GERARD W. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS, 1760–1840* at 94, 109 (1979) (discussing competition and fee schedules in Massachusetts); Gerard W. Gawalt, *Sources of Anti-Lawyer Sentiment in Massachusetts, 1740–1840*, 14 AM. J. LEGAL HIST. 283, 304–05 (1970) (discussing controls lawyers exerted on entry into the Massachusetts bar). Similar price controls existed in Connecticut. See Roger Minott Sherman, *Account Book (1796–1803)* (on file with the Fairfield Historical Soc'y).

64. Examples of land work abound in lawyers' papers. The lawyer George Tod's earliest work in Ohio, for example, involved drafting deeds for land sales by John Young, the founder of Youngstown, Ohio. See *Deed of John Young* (May 13, 1801) (on file with the W. Reserve Historical Soc'y) (selling \$1867.75 of land to James Gibson). Tod also drafted agreements for clearing lumber, securing debts with land, and selling land. See *Copy of Agreement to Chop Lumber* (June 12, 1802) (on file with the W. Reserve Historical Soc'y); *Agreement to Settle Debt of \$15.23* (June 8, 1810) (on file with the W. Reserve Historical Soc'y); *Agreement to Sell \$150 of land* (Dec. 9, 1803), (on file with the W. Reserve Historical Soc'y). The lawyers Turhand Kirtland and John S. Edwards too established extensive out-of-court land practices. See 1 HARRIET TAYLOR UPTON, *A TWENTIETH CENTURY HISTORY OF TRUMBULL COUNTY OHIO: A NARRATIVE ACCOUNT OF ITS HISTORICAL PROGRESS, ITS PEOPLE, AND ITS PRINCIPAL INTERESTS* 149 (1909). They continued to conduct plenty of out-of-court work even after the courts opened. See also Harris, *supra* note 62, at 95 ("A frontier lawyer's business involved mostly land cases, which mean that his time would largely be taken up with the land agent who often sent him business.").

65. JAMES HARRISON KENNEDY & WILSON M. DAY, *THE BENCH AND BAR OF CLEVELAND* 24 (1889) ("The record of four years, from May, 1810 to May, 1814, embraces one hundred and nine civil suits, the greater number being petitions for partition of lands, and generally of non-resident heirs, mostly living in Connecticut.").

66. See George Tod, *Notes on Court Cases* (July 1815) (on file with the W. Reserve Historical Soc'y).

land sales were so intertwined, these cases likely involved land, either as the object of the loan or as collateral.<sup>67</sup> As Whittlesey's practice records indicate, lawsuits involving land accounted for only a small portion of extensive and wide-ranging Reserve practices related to land. Other Reserve lawyers, whose private records have been lost, therefore likely performed the same kind of diverse, land-related work found in Whittlesey's account books.

### B. *Setting*

The extremely isolated Western Reserve was not a place where one would expect to find lawyers. The Reserve grew from Connecticut's claim to land in the Ohio River Valley, which had been granted by King Charles I.<sup>68</sup> Connecticut ceded most of its claim to the United States in 1786 but retained the rights to the northeastern corner of what would eventually become the state of Ohio. More than three million acres of this 120-mile-wide parcel became the Western Reserve, which the state sold for \$1.2 million in 1795 to a group of land speculators.<sup>69</sup> After the land was surveyed, the company divided the land into parcels scattered throughout the Reserve.<sup>70</sup>

Even in the 1820s, the Reserve was separated from eastern society by a desolate wilderness.<sup>71</sup> Conditions in the Western Reserve were not only inconvenient but also dangerous. Reports circulated of lawyers falling into rivers

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67. *Id.*

68. See ANDREW R. L. CAYTON, OHIO: THE HISTORY OF A PEOPLE 29–30 (2002).

69. *Id.*

70. See *id.*

71. See ZERAH HAWLEY, A JOURNAL OF A TOUR THROUGH CONNECTICUT, MASSACHUSETTS, NEW-YORK, THE NORTH PART OF PENNSYLVANIA AND OHIO, INCLUDING A YEAR'S RESIDENCE IN THAT PART OF THE STATE OF OHIO, STYLED NEW CONNECTICUT, OR WESTERN RESERVE 9 (1822).

and dying,<sup>72</sup> and even being chased by packs of wolves.<sup>73</sup> The Reserve's slow, irregular, and insecure mail service further isolated it from the East.<sup>74</sup> Warren, one of the largest and most important cities in the early Reserve, had no regular post until 1802,<sup>75</sup> and in Cleveland new routes were still being established in the late 1810s.<sup>76</sup> Rather than trusting the postal service, lawyers on the Reserve sometimes sent letters with visitors to "save the risque of transportation."<sup>77</sup> Even that did not always work.<sup>78</sup> In the second decade of the

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72. The lawyer John S. Edwards fell in a river in 1813 and died before he could be brought to a doctor. *See* LOUISA MARIA EDWARDS, A PIONEER HOMEMAKER, 1787–1866: A SKETCH OF THE LIFE OF LOUISA MARIA MONTGOMERY, 36–37 (1903).

73. *See* UPTON, *supra* note 64, at 154 ("Judge Huntington once fought a pack of wolves within what is now the residence portion of Cleveland with an umbrella, and owed his deliverance to this implement and to the fleetness of his horse."); *see also* JOSEPH BADGER, A MEMOIR OF REV. JOSEPH BADGER; CONTAINING AN AUTOBIOGRAPHY, AND SELECTIONS FROM HIS PRIVATE JOURNAL AND CORRESPONDENCE 25 (1851) (describing being followed by a "large wolf").

74. Lawyers and clients frequently complained of, and attempted to circumvent, the mail. *See, e.g.*, Elisha Whittlesey, Letter (May 18, 1809) (on file with the W. Reserve Historical Soc'y) (noting that mail from "Pittsburgh to Warren has not been very regular"); letter from E.D. Whittlesey to Elisha Whittlesey (June 1, 1816) (on file with the W. Reserve Historical Soc'y) ("Your letter from some strange cause was very tardy. It must have been owing to neglect of Postmasters, whether willful or not, I am not able to say. In case the late letter I sent you should be also backward, I will observe that we wish you to proceed immediately to partition.").

75. *See* LEONARD CASE, EARLY SETTLEMENT OF TRUMBULL COUNTY, OHIO 8 (1876). In 1803, Warren's mail route was extended to Pittsburgh, but the 150 mile journey took ten days for carriers on foot. *See* WILLIAM GANSON ROSE, CLEVELAND: THE MAKING OF A CITY 57 (1950) (describing Cleveland to Erie route, established in 1808, which took thirty miles a day on foot).

76. *See* EDMUND H. CHAPMAN, CLEVELAND: VILLAGE TO METROPOLIS 17 (1964) (noting mail line established between Cleveland and Painsville in 1818).

77. Letter from Elisha Whittlesey to Elisha Sterling (Sept. 3 1810) (on file with the W. Reserve Historical Soc'y) *See also* Letter from Elisha Sterling to Elisha Whittlesey (Aug. 31, 1819) (on file with the W. Reserve Historical Soc'y) (instructing lawyer to send money with a neighbor who was visiting Ohio rather than entrusting it to the mail); Letter from Elisha Sterling to Elisha Whittlesey (May 29, 1820) (on file with the W. Reserve Historical Soc'y) (requesting Whittlesey to give letter to another person to have it brought to him).

78. Letter from E.D. Whittlesey to Elisha Whittlesey (June 1, 1816) (on file with the W. Reserve Historical Soc'y) (discussing problem with initial attempt at transferring a power of attorney form).

nineteenth century, they cut bills in half and sent them in separate envelopes to prevent theft.<sup>79</sup>

Despite its isolation, ambitious lawyers were among the earliest residents on the Western Reserve.<sup>80</sup> Dozens of practitioners, who inhabited the well-framed houses and owned the better clothes that distinguished them from their neighbors on the frontier, would transform the frontier, not in public politics, but through private legal work.<sup>81</sup>

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79. See, e.g., Letter from E.D. Whittlesey to Elisha Whittlesey (Mar. 24, 1817) (on file with the W. Reserve Historical Soc’y).

80. In 1799, the lawyer John Stark Edwards settled twenty-five miles west of the Pennsylvania border, where he established Mesopotamia. He had to build his own house and returned to Connecticut for the winter. EDWARDS, *supra* note 72, at 8. George Tod, who finished his legal education in 1796, was one of Youngstown’s first residents when he moved there in 1800. See *supra* note 64; see also Jeffrey P. Brown, *Samuel Huntington: A Connecticut Aristocrat on the Ohio Frontier*, in OHIO’S WESTERN RESERVE: A REGIONAL READER 45, 47 (Harry F. Lupold & Gladys Haddad eds., 1988) (noting that George Tod “came to the Northwest as a representative of Connecticut Land Company shareholders”). Calvin Pease, another lawyer from Connecticut, settled in Youngstown that same year. 1 HISTORY OF TRUMBULL AND MAHONING COUNTIES WITH ILLUSTRATIONS AND BIOGRAPHICAL SKETCHES 208 (1882). William Woodbridge and Elijah Bottom Merwin also arrived before Ohio statehood, moving to Marietta in 1799 and 1801, respectively. MILES MERWIN (1623–1697) ASSOCIATION, 1 THE MERWIN FAMILY IN NORTH AMERICA: A GENEALOGY OF MILES MERWIN (1623–1697) IN THE MALE LINE THROUGH THE TENTH GENERATION 92 (1978); Woodbridge, William, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=w000709> (last visited Nov. 3, 2016). At the time, the township was small, having only reported 173 “free white male inhabitants” in the 1800 census. U.S. CENSUS BUREAU, 1800 UNITED STATES FEDERAL CENSUS. Homer Hine, another Connecticut lawyer, moved to Ohio soon after he finished studying law in 1800, settling first in Canfield and then Youngstown. MILES MERWIN (1623–1697) ASSOCIATION, *supra*, 211–12.

Even if lawyers had not founded a town, they were often among its first residents. Samuel H. Huntington, who studied law with his stepfather, moved to a “nearly depopulated” Cleveland in 1801 after seven years of legal practice in Connecticut. CHARLES WHITTLESEY, EARLY HISTORY OF CLEVELAND 382, 384 (1867); see also Brown, *supra* note 45, at 46. Job Doane, whose father founded East Cleveland Township, stayed on the frontier and became a lawyer. See BADGER, *supra* note 73, at 95 (discussing Esquires Doanes in Euclid); Andrew Cozad, History of East Cleveland Town 1 (undated) (unpublished manuscript) (on file with the Kelvin Smith Library, Case Western Reserve University) (mentioning Nathaniel Doane’s settlement of East Cleveland in 1800).

81. Later Ohioans bragged incessantly about the importance of these lawyers, “[t]he products of the best families; the sons of Revolutionary statesmen and

### C. *Legal Work*

The demand for legal expertise on the frontier came from eastern buyers and sellers. Both settlers and land speculators wanted certainty that title to the land that they were buying was secure.<sup>82</sup> Absentee sellers needed help managing their land, paying taxes, ensuring the accuracy of deeds, negotiating sales, collecting notes, suing delinquent debtors, and accomplishing a host of related tasks.<sup>83</sup> No individual landholder made enough money on speculation to justify paying a full-time employee in Ohio.

Later such diverse tasks would be undertaken by accountants, bankers, real estate agents, managers, title agents, and insurers, as well as lawyers. In the early nineteenth century, however, such specialized professionals were rare. Even clerks, who in the nineteenth century performed many of the bureaucratic functions of business, were relatively uncommon until after 1830.<sup>84</sup> As late as 1870, white-collar workers made up less than three percent of the American workforce.<sup>85</sup> Accountancy became an established professional category only in the twentieth century.<sup>86</sup>

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Revolutionary soldiers; the graduates of the foremost colleges of the East; the legal seedlings of the best American culture of the day, ready to ripen in the virgin soil of New Connecticut.” KENNEDY & DAY, *supra* note 65, at 10–11.

82. This concern was represented in advertisements for Western Reserve land. One speculator proudly claimed that title to the land he sold was “*certain*, easy to be traced, and free from *all controversy*.” Uriel Holmes, *Farms and New Lands*, LITCHFIELD GAZETTE, Apr. 13, 1808.

83. See Harris, *supra* note 62, at 60 (“Legal business was potentially good from the very beginning of settlement because of the confusion of titles and the prospects of large land sales.”); Timothy J. Shannon, “*This Unpleasant Business*”: *The Transformation of Land Speculation in the Ohio Country, 1787–1820*, in THE PURSUIT OF PUBLIC POWER: POLITICAL CULTURE IN OHIO, 1787–1861, at 15, 22 (Jeffrey P. Brown & Andrew R. L. Cayton eds., 1994) (noting “scarcity of money” on frontier).

84. See Michael Zakim, *Producing Capitalism: The Clerk at Work*, in CAPITALISM TAKES COMMAND: THE SOCIAL TRANSFORMATION OF NINETEENTH-CENTURY AMERICA 223, 223 (Michael Zakim & Gary J. Kornblith eds., 2012).

85. Alba M. Edwards, *The “White-Collar Workers,”* 38 MONTHLY LAB. REV. 501, 504 tbl.3 (1934). By 1930, the percentage had climbed to 16.3%. *Id.*

86. See GOOGLE NGRAM VIEWER, <https://books.google.com/ngrams/graph?>

Lawyers filled the gap. Not only were they trained to read and understand complicated legal texts, they were also familiar—and deeply involved—with the promissory note-based financial transactions on which the economy depended in the early Republic. Along with an understanding of the basics of ledger keeping, most lawyers were capable of acting as financial agents. They were also willing to undertake many other tasks for their clients. They executed the technical tasks normally associated with lawyering, and the broader set of functions on which land sales depended. Because lawyers were the ones performing this extensive array of tasks, they shaped the form that the western market assumed. Lawyers brought eastern standards about markets and law west, and they implemented and enforced these standards, even before the Ohio government had the power to do so.

The broad variety of legal roles is illustrated in Whittlesey's work on behalf of his client Elisha Sterling, for whom he started working as soon as he moved to Canfield. Their collaboration lasted for nearly thirty years and during this time, Sterling delegated to Whittlesey the work of selling his Ohio land.<sup>87</sup> By the book, selling land was a

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content=accountant&year\_start=1800&year\_end=2000&corpus=15&smoothing=3&share=&direct\_url=t1%3B%2Caccountant%3B%2Cc0 (illustrating spike in use of term "accountant" after 1900).

87. Correspondence exists in Elisha Whittlesey's papers from 1806 to 1833. See Elisha Whittlesey Papers (1806–1833) (on file with the W. Reserve Historical Soc'y). Sterling had graduated from Yale in 1787 and then studied law, but by the time Whittlesey began working for him, much of his time was spent on business ventures, especially land speculation. See DAVID S. BOARDMAN, SKETCHES OF THE EARLY LIGHTS OF THE LITCHFIELD BAR 33–34 (1860); Charles F. Sedgwick, *Fifty Years at the Litchfield County Bar: A Lecture Delivered Before the Litchfield County Bar*, in THE BENCH AND BAR OF LITCHFIELD COUNTY, CONNECTICUT 1709–1909: BIOGRAPHICAL SKETCHES OF MEMBERS HISTORY AND CATALOGUE OF THE LITCHFIELD LAW SCHOOL HISTORICAL NOTES 68, 86 (Dwight C. Kilbourne ed., 1909).

Sterling does not appear to have been one of the initial investors in the Connecticut Land Company. Because the pace of development on the Reserve was slow and the competition for sales intense, however, land prices on the Reserve were depressed and wary speculators or heirs of initial investors were willing to sell. See Shannon, *supra* note 83, at 23–25; JON T. COLEMAN, VICIOUS: WOLVES

straightforward process. The seller drafted contracts of sale, conveying the land and often instituting a payment scheme that the two parties would sign. When the buyer completed payment, the deed would be conveyed. Even on the East Coast, however, transactions could be complicated by unclear titles, defaults, and disputes over mortgage contracts. Lawyers verified that a deed accurately described the land, collected debts, repossessed land, and appeared in court to defend their clients' interests. In the Western Reserve, speculators needed even more extensive work from their lawyers.

### 1. Management

Before land could be sold it had to be looked after. Whittlesey managed workers, hiring them to clear and survey land, and perform other unspecified tasks.<sup>88</sup> Whittlesey also paid taxes, travelling the fifteen or so miles to Warren to pay them in person, and negotiating the sometimes complex rules that would result in forfeiture if not

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AND MEN IN AMERICA 127 (2004).

As for other speculators, selling land was a relatively hands-off enterprise for Sterling. The most active role they played was in placing advertisements in eastern newspapers to attract buyers. See VISIONS OF THE WESTERN RESERVE: PUBLIC AND PRIVATE DOCUMENTS OF NORTHEASTERN OHIO, 1750–1860, at 96–97 (Robert A. Wheeler ed., 2000); see also HARLAN HATCHER, THE WESTERN RESERVE: THE STORY OF NEW CONNECTICUT IN OHIO 71 (1949). Ads trumpeted the benefits of “acres of new land . . . in the Western Reserve” for sale within “the increasing & flourishing state of Ohio.” Holmes, *supra* note 82. They promised that with “a small sum,” settlers could secure land “in a country unusually healthy, and which afford[ed] a prospect of soon containing a greater number of rich and independent Farmers, than any section of America.” *Id.* Thanks to the Reserve’s “rapid settlement,” “rich and fertile” soil, “industrious enterprising inhabitants,” mills, schools, and stores, an “industrious cultivator of the earth” would find “certain and never failing sources of wealth.” *Id.*

88. See Elisha Whittlesey, Account Book (1806–1817) (on file with the W. Reserve Historical Soc’y) (noting payment of other people on behalf of Elisha Sterling).

followed.<sup>89</sup> Whittlesey also routinely inspected land,<sup>90</sup> examined its boundaries and features,<sup>91</sup> researched titles,<sup>92</sup> vetted sellers, drafted conveyances,<sup>93</sup> transferred deeds,<sup>94</sup> and registered sales with the state.<sup>95</sup> If a plot “possesse[d] no particular advantages over the land adjoining,” it would be sold for market rates.<sup>96</sup> On the other hand, if Whittlesey found coal, limestone, or another especially valuable feature, the price would be adjusted upward.<sup>97</sup>

## 2. Transfer

In the next step, Whittlesey would ensure that Sterling held clear title, checking that the lot had not already been

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89. See letter from Elisha Whittlesey to Elisha Sterling (May 2, 1808) (on file with the W. Reserve Historical Soc’y) (noting that if land tax had not been paid the land “would have been exposed for sale” and explaining complicated tax requirements).

90. Letter from Elisha Sterling to Elisha Whittlesey (May 29, 1820) (on file with the W. Reserve Historical Soc’y) (instructing Whittlesey to examine boundaries of the “Landon Lot”).

91. *Id.* (Sterling inquiring about the lot’s “[b]oundries so that [he] can convey it”); Letter from Elisha Whittlesey to Elisha Sterling (Oct. 10, 1810) (on file with the W. Reserve Historical Soc’y) (noting that Whittlesey found coal and limestone on the land).

92. Letter from Elisha Sterling to Elisha Whittlesey (Oct. 2, 1804) (on file with the W. Reserve Historical Soc’y) (“[B]ut before the deed is delivered [I] wish you to be fully satisfied that the Lot belongs to me and has not been conveyed by myself or masterman to any other.”); Letter from Elisha Whittlesey to Elisha Sterling (May 2, 1808) (on file with the W. Reserve Historical Soc’y) (noting costs incurred examining titles in August, 1807).

93. See Letter from Elisha Sterling to Elisha Whittlesey (Oct. 2, 1804) (on file with the W. Reserve Historical Soc’y) (approving of contract drafted by Whittlesey).

94. See, e.g., *id.* (“[I] inclose to you my deed . . . thereby approving of the contract you made with him”).

95. See, e.g., Letter from Elisha Whittlesey to Elisha Sterling (May 2, 1808) (on file with the W. Reserve Historical Soc’y) (listing work of recording a deed in August, 1807).

96. Letter from Elisha Whittlesey to Elisha Sterling (May 15, 1810) (on file with the W. Reserve Historical Soc’y).

97. See Letter from Elisha Whittlesey to Elisha Sterling (Oct. 10, 1810) (on file with the W. Reserve Historical Soc’y).

sold by Sterling or a business partner, for example, and verifying that there were no liens on the property.<sup>98</sup> Whittlesey then prepared sales contracts that might include payment plans or liquidated damage clauses.<sup>99</sup> Sterling delegated all of this work to Whittlesey, who made decisions he assumed would be “agreeable” to Sterling.<sup>100</sup>

### 3. Accounting

As in the rest of the country, Ohio land sales depended on credit. In the words of one seller, there was simply “no money.”<sup>101</sup> This dearth of a medium of exchange dated back to colonial times when many states had printed their own paper currency as a way to get around a general lack of circulating specie in the colonial economy.<sup>102</sup> The effects varied, but the colonial money printing was blamed for a host of ills including uncertain pricing, “currency gluts,” and depreciation significant enough to lead some to revert to bartering.<sup>103</sup> Article I, Section 10 of the Constitution, which barred states from coining money and printing currency was

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98. Letter from Elisha Sterling to Elisha Whittlesey (Oct. 2, 1804) (on file with the W. Reserve Historical Soc’y) (requesting that Whittlesey verify “that the Lot belongs to me and has not been conveyed by myself or Masterman to any other”).

99. *See, e.g., id.* (detailing contract providing for payment from seller to purchaser of \$3 per deficient acre if the lot were too small and a payment of \$3 per additional acre if the lot were larger than specified).

100. *See* Letter from Elisha Whittlesey to Elisha Sterling (May 2, 1808) (on file with the W. Reserve Historical Soc’y) (“I expect this arrangement will be agreeable to you. If not I wish you on the receipt of this to give me immediate information.”). Whittlesey and Sterling only disagreed occasionally. *See, e.g.,* letter from Elisha Whittlesey to Elisha Sterling (May 27, 1811) (on file with the W. Reserve Historical Soc’y) (defending against accusations of overcharging for work).

101. Shannon, *supra* note 83, at 22 (quoting John May, an Ohio Company agent). This problem was common to the whole territory. *Id.*

102. *See* Christine Desan, *Contesting the Character of the Political Economy in the Early Republic: Rights and Remedies in Chisolm v. Georgia*, in *THE HOUSE AND SENATE IN THE 1790S: PETITIONING, LOBBYING, AND INSTITUTIONAL DEVELOPMENT* 178, 193 (Kenneth R. Bowling & Donald R. Kennon eds., 2002).

103. Claire Priest, *Currency Policies and Legal Development in Colonial New England*, 110 *YALE L.J.* 1303, 1313–14 (2001).

drafted to prevent these problems in the future.<sup>104</sup> Although this provision prevented the confusing array of regional depreciating currency that characterized America before the Revolution, it still left the American economy without a reliable and accessible means of exchange. Specie was rare and difficult to source, especially because it was frequently exported to pay for goods from abroad.<sup>105</sup> The federal government did little to help. Not until the Civil War would the treasury begin to print paper money under the authority granted to it by the Constitution.<sup>106</sup> As a result, exchange was difficult.<sup>107</sup> Business came to depend on promissory notes, basic instruments of exchange that allowed for transactions on credit. Moreover, because many land buyers did not have the means to pay without a mortgage,<sup>108</sup> and because banks were not common in the Western Reserve

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104. U.S. CONST. art. I, § 10, cl. 2.

105. "State governments as well as merchants found themselves handicapped by the shortage of circulating media, both in collecting their revenues and in paying their accounts." MARGARET G. MYERS, *A FINANCIAL HISTORY OF THE UNITED STATES* 72 (1970) (noting that a large amount of specie was sent overseas).

106. See U.S. CONST. art. I, § 8, cl. 5 (permitting Congress to coin money); U.S. CONST. art. I, § 10, cl. 1 (prohibiting states from coining money). For more on the history of money, see MYERS, *supra* note 105, at 163 ("[U]niform paper currency . . . made possible the elimination of the motley array of state bank paper which had so long plagued the economy.").

107. See Cathy Matson, *Public Vices, Private Benefit: William Duer and His Circle, 1776-1792*, in *NEW YORK AND THE RISE OF AMERICAN CAPITALISM: ECONOMIC DEVELOPMENT AND THE SOCIAL AND POLITICAL HISTORY OF AN AMERICAN STATE, 1780-1870*, at 72, 88-91 (William Pencak & Conrad Edick Wright eds., 1989). The shortage of currency affected everyone from farmers, to merchants, to states who collected taxes. BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 98 (1957) (noting that speculators and farmers wanted states to issue more paper money).

Shays's Rebellion was at least in part a protest against a lack of circulating money. See *id.* at 96. Businessmen also lamented the lack of cash. William Bingham, the Philadelphia trader, shipper, and land speculator, wrote to Alexander Hamilton to encourage him "by all possible means to increase the quantity of circulating medium." *Id.* He recommended paper currency because "it cost[] the country a vast sum of productive labor to purchase the necessary quantity of [specie] to discharge the duties of circulation." *Id.*

108. See Shannon, *supra* note 83, at 22 (noting that in the "cash-strapped economy [of Ohio] any land sales were usually on credit over an extended time").

until mid-century, buyers relied on landholders like Sterling to provide financing.<sup>109</sup> In addition to drafting mortgage contracts, Whittlesey also ensured that mortgagees kept up their payments.<sup>110</sup> The use of mortgages and promissory notes brought Sterling and other speculators into a sometimes complicated web of debt, in which all parties involved had to carefully balance income and outlays to ensure they had the means to pay when a note came due. Whittlesey collected and accounted for payments, receiving money in person and by the mail.<sup>111</sup> Because he dealt with the lenders, borrowers, purchasers, and sellers in the Western Reserve, he was able to advise Sterling which loans were likely to be paid on time, which were likely to be late, and which were worthless.<sup>112</sup> When possible, Whittlesey secured suspect notes with a debtors' property. In one case Whittlesey traveled "forty miles" to visit a sickly debtor and then inspect "three or four thousand acres of forest lands" for "quality of soil and local situation."<sup>113</sup> Detailed accounting helped Sterling to avoid liquidity problems: Whittlesey made sure that when Sterling had to pay one of his creditors that he had sufficient funds. Whittlesey also sent profits back

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109. See Harris, *supra* note 62, at 59; Letter from Elisha Whittlesey to Elisha Sterling (May 15, 1810) (on file with the W. Reserve Historical Soc'y) (discussing payment plan for a land sale).

110. See, e.g., Letter from Elisha Whittlesey to Elisha Sterling (July 3, 1809) (on file with the W. Reserve Historical Soc'y) (discussing mortgage holder who claims to have paid off his land).

111. See Elisha Whittlesey, Ledger (1811–1814) (on file with the W. Reserve Historical Soc'y) (documenting "money paid you by" and "money sent you in a letter").

112. See Letter from Elisha Sterling to Elisha Whittlesey (Oct. 7, 1816) (on file with the W. Reserve Historical Soc'y) (requesting accounting of "what has been paid & what is yet due & the probability of Collection as we have a statement of each Debt we could then determine what would be proper for us to do with Robbins"); see also Letter from Elisha Whittlesey to Elisha Sterling (Nov. 17, 1807) (on file with the W. Reserve Historical Soc'y) (listing Sterling's notes and explaining their status).

113. Letter from Elisha Whittlesey to Elisha Sterling (May 27, 1811) (on file with the W. Reserve Historical Soc'y).

East, either through the mail or with a friend.<sup>114</sup>

#### 4. Representation

When disputes arose over title, payment, or collection, Whittlesey handled the dispute and, if necessary, went to court.<sup>115</sup> He negotiated with buyers in default,<sup>116</sup> took depositions,<sup>117</sup> and repossessed property.<sup>118</sup> Repossession could be lengthy and complicated, as an 1808 dispute between Sterling and a buyer recorded only as “Bradley” attested. When a buyer defaulted, Whittlesey generally attempted first to negotiate or to encourage the debtor to sell his property.<sup>119</sup> If that didn’t work, Whittlesey’s next step was to bring suit—often a slow process. For reasons that Whittlesey did not specify in his letters to Sterling, he was unable to file suit against Bradley in June of 1808.<sup>120</sup> In the fall of 1808, Whittlesey again attempted to sue Bradley in the Court of Common Pleas. At court, however, Bradley’s attorney did not appear, supposedly due to illness. Although Whittlesey was skeptical—he believed that Bradley’s

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114. See Letter from Elisha Sterling to Elisha Whittlesey (Oct. 2, 1804) (on file with the W. Reserve Historical Soc’y) (requesting that Whittlesey pay debts and send the extra money back East); Letter from Elisha Sterling to Elisha Whittlesey (Aug. 31, 1819) (on file with the W. Reserve Historical Soc’y) (making arrangements for Whittlesey to send money with a neighbor).

115. See, e.g., Letter from Elisha Sterling to Elisha Whittlesey (Sept. 12, 1831) (on file with the W. Reserve Historical Soc’y) (discussing claims against Asa Keyes).

116. See Letter from Elisha Whittlesey to Ansel Sterling (Mar. 22, 1808) (on file with the W. Reserve Historical Soc’y) (discussing ongoing negotiations with a debtor in default).

117. See, e.g., Letter from Elisha Sterling to Elisha Whittlesey (Aug. 5, 1813) (on file with the W. Reserve Historical Soc’y) (requesting that Whittlesey take depositions).

118. See Letter from Elisha Whittlesey to Elisha Sterling (Oct. 1, 1809) (on file with the W. Reserve Historical Soc’y) (discussing selling of repossessed land).

119. See Letter from Elisha Whittlesey to Ansel Sterling (July 6, 1807) (on file with the W. Reserve Historical Soc’y); Letter from Elisha Whittlesey to Elisha Sterling (Mar. 22, 1808) (on file with the W. Reserve Historical Soc’y).

120. See Letter from Elisha Whittlesey to Elisha Sterling (Nov. 22, 1808) (on file with the W. Reserve Historical Soc’y).

attorney “neglected attending court to have [the] cause put over”—the judge postponed the case.<sup>121</sup> The delay worked, but only temporarily.<sup>122</sup> After a trial in the summer of 1809, the judge issued an execution for Sterling to repossess Bradley’s land.<sup>123</sup> Although the records are ambiguous, it appears that Bradley’s lot was divided and sold in pieces over the next few years.<sup>124</sup> In cases like these, Whittlesey used his status as a member of the bar to make convincing threats, and he brought suit when threats did not work.

### 5. Communication

The distance between Whittlesey and Sterling necessitated constant communication. Whittlesey updated Sterling on his maintenance, selling, finance, and legal representation in letters sent from Ohio. Between 1806, when their correspondence began, and 1836 when Sterling died, the two exchanged eighty-four letters, the most concentrated in the first ten years of their work together. In the early nineteenth century, when mail service was slow, and “[r]eceiving a letter was, for most Americans, an event rather than a feature of ordinary experience,” such lengthy and frequent correspondence was highly unusual for most, but not for lawyers.<sup>125</sup> A lawyer’s constant and detailed

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121. *Id.*

122. After attempting once more to negotiate with Bradley, Whittlesey finally brought the suit before a judge. *See* Letter from Elisha Whittlesey to Ansel Sterling (Nov. 22, 1808) (on file with the W. Reserve Historical Soc’y).

123. Letter from Elisha Whittlesey to Elisha Sterling (July 3, 1809) (on file with the W. Reserve Historical Soc’y).

124. *See* Elisha Whittlesey, Ledger (1811–1817) (on file with the W. Reserve Historical Soc’y) (listing charge for surveying “Bradley lot so much as is sold to Phil Beardsley”).

125. DAVID M. HENKIN, *THE POSTAL AGE: THE EMERGENCE OF MODERN COMMUNICATIONS IN NINETEENTH-CENTURY AMERICA* 17 (2006). Even in the 1850s, the average American sent only five letters per year, and most of this mail was concentrated in urban centers. *See id.* at 31. Communication was so important to Whittlesey and Sterling that they were both willing to pay costly postage fees, assessed based on the long distance their letters traveled. *See id.* at 18–19 (discussing expense of postage); Elisha Whittlesey, Ledger (1811–1817) (on file

correspondence with his client helped him to overcome the problems posed by working from a distance.

Whittlesey's reports give a sense both of the scope and diversity of his work:

following are made

Date	Description	Amount	Method	Amount
1807	for Elisha Sterling			\$190
Jan 27	highway tax	52.50	by Dr S. Evans	52.50
March 9	to county tax	20.00	by Dr S. Evans	20.00
March 16	to money sent you by J. M. Kim	100.00	by Dr S. Evans	20.00
June 27	to paying that title on the note given by H. Banfield for money he borrowed to pay that title	75.00	by Dr S. Evans	20.00
July 15	to pay Dr. S. Evans	20.00	by Dr S. Evans	12.15
Aug 6	to pay Dr. S. Evans	55.00	by Dr S. Evans	20.00
Aug 10	to order to take deposition of the witnesses of the unknown title	50.00	by Dr S. Evans	22.50
Aug 14	to paying on note Dr. S. Evans	75.00	by Dr S. Evans	47.50
Aug 21	to expenses at Wmms to examine accounts, including your title	1.00	by Dr S. Evans	100.00
Aug 24	to pay for recording deed	20.00	by Dr S. Evans	100.00
Aug 27	to pay for recording deed	2.00	by Dr S. Evans	
Sept 4	to pay for recording deed	2.00	by Dr S. Evans	
Sept 12	to pay for recording deed	2.00	by Dr S. Evans	
Sept 15	to pay for recording deed	2.00	by Dr S. Evans	
Sept 21	to pay for recording deed	2.00	by Dr S. Evans	
Sept 25	to pay for recording deed	2.00	by Dr S. Evans	
Sept 28	to pay for recording deed	2.00	by Dr S. Evans	
Money expended				\$42.92
				\$587.46

Letter of Elisha Whittlesey to Elisha Sterling, May 2, 1808.

In this letter, Whittlesey accounted for 1807 and 1808, with the expenses ranging from tax payments (in January, March, and August, 1807), to payments on a note (in June, 1807), to costs incurred examining titles (in August, 1807), to paying for recording a deed (in August, 1807). Whittlesey noted money received from a variety of sources in amounts

with the W. Reserve Historical Soc'y).

from \$120 (in April, 1807) to \$5 (in July, 1808). In addition to listing expenses, Whittlesey also summarized the amount spent and received, in this instance \$542.92 and one-half and \$537.46 respectively.

When Dated	Against Whom	Amount	Remarks
Nov 9, 1804	Ed George Linn	132 85	due 1 <sup>st</sup> of April 1806
April 1, 1800	James Bradley	6 49	
Dec 8 <sup>th</sup> 1804	Nathan Lamb	350	
June 9, 1806	Elisha Chapman	256 33	
Dec 8, 1804	Wm Chapman	176 15	
April 24, 1807	Joseph Sangham	25 40	
July 12, 1803	Joshua Hollister	31 11	For this note there is an endorsement of \$2.00 dated 5 May 1807, which was before signed & signed by H. Campbell.
June 14 <sup>th</sup> 1802	Thomas Bipe	30	Do Do
April 7, 1806	A. Huntbird	20	Do Do
April 1, 1801	A. B. L. Linn	28 30	As now due on this note of \$72.50, the interest amount, I have received on it \$72.50, in cattle which answered an Order of the Court dated
	James Gifford	53 52	Judgment confessed April 5 <sup>th</sup> 1807. Stay of Execution 9 Months Mathias King & Sonsman
	Ezra Hunt	38 20	confessed judgment April 24 <sup>th</sup> 1807. Stay of Execution 9 Months
	James Gifford		John E. King & Sonsman

Letter from Elisha Whittlesey to Elisha Sterling, November 17, 1807

In this second report, Whittlesey listed outstanding notes. Sterling held a note signed by Alisha Chapman, dated June 9, 1806, for example, in which Chapman promised to pay Sterling \$256.33. Whittlesey also listed twelve other outstanding notes. When relevant, he added pertinent information such as an explanation that the remaining amount due on one note was \$28.30 because \$72.50 in cattle had already been paid. In addition, two other notes were the result of judgments in courts, and the execution of each was stayed for nine months. Whittlesey's work as agent,

accountant, lawyer, and manager merged within these reports, allowing him to summarize the entirety of Sterling's frontier business.

Although Sterling was one of Whittlesey's biggest clients, he performed similar work for dozens of others. He helped Samuel Smedley address errors committed by land auditors;<sup>126</sup> used his power of attorney to "partition" and "convey" E.D. Whittlesey's land;<sup>127</sup> drafted power of attorney forms for "Hermon of Canfield";<sup>128</sup> "took depositions for lawsuits" and traveled to "negotiate purchase . . . of land" for Elijah Wadsworth;<sup>129</sup> paid taxes on land "west of Cuyahoga," and "explor[ed] R.R. Township" for John Calhoun and Nathaniel Rollin;<sup>130</sup> paid Matthew Whittlesey's "high way" "county" and "state tax";<sup>131</sup> sold land on behalf of the New York merchants August Hammett and William Lane;<sup>132</sup> brought a "petition for partitioning lands of Joseph Storey & Others" at the request of Turhand Kirtland;<sup>133</sup> sold a massive lot worth \$2410 for Samuel B. Flores of Philadelphia;<sup>134</sup> received and sent money, collected interest on loans, and paid judgments on behalf of Judson Canfield;<sup>135</sup> and traveled to Cleveland for William Winthrop "to take the Depositions of John Williams" in relation to a suit.<sup>136</sup>

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126. See Letter from Elisha Whittlesey to Samuel Smedley (Apr. 21, 1812) (on file with the W. Reserve Historical Soc'y).

127. Letter from E.D. Whittlesey to Elisha Whittlesey (June 1, 1816) (on file with the W. Reserve Historical Soc'y).

128. Elisha Whittlesey, Ledger (Number 12) (on file with the W. Reserve Historical Soc'y).

129. *Id.* at 20.

130. *Id.* at 33.

131. *Id.* at 30. Matthew Whittlesey was related to Elisha, but he appears to have paid the same rates as other clients.

132. *Id.* at 42.

133. *Id.* at 39.

134. *Id.* at 188.

135. *Id.* at 71; see also *id.* at 143, 159.

136. *Id.* at 112.

Whittlesey, then, played a significant role in land sales and other transactions for dozens of clients. The sketchier records left behind by his colleagues suggest that they too were performing a similar quantity of work for large groups of clients as well. Their effects were amplified by the large number of lawyers on the frontier. The western migration of lawyers was so substantial that the Reserve almost certainly had more lawyers per capita than the East did. The ratio of lawyers to population in Northeastern Ohio was probably at least five or ten times what it was in Connecticut or Massachusetts.<sup>137</sup> Even these estimates possibly understate the pervasiveness of lawyers. In the Reserve's tiny towns, the presence of a single lawyer would have boosted a town's lawyer to population ratio immensely, amplifying his influence. In aggregate, the work of lawyers thus played an enormous role in transaction on the Reserve.<sup>138</sup>

#### D. *Effects of Legal Work*

Not only did lawyers enable transaction, they also ensured that transaction in the West mirrored legal and

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137. In 1800, there was roughly one lawyer for every 2100 people in Connecticut and one for every 2900 in Massachusetts. U.S. CENSUS BUREAU, *supra* note 80. County-level census records are not available for Ohio in 1800, but even ten years later, fewer than 20,000 people lived on the Reserve. U.S. CENSUS BUREAU, 1810 UNITED STATES FEDERAL CENSUS. Considering that Ohio's population grew fivefold during that period, it is safe to assume that approximately 4000 people lived on the Reserve in 1800. *See id.* At eastern ratios that would have entailed one or two lawyers. Yet by 1801, at least five lawyers, trained by the same teacher, had already moved to the Reserve. In Massachusetts, Gerard Gawalt found 200 lawyers in 1800, and calculated the ratio of lawyers to population at 1: 2872. GAWALT, *supra* note 63, at 200. I calculated the population of the Western Reserve in 1810 by using county-level data available from the 1810 U.S. Census.

138. Although the strong connection to Connecticut was unique to the Western Reserve, the westward migration of lawyers—and the high ratio of lawyers to population—was not. In 1830, when there was only one lawyer for every four hundred people in New York City, the ratio of lawyers to population in Chicago was as high as 1:85. Even in 1847, there was approximately one lawyer for every three hundred residents. *See* Deborah L. Haines, *City Doctor, City Lawyer: The Learned Professions in Frontier Chicago, 1833–1860* 62 (May 12, 1986) (unpublished Ph.D. dissertation, University of Chicago).

economic standards in the East. Lawyers brought their legal training with them and addressed frontier problems by using those tools. By organizing transaction, lawyers helped to regulate the market for land.

### 1. Transmission of Legal Standards

Lawyers brought legal standards to the most sparsely inhabited parts of Ohio. Canfield, founded in 1798, only contained seventeen homes and a single store in 1805.<sup>139</sup> By 1811, Whittlesey and other lawyers there produced conveyances for their land speculator clients that would have looked at home in New England (or England):

[T]he said Ephraim paying or causing to be paid \$134 by the 1st day of July 1810, with Interest, \$134 by the first day of July 1811 with Interest, and \$134 by the first day July, 1812 with Interest, and the said Ephraim agrees on his part to pay or cause to be paid to said Sterling the said several sums of Money or to his said agent in Canfield at the times above specified in consideration of said Sterling's conveying or causing to be conveyed the said Lot of land after the said last payment shall become due and payed and it is further agreed between the parties above that if the said lots of land should not contain one hundred thirty four acres that the shall be deducted from the last payment at the rate of \$3 per acre for each and every acre thus deficient and to be added in the same proportion for each acre it should over measure the above quantity of one hundred and thirty four acres in Witness where of we have here unto lot and lands (two witnesses' signatures).<sup>140</sup>

Here were the hallmarks of a professional legal approach: The contract was specific, used legal terminology, included a three-part payment plan with interest, a liquidated damages clause, and was signed by two witnesses. Other surviving documents demonstrate a similar concern

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139. RICHARD ULRICH, *AN EARLY HISTORY OF CANFIELD: 1776 to 1876*, at 4, 22 (1980).

140. Letter from Elisha Whittlesey to Elisha Sterling (July 3, 1809) (on file with the W. Reserve Historical Soc'y). Other documents were similarly technical. *See, e.g.*, Deed from John Young of Youngstown (May 13, 1801) (on file with the W. Reserve Historical Soc'y); Agreement to Chop Lumber (June 12, 1802) (on file with the W. Reserve Historical Soc'y); Indenture for Land Use (Feb. 14, 1803) (on file with the W. Reserve Historical Soc'y).

for legal rules. In 1802, for example, a lawyer drafted an agreement for clearing “all the timber and bushes” from the land owned by one of his clients.<sup>141</sup> The contract was lengthy and precise.<sup>142</sup> It contained a liquidated damages clause, specifying that the brush clearer had to pay double his fee if he failed to perform.<sup>143</sup> This agreement demonstrated none of the informality that might be expected in a small settlement on the periphery of the country. Instead, it treated the development of the frontier—the clearing and settling of land—as a legal process dependent on procedures dictated by lawyers. Lawyers enforced and demanded these standards even when the frontier was relatively undeveloped.

The use of such complex legal forms was made possible by the density of lawyers on the frontier and by their devotion to their professional methods. Lawyers solidified these standards by assuming roles in frontier government. When Cleveland established its first court in 1810, the city only had fifty-seven residents, yet the first presiding judge was a lawyer, Benjamin Ruggles, who had come to Ohio from Connecticut in 1807.<sup>144</sup> Records from the early years of the court show 109 civil suits in its first few years, and seven different lawyers appeared before Judge Ruggles before 1814.<sup>145</sup> Court filings that took the same form and followed the same technical rules of law used in the East.<sup>146</sup> Litigants pressed judges to require opposing parties to amend faulty

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141. George Todd Contract (June 12, 1802) (on file with the W. Reserve Historical Soc’y).

142. *Id.* It was detailed enough to exclude “three trees” from clearing.

143. *Id.*

144. See ROSE, *supra* note 75, at 63; see also Ruggles, Benjamin, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000500> (last visited Oct. 22, 2016).

145. ROSE, *supra* note 75 at 73.

146. Tod’s filing used technical legal language and included a copy of the contract. George Tod, Complaint in Court of Common Pleas (Mar. 1811) (on file with the W. Reserve Historical Soc’y).

documents,<sup>147</sup> and often persuaded them to throw out meritorious suits because they failed to meet technical pleading requirements.<sup>148</sup> Exceptions were noteworthy. When a judge postponed a case because of a lawyer's dubious claim of illness, it was surprising.<sup>149</sup> By applying exacting legal standards, lawyers treated divisions of frontier land as transactions that should be channeled into an existing legal framework. Within just a few years, organization of property on the frontier was just like property transactions elsewhere in early national America: Increasingly, they were the province of lawyers.

## 2. Building a Market and State

Later members of the Ohio bar imagined a simpler time when lawyers spent their time "writing deeds, wills and contracts and in the trial of litigated cases of small consequence," when, "[i]t was not necessary for them to solve the mysteries and unravel the intricacies of modern business."<sup>150</sup> Likewise, historians have described the "unsubstantial" work of "debts, accounts, notes, contracts, titles, foreclosures, ejectments, and bankruptcy" that made up early frontier practice.<sup>151</sup> This work, however, was neither simple nor unimportant. Both in and out of court lawyers were critical to the sale and distribution of land on the

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147. *Id.*; see also letter from Elisha Whittlesey to Ansel Sterling (Nov. 22, 1808) (on file with the W. Reserve Historical Soc'y) (describing the pleading problem in fuller detail).

148. See letter from Elisha Whittlesey to Ansel Sterling (Mar. 22, 1808) (on file with the W. Reserve Historical Soc'y) ("I believe Bradley is now foreclosed from having his account set off on the Note. By our statute it is necessary to give notice when pleading that the defendant intends to exhibit his amount against the pltf. which Mr. Hays his attorney has failed to do.").

149. Letter from Elisha Whittlesey to Ansel Sterling (Nov. 22, 1808) (on file with the W. Reserve Historical Soc'y).

150. 1 CARRINGTON T. MARSHALL, A HISTORY OF THE COURTS AND LAWYERS OF OHIO, at xiv-xv (1934).

151. Paul E. Wilson, *How The Law Came to Kansas*, 15 KAN. HISTORY 18, 34 (1992).

Reserve. They handled hundreds of small and large decisions for clients, making transactions possible. They laid the groundwork for development of the frontier, playing a role normally associated with government, when they encouraged settlement and helped to ensure that land transactions met eastern standards.

The contribution of private legal work to the institutional foundations of economic growth is counterintuitive. We are conditioned to distinguish private law from public law. From this perspective, the private work of lawyers looks like the work of intermediaries rather than of the government itself. Perhaps this is also why scholars of economic development have tended to understate the profession's role. As the political scientist Timothy Mitchell has pointed out, however, governments have "porous edges."<sup>152</sup> On these boundaries, "official practice mixes with the semiofficial and the semiofficial with the unofficial."<sup>153</sup> Close attention to the boundaries of the relatively weak government in early Ohio illustrates that it was never completely distinguishable from society, and that, by patrolling this middle ground, lawyers in Ohio played roles normally associated with government officials.

This framework explains the larger significance of private lawyers' day-to-day practice. Lawyers were not just acting as intermediaries between the government and speculators, they were the government. When migrating to the Reserve, lawyers brought state- and market-making capabilities with them. Their work established technical legal standards, clarified titles, organized transactions, and instituted patterns and practices that allowed the sale and distribution of Western Reserve land on a scale that would not otherwise have been possible.<sup>154</sup> Their professional skills

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152. Timothy Mitchell, *The Limits of the State: Beyond Statist Approaches and Their Critics*, 85 AM. POL. SCI. R. 77, 82 (1991).

153. *Id.*

154. See generally HURT, *supra* note 53, at 168–77 (discussing importance of

and assistance on adherence to technical detail allowed them to regulate transaction. In this process, lawyers were not just intermediaries, they were private bureaucrats. As they divided land and organized the frontier, they built the state and they governed the market; Ohio became a lawyer's frontier. Without lawyers' work, buyers and sellers of land would have been hard-pressed to create and control the market for land that was essential to Ohio's development.

### III. NEW YORK

Commercial work was valuable not just on the frontier but also at the center of American commerce: New York City. Despite New York's well-regulated municipal government<sup>155</sup> and the relative ease with which it could be monitored by the Federal and state government, lawyers played just as important a role in the city's economy as they had on the frontier. In nineteenth-century New York, lawyers did not need to set up the market—they needed to make it work.

Elite New York lawyers performed a wide variety of tasks for their clients. For real-estate speculators, they researched and examined complicated titles; for traders, they drafted agreements and settled disputes; for insurers, they prepared policies and fought over interpretation; for manufacturers, they established financing and organized partnerships; and for bankers, they secured loans and

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division of land by speculators); Christopher Clark, *The Ohio Country in the Political Economy of Nation Building*, in *THE CENTER OF A GREAT EMPIRE: THE OHIO COUNTRY IN THE EARLY AMERICAN REPUBLIC* 150 (Andrew R. L. Cayton & Stuart D. Hobbs eds., 2005) (arguing that the division of land into small parcels led to growth); see also Walter Licht, *Envelopment*, 103 (May 7, 2014) (unpublished manuscript, on file with author) (“[T]he transfer of federal lands to private interests represents perhaps the greatest input of the federal government to the growth and development of the U.S. economy in the nineteenth century.”). In other frontier economies lawyers played a similar role. See STEPHEN ARON, *HOW THE WEST WAS LOST: THE TRANSFORMATION OF KENTUCKY FROM DANIEL BOONE TO HENRY CLAY* 150 (1996) (“The engrossment of land, the rule of lawyers, the privatization of property rights, the power of merchant-manufacturers, and the entrenchment of slavery transformed the Bluegrass from the world of Daniel Boone to that of Henry Clay.”).

155. See NOVAK, *supra* note 49, at 43–44.

deposits. To understand how these actions made the economy work, it is useful to view their work in terms of Douglass North's framework of formal and informal constraint.<sup>156</sup> Recall that formal constraints are explicit rules of conduct and that informal constraints are extensions of these formal rules, including socially sanctioned norms and internally enforced standards of conduct.<sup>157</sup> Markets, particularly complex markets in which participants do not know each other, need these kind of constraints to prevent market participants from breaking promises. This Part argues that the work of lawyers was a private complement to public structures. Through their services, lawyers provided both kinds of constraints: the formal, by ensuring that agreements would be enforceable in court and by enforcing agreements when necessary, and the informal, by cultivating a legal culture that expressed adherence to higher values outside the market. These lawyers did more than just navigate regulatory regimes; they cultivated trust in a market full of risk.

By establishing relationships of trust with their clients and building institutions to support these relationships, New York lawyers facilitated the complex and anonymous financial transactions on which their clients' fortunes depended.<sup>158</sup> By embracing commercial work, Lord and his colleagues not only facilitated economic growth but also built an elite bar that served wealthy business enterprises in the name of justice. Building on the work of earlier lawyers, they shaped the future of the profession and the American economy.

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156. *See generally* NORTH, *supra* note 4, at 36–53.

157. *See id.* at 36–53.

158. *See id.* at 53; *see generally* STEPHEN KNACK, TRUST, ASSOCIATIONAL LIFE, AND ECONOMIC PERFORMANCE 22–28 (2010), <https://mpra.ub.uni-muenchen.de/27247>. This approach qualifies Lawrence Friedman's claim that New York's "small but sophisticated bar of commerce" was made up of men who "were basically courtroom lawyers." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 232 (3d ed. 2005).

A. *Sources*

This portion of the study depends on the records of Daniel Lord and the law firm that he started, records that currently are held by a lawyer who worked for the firm that Lord founded.<sup>159</sup> Born in Stonington, Connecticut in 1795, Lord moved to New York City with his father and mother when he was a small child.<sup>160</sup> After graduating second in his class at Yale, Lord immediately studied law, and he joined the New York Bar in 1817.<sup>161</sup> Although Lord's practice gained an immense reputation, it never extended obviously into the public sphere.<sup>162</sup> Lord spent his entire career as a private lawyer, working for more than five decades for large and influential commercial actors in New York. His law practice "embraced every variety of law, real property, commercial law including revenue cases, and the law of shipping and insurance."<sup>163</sup> Eventually, Lord formed the firm Lord, Day & Lord, which at its peak employed more than 120 lawyers and became one of the top firms in New York before dissolving in 1994.<sup>164</sup> Lord was especially successful, but his practice shared much in common with other top commercial lawyers

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159. The lawyer received the records after the firm went bankrupt. Lord, Day & Lord dissolved in 1994 following a vote by its partners. Jan Hoffman, *Oldest Law Firm Is Courtly, Loyal and Defunct*, N.Y. TIMES, Oct. 2, 1994, at 33.

160. See 6 FRANKLIN BOWDITCH DEXTER, *BIOGRAPHICAL SKETCHES OF THE GRADUATES OF YALE COLLEGE: WITH ANNALS OF THE COLLEGE HISTORY* 679 (1885).

161. Lord finished his legal education by clerking with George Griffin in New York. MEMORIAL OF DANIEL LORD 9 (D. Appleton & Co. 1869) [hereinafter MEMORIAL].

162. He was so well respected by other members of the bar that when he died, all of the courts in New York City were closed in his honor. As the *New York Times* reported in a lengthy article the next day, "[n]one of the Federal, State or City Courts did anything beyond the calling of the jury rolls, or some other slight preliminary business, before motions were made to adjourn." *Local Intelligence: Death of Daniel Lord*, N.Y. TIMES, Mar. 6, 1868, at 2.

163. DEXTER, *supra* note 1610 at 679.

164. Lawyers attributed the firm's failure to be "confirmation that a somewhat romanticized way of law-firm life [was] over, that the profession [had] become a business." Hoffman, *supra* note 159, at 33. As one of the firm's partners put it, "[t]he coin of the realm ceased being loyalty, predictability and continuity . . . and became money, money and money." *Id.*

in New York. His papers thus show how a small group of lawyers—in 1830 there were just 450 lawyers in the entire city—made New York’s massive economic growth possible.<sup>165</sup>

### B. *Setting*

When Daniel Lord started his legal practice in 1817, the economic system that lawyers were helping build in Ohio was already booming in New York City. Although New York had been a major hub of commerce for decades, its population and importance grew dramatically during the nineteenth century. In 1820, the city boasted a population of 123,706, making it the largest in the country, and it continued to grow at an average rate of sixty-five percent per decade throughout the nineteenth century, twice the rate of the national average during the same period.<sup>166</sup> By 1860, New York City was home to more than 800,000 people;<sup>167</sup> sixty-four percent of the country’s imports and thirty-five percent of its exports traveled through New York’s harbor.<sup>168</sup> Its industry also took off, leading it to become one of the most important manufacturing locations in the world.<sup>169</sup> New York traders, merchants, manufacturers, bankers, insurers, and speculators monopolized the economy and exerted influence across the country and around the world.<sup>170</sup>

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165. THOMAS J. FRUSCIANO & MARILYN H. PETTIT, *NEW YORK UNIVERSITY AND THE CITY: AN ILLUSTRATED HISTORY* 59 (1997).

166. Campbell Gibson, *Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990*, at tbl.5, U.S. BUREAU OF THE CENSUS (June 15, 1998), <https://www.census.gov/population/www/documentation/twps0027/tab05.txt>.

167. *Id.* at tbl.9.

168. William Pencak, *Introduction to NEW YORK AND THE RISE OF AMERICAN CAPITALISM: ECONOMIC DEVELOPMENT AND THE SOCIAL AND POLITICAL HISTORY OF AN AMERICAN STATE, 1780–1870*, at xii (William Pencak & Conrad Edick Wright eds., 1989).

169. *See generally* SVEN BECKERT, *THE MONIED METROPOLIS: NEW YORK CITY AND THE CONSOLIDATION OF THE AMERICAN BOURGEOISIE, 1850–1896* (2001); *NEW YORK AND THE RISE OF AMERICAN CAPITALISM*, *supra* note 168.

170. *See* BECKERT, *supra* note 169, at 18.

Although the New York economy grew rapidly over the course of the nineteenth century, the upward trajectory would not always have been obvious to those active in commerce. In the volatile American economy of the nineteenth century, amidst the “radical uncertainty of capitalism,” even experienced commercial actors understood failure firsthand.<sup>171</sup> According to one historian’s calculations, approximately twenty percent of Americans living in the early nineteenth century would become insolvent during their lifetimes.<sup>172</sup> Among businessmen, the prognosis was worse. In 1850 San Francisco, for example, nearly seventy percent of merchants failed.<sup>173</sup> Oft-circulated nineteenth-century common wisdom pegged the number even higher, suggesting that ninety-seven percent of merchants eventually became insolvent.<sup>174</sup>

For participants in the market, the causes of ruin sometimes appeared opaque. The Panic of 1819, for example, inaugurated an economic depression that lasted until 1821 and led to the failure of hundreds of businesses and the impoverishment of thousands; yet unlike in prior economic downturns, Americans could point to no obvious cause, natural or manmade, to blame for the crisis.<sup>175</sup> Other dangers were more obvious. In the complex and specialized economy that developed in nineteenth-century New York, market participants rarely knew the people with whom they

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171. LEVY, *supra* note 47, at 18.

172. See SCOTT A. SANDAGE, *BORN LOSERS: A HISTORY OF FAILURE IN AMERICA* 7 (2005) (citing PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900*, at 287–88 (1974)).

173. *Id.* at 7.

174. *Id.* (citing HENRY D. THOREAU, *WALDEN* 41 (Harper & Bros. Publishers 1950)); Edward Balleisen pegs the rumored number at a still unbelievable ninety-five percent. EDWARD J. BALLEISEN, *NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA* 3 (2001).

175. See JOHN LAURITZ LARSON, *THE MARKET REVOLUTION IN AMERICA: LIBERTY, AMBITION, AND THE ECLIPSE OF THE COMMON GOOD* 39–45 (2010). Prior panics could be blamed on “drought, revolution, or wartime embargoes.” SANDAGE, *supra* note 172, at 29.

traded.<sup>176</sup> The incentive for fraud of every kind increased, because it was harder to discover.<sup>177</sup> Fraudulent bank notes, either forged or issued without backing, frequently passed in commerce.<sup>178</sup> Moreover, trade with sometimes distant strangers meant that far-off problems could lead to local crisis. A run on a remote bank might pose disaster as enterprises fell, leaving hundreds of debtors in their wake.<sup>179</sup> The risk (and fear) of failure haunted market participants. Some committed suicide when faced with economic ruin.<sup>180</sup> Others sublimated their fears by turning to reform campaigns, attacking gambling and the random risks it posed, thereby distinguishing the market's rewards as based on rationality rather than chance.<sup>181</sup> Still others obsessed over the “get-rich-quick scheme[s],” “confidence games” and

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176. Even simple economies, however, face the problem of transaction costs. As economists have realized, one of the primary inefficiencies faced by market economies is caused by the problem of cooperation. In ideal situations—in which each party has perfect knowledge, the parties are repeat players, etc.—trade can happen with perfect efficiency. Perfectly efficient trade never happens in the real world. Instead, the cost of information, the lack of repeated transactions, and other hindrances, inject market transactions with expensive transaction costs. See NORTH, *supra* note 4, at 11–16. For a historical analysis of exchange in a relatively simple economy, see generally BRUCE H. MANN, NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT (1987).

177. See NORTH, *supra* note 4, at 34–35. In a simple economy, the difficulties of cooperation in trade are ameliorated by the familiarity of participants. Reputation and solvency are relatively easy to ascertain and fraud consequently easy to punish. See *id.*

178. Determining whether a note was fraudulent was difficult in 1830 when about three hundred banks existed in the United States; by 1850 with “more than ten thousand different kinds of paper” in circulation, it became significantly harder. See STEPHEN MIHM, A NATION OF COUNTERFEITERS: CAPITALISTS, CON MEN, AND THE MAKING OF THE UNITED STATES 3, 6–9 (2007); JANE KAMENSKY, THE EXCHANGE ARTIST: A TALE OF HIGH-FLYING SPECULATION AND AMERICA'S FIRST BANKING COLLAPSE 16–17 (2008).

179. For an example of one such failure and its effects, see generally KAMENSKY, *supra* note 178, at 115–64.

180. SANDAGE, *supra* note 172, at 6–7.

181. Ann Fabian shows how middle-class Americans used gambling reform campaigns to distance themselves from the risk inherent in the market. See generally ANN FABIAN, CARD SHARPS, DREAM BOOKS, & BUCKET SHOPS: GAMBLING IN 19TH-CENTURY AMERICA 59–107 (1990).

“mania for speculation” that characterized the era.<sup>182</sup>

Despite these challenges, the antebellum American economy grew more complex and expanded at unprecedented rates. Although the market remained volatile throughout the nineteenth century, Lord’s commercial clients vigorously participated in commerce. They built enterprises that made them wealthy while the American economy expanded and contracted at unprecedented rates.<sup>183</sup> With legal support, they were able to build enterprises that secured their wealth, and positioned New York at the center of American commerce.

### C. *Building Legal Practice*

Like many other lawyers, Lord began his practice by building on personal connections. One of his first major clients was the Crary family, to whom he was related through his mother.<sup>184</sup> The Crarys had been in the dry goods business since the turn of the century.<sup>185</sup> Lord initially represented the family’s patriarch, Edward Crary, but he eventually worked for his sons and the firm they established, P. & J.S. Crary & Co.<sup>186</sup> Lord’s work for the Crarys touched on all of his major practice areas. He drafted many power of attorney forms, provided “advice & services” related to purchasing orders, reviewed contracts, and examined titles.<sup>187</sup> He, and eventually his partners as well, worked for members of the Crary family into the 1860s, providing them

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182. MIHM, *supra* note 178, at 15.

183. North attributes this economic growth to the strength of American institutions, whose importance, he argues, increased with the market’s complexity. NORTH, *supra* note 4, at 25.

184. Lord’s connections with his mother and wife were particularly important because his father was not wealthy. See MEMORIAL, *supra* note 161, at 4–5.

185. 2 WALTER BARRETT, THE OLD MERCHANTS OF NEW YORK CITY 80 (1870).

186. See Daniel Lord, Ledger (1815–1823) (on file with John D. Gordan III). Lord’s work before that date was mostly minor drafting work. See *id.*

187. See Daniel Lord, Ledger (1815–1823) (on file with John D. Gordon III).

with over fifty years of legal services.<sup>188</sup> Lord developed a similar relationship with the De Forest family, to whom he was related through his wife. The work started in 1819, once again with the simple tasks of drafting deeds, affidavits, leases, and powers of attorney. His relationship soon developed with the rest of the family, whom he assisted with the redemption of notes and a variety of minor lawsuits.<sup>189</sup>

After his kinship ties gave Lord a foothold in the competitive world of New York law, he came to the attention of other economic actors.<sup>190</sup> In his second decade of practice Lord began to attract work from new clients, including John Jacob Astor, the fur trader and one of the richest men in America, whom he first encountered while working for the Crarys. By the 1830s, Lord's client list had grown significantly, thanks in part to the prominence that his representation of Astor gave him.<sup>191</sup> Lord represented a significant and diverse set of the most important businesses in New York including the "[m]erchants, traders, and clipper ship operators" B. Aymar & Co., the Stebbins Brothers & Co.

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188. See Daniel Lord, Letters (1864–1865) (on file with John D. Gordon III).

189. See Daniel Lord, Ledger (1815–1823) (on file with John D. Gordon III) (listing charges for De Forest and Son, John De Forest, L & G De Forest, Lockwood De Forest, John H. De Forest, and David C. De Forest).

190. Lord's colleagues recognized the importance of his connections to the development of his firm, but saw no dishonor in working for family members. See, e.g., Victor Wolfgang Von Hagen, *Introduction* to JOHN LLOYD STEPHENS, INCIDENTS OF TRAVEL IN EGYPT, ARABIA PETRÆA, AND THE HOLY LAND, at xiii (Victor Wolfgang Von Hagen ed., Dover Publications, Inc. 1970) (quoting Letter from John Lloyd Stephens to Benjamin Stephens (Nov. 28, 1822) (writing admiringly of Lord's "very active friends" who "interest[ed] themselves . . . openly" in his career when he was a young lawyer)).

191. According to Judge Blatchford, in a remembrance before he adjourned the New York Circuit Court in honor of Lord:

[T]he case which first gave him professional éclat, and placed him at the age of about thirty among the foremost at the Bar, was the great ejection case brought by John Jacob Astor, in regard to a tract of land in Dutchess County, which, it has always been understood, was prepared and managed by him, so far as arrangement of it out of court was concerned.

See *Local Intelligence: Death of Daniel Lord*, N.Y. TIMES, Mar. 6, 1868, at 2.

brokerage firm, the Atlantic Insurance Company, the booksellers Berard and Mondon, the oil merchants Fish, Grinnell & Co., the shipping agents C. & J. Barstow, the importers and merchants F.W. Steinbrenner & Co., the Alley, Lawrence & Trimble commission house, and the prosperous store owners and importers A. Tappan & Co.<sup>192</sup> New clients continued to appear in Lord's firm's books throughout the nineteenth century.

Lord's clients valued his work in both tangible and intangible ways. Estimated conservatively, from 1836 to 1848 clients paid him and his partner more than \$7000 a year.<sup>193</sup> In the 1840s, when industrial workers earned less than \$0.06 an hour, this was a tremendous amount of money.<sup>194</sup> Even in 1856, only five percent of New York City's residents owned assets over \$10,000. By the early 1850s, now part of a three-member firm, Lord took home more than \$15,000 a year, with the firm grossing at least twice that sum.<sup>195</sup> Lord's clients admired his work, and they continued

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192. See Daniel Lord, *Ledger (1831–1838)* (on file with John D. Gordon III); Kenneth J. Blume, *Aymar & Co.*, in *HISTORICAL DICTIONARY OF THE U.S. MARITIME INDUSTRY* 54 (2012); JESSICA M. LEPLER, *THE MANY PANICS OF 1837: PEOPLE, POLITICS, AND THE CREATION OF A TRANSATLANTIC FINANCIAL CRISIS* 142–43 (2013); THOMAS LONGWORTH, *LONGWORTH'S AMERICAN ALMANAC, NEW YORK REGISTER, AND CITY DIRECTORY OF THE SIXTY-FIRST YEAR OF AMERICAN INDEPENDENCE* 91, 628, 629 (1836); WILLIAM L. MACKENZIE, *THE LIVES AND OPINIONS OF BENJ'N FRANKLIN BUTLER, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK* 110 (Boston, Cook & Co. 1845); LEWIS TAPPAN, *THE LIFE OF ARTHUR TAPPAN* 70 (1870); EDWIN WILLIAMS, *THE NEW-YORK ANNUAL REGISTER FOR THE YEAR OF OUR LORD 1834: CONTAINING AN ALMANAC, CIVIL AND JUDICIAL LIST, WITH POLITICAL, STATISTICAL AND OTHER INFORMATION, RESPECTING THE STATE OF NEW-YORK AND THE UNITED STATES* 259 (1834).

193. I calculated these numbers using Lord's surviving records. The success of Lord and Butler's partnership distinguishes it from many other firms. According to Naomi Lamoreaux, the majority of other nineteenth-century partnerships seem to have offered few financial benefits over sole proprietorships, and they often failed or dissolved quickly. See Naomi Lamoreaux, *The Partnership Form of Organization: Its Popularity in Early-Nineteenth-Century Boston*, in *ENTREPRENEURS: THE BOSTON BUSINESS COMMUNITY, 1700–1850*, at 269, 282–83, 293 (Conrad Edick Wright & Katheryn P. Viens eds., 1997).

194. See LAWRENCE H. OFFICER, *TWO CENTURIES OF COMPENSATION FOR U.S. PRODUCTION WORKERS IN MANUFACTURING* 166 tbl.7 (2009).

195. These calculations are based on records for 1851, 1856, 1857, and 1858.

to return to him year after year, despite his significant fees. The Atlantic Insurance Company for example, for whom Lord began working in the 1830s, regularly consulted Lord's firm throughout his lifetime.<sup>196</sup> With Astor, Lord also developed a close and long-lived relationship, working for him the last seventeen years of Astor's life.<sup>197</sup> Astor's family members continued to turn to Lord for their own business ventures after their father died.<sup>198</sup> Lord's papers reveal many such repeated relationships, in which, over months and years, he positioned himself as a trusted adviser and as navigator of the unstable market. Lord became "a lawyer and a friend," someone "to be consulted in an emergency where a client's whole fortune or reputation for life might depend on the course."<sup>199</sup>

#### D. *Law and Business*

Lord's ties with his clients were not unusual. Businessmen recognized the importance of law to their enterprises. A series of how-to manuals, published throughout the nineteenth century, offered to introduce market participants to the rudiments of law to help them undertake business in an economy dependent on credit and anonymous exchange.<sup>200</sup> As one book noted, merchants could

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See Daniel Lord, Daybook (1847–1856) (on file with John D. Gordon III); Daniel Lord, Ledger (1859–1866) (on file with John D. Gordon III).

196. See Daniel Lord, Ledger (1831–1838) (on file with John D. Gordon III); Daniel Lord, Ledger (1839–1844) (on file with John D. Gordon III); Daniel Lord, Daybook (1857–1865) (on file with John D. Gordon III); Daniel Lord, Daybook (1865–1868) (on file with John D. Gordon III). They may have also relied on his firm after his death, but I did not have access to those records.

197. John Jacob Astor first appeared in Lord's account book in 1831. See Daniel Lord, Ledger (1831–1838) (on file with John D. Gordon III).

198. Daniel Lord, Ledger (1847–1856) (on file with John D. Gordon III).

199. MEMORIAL, *supra* note 161, at 99.

200. See, e.g., EVERY MAN'S LAWYER: OR EVERY MAN HIS OWN SCRIBENER AND CONVEYANCER (J. Royer 1830); MOSES CROWELL, THE COUNSELLOR, OR EVERY MAN HIS OWN LAWYER (Ithaca, D. D. & A. Spencer 1844); THE NEW AMERICAN CLERK'S MAGAZINE: AND YOUNG CONVEYANCER'S POCKET COMPANION (Alexandria, R. & J. Gray 1803); FREDERIC W. SAWYER, THE MERCHANT'S AND SHIPMASTER'S GUIDE, IN

not safely extend credit to “customers . . . scattered throughout the country” unless they understood the laws in the states in which they were trading.<sup>201</sup> Nor could retailers make loans to their purchasers without understanding “the legal details concerning false representations on the part of buyers.”<sup>202</sup> The books contained forms for notes, contracts, mortgages, and other common legal documents, as well as basic summaries of relevant law so that businessmen could undertake basic legal tasks themselves.<sup>203</sup> Even these self-help books, however, exhibited faith in the expertise of lawyers. One, for example, prominently noted that the author had been “assisted by an attorney” in producing his book.<sup>204</sup> Another recommended that a businessmen turn to a lawyer in a matter involving “any considerable amount.”<sup>205</sup> The strongest testimonial to lawyers came in Edwin T. Freedley’s, *A Practical Treatise on Business*. According to Freedley, it “was positive economy for every man whose contracts are at all complicated, in fact, whose business is not of the simplest kind, to choose at the outset of his career an able attorney, which whom to consult and advise before concluding any important undertaking.”<sup>206</sup> Attorneys, Freedley maintained, recognized issues that businessmen, clouded by “anxious cupidity” might not. Their true worth

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RELATION TO THEIR RIGHTS, DUTIES AND LIABILITIES, UNDER THE EXISTING COMMERCIAL REGULATIONS OF THE UNITED STATES (Boston, Benjamin Loring & Co. 1840); THE BUSINESS MAN’S ASSISTANT AND LEGAL GUIDE (New York, L. Hauser & Co. 1855).

201. JOHN G. WELLS, WELLS’ EVERY MAN HIS OWN LAWYER, AND UNITED STATES FORM BOOK 7–8 (New York, Pudney & Russell 1860).

202. *Id.*

203. Most also contained other general reference information, such as instructions for keeping books or calculating interest. *See generally, e.g., id.*

204. I.R. Butts, *Front Matter to The Trader’s Guide, and Business Man’s Legal Companion, in THE BUSINESS MAN’S LAW LIBRARY* (New York, H. Long & Bro. 1855).

205. CROWELL, *supra* note 200, at 17.

206. EDWIN T. FREEDLEY, A PRACTICAL TREATISE ON BUSINESS: OR HOW TO GET, SAVE, SPEND, GIVE, LEND, AND BEQUEATH MONEY: WITH AN INQUIRY INTO THE CHANCES OF SUCCESS AND CAUSES OF FAILURE IN BUSINESS 119 (1852).

was not in the courtroom but outside it, “to save men from lawsuits [was] the noblest office of their profession.”<sup>207</sup> For those who could afford what Freedley considered a “moderate . . . sum,” lawyers promised to ease the difficulty of navigating a treacherous economic climate.<sup>208</sup> As another author concluded, if “pa[id] honorably,” a client could expect “safe and correct advice.”<sup>209</sup>

### E. *Legal Work*

As the books recommended, Lord’s clients hired him to work closely with them as they participated in the most active sectors of the New York economy: real estate, finance, insurance, and trade. In real estate, Lord’s clients speculated on city land, counting on the value to increase as the population of Manhattan swelled. In finance, they loaned and borrowed money in support of trade and business.<sup>210</sup> As insurers, Lord’s clients protected merchandise and real property, earning profits from the premiums they charged.<sup>211</sup> In trade, they brought furs, silks, spices, and other commodities to New York and then distributed them throughout the country. In each of these ventures, Lord’s work supported and secured their participation in the volatile and lucrative New York market.

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207. *Id.*

208. *Id.*

209. BENJAMIN SWAIM, 2 *THE MAN OF BUSINESS, OR, EVERY MAN’S LAW BOOK* 419–20 (1834). These statements can be read in part as responses to stereotypes disseminated about lawyers at the time. Marc Galanter relates a joke circulating in 1832 about a lawyer who pretended to be ignorant until his prospective client “placed a shining guinea in the learned gentleman’s hand.” MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* 66–67 (2005).

210. Bankers became some of the richest New Yorkers. *See* BECKERT, *supra* note 169, at 25.

211. From January 1844 to January 1854, The Atlantic Insurance Company, one of Lord’s largest clients generated returns of thirty-three percent and an annual average of over \$500,000 a year. *See* FREEMAN HUNT, 1 *LIVES OF AMERICAN MERCHANTS* 419–21 (1856).

### 1. Real Estate

During the 1820s, New York's rapid expansion encouraged real estate speculation. For his early clients, Lord undertook basic tasks associated with land transfers. For example, he charged Philetus Havens \$8 for "Drawing [a] Bond & Mortgage to Bank of N York and engrossing with collateral instrument."<sup>212</sup> For Gabriel Havens, Lord did more drafting, drawing and engrossing a "[b]argain and sale of certain lands" and a "declaration of trust relating these deeds."<sup>213</sup> For other clients, Lord drew mortgages, drafted deeds, and wrote "[p]arty wall agreement[s]."<sup>214</sup> Deeds and leases were the basis of the land transactions through which New York's business class was establishing shops and homes, speculating on land, and developing the island. Lord's work formalized and secured these property transactions. By drafting the documents on which transactions depended, Lord reassured his clients that the documents said what his clients wanted them to say and that they would stand up under the scrutiny of trading partners and judges.

Lord's real estate work also included the examination of titles to property.<sup>215</sup> This work was important, especially in an unstable economic environment in which property might be encumbered by multiple liens and ownership claims. A title search involved extensive examination of the provenance of a piece of land, detailing its exact outline and the history of its transmission. In his searches, Lord would have had to check for liens, unsatisfied judgments, and other legal encumbrances that could reduce or destroy the value of the land.<sup>216</sup>

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212. Daniel Lord, Ledger (1815–1823) (on file with John D. Gordon III).

213. *Id.*

214. *Id.* (noting work done on behalf of Benjamin Birdsall).

215. *Id.* ("examining title" and charging \$20.00).

216. See Grant Morrison, *A New York City Creditor and His Upstate Debtors: Issac Bronson's Moneylending, 1819–1836*, 61 N.Y. HIST. 255, 267–68 (1980)

A typical entry from Lord's records illustrates the fastidiousness and practical reach of his title work. A deed search in Lord's title registry often contained a map and a description of the lot Lord's client intended to purchase. For a land purchase in Brooklyn, Lord provided a map and description of the fourteen lots his client sought to purchase and a history of the property's ownership. The deed search begins with a transfer from October 3, 1796 and goes on for eight pages; it includes nine separate conveyances, culminating in the most recent in March, 1835.<sup>217</sup> Such a complex analysis benefited from a lawyer's eye and his familiarity with property law. Lord's examination attested to the land's clear title and ensured his client was making a calculated risk on the land's value rather than the much larger risk of buying land with a cloudy title. Lord's involvement with title work and the exchange of property continued throughout his career.<sup>218</sup> Lord and his partners at the firm continued to draw assignments and deeds,<sup>219</sup> write leases,<sup>220</sup> negotiate sales,<sup>221</sup> provide title searches for their clients,<sup>222</sup> and even "attend[] the closing of sale of property"<sup>223</sup> into the 1860s. They provided the legal expertise that businessmen agreed was essential to commerce.

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(describing importance of title searches). Titles were complicated before lawyers became involved. *See, e.g.*, David Thomas Konig, *Community Custom and the Common Law: Social Change and the Development of Land Law in Seventeenth-Century Massachusetts*, 18 AM. J. LEGAL. HIST. 137, 148, 163 (1974) (discussing problems caused by uncertain titles including the reduction of land values).

217. Daniel Lord, Title Register (1796) (on file with John D. Gordon III).

218. *See, e.g.*, Daniel Lord, Ledger (1859–1866) (on file with John D. Gordon III) (examining title on behalf of G.H. Robbins, "drawing deed" on behalf of William Bradford).

219. *Id.* (recording drawing of assignment and deed).

220. *Id.* (drawing trust deed and drawing "party wall agreements" and "agreements of lease").

221. *Id.* (on behalf of S.B.J. Morse).

222. *Id.*

223. *Id.*

## 2. Finance

Lord was deeply enmeshed in financial work, work that the volatile New York economy continually produced. Even large and successful New York merchants did not always have the specie required to pay for merchandise, and they therefore relied on private financial instruments as a means of exchange. He drafted securities,<sup>224</sup> filed legal protests when debtors refused to pay,<sup>225</sup> and secured hundreds of debts on behalf of lenders.<sup>226</sup> Although Lord's practice was especially note-heavy in its early years, his involvement with finance lasted his entire career. Lord and his associates provided counsel in relatively straightforward debt cases even as they also represented clients in novel commercial law cases before appellate courts.<sup>227</sup> That his clients continued to hire him suggests that they valued the reassurance that financial work by an experienced and well-regarded lawyer provided.

## 3. Insurance

Lord helped his clients deal with other risks as well. In New York, commercial actors faced threats from weather, pests, and fire, and they took out insurance policies to guard against those risks. Lord's books reflect extensive work for both policyholders and providers. His practice on behalf of insurance companies grew from a small concern in the 1820s to a major focus in the 1830s and 1840s. He drafted affidavits that testified to the value of insured properties and goods, and these affidavits became the basis of insurance

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224. See, e.g., Daniel Lord, Ledger (1815–1823) (on file with John D. Gordon III) (“[t]o services in securing debt of Richardson” and “drawing securities with Rich & Grant”).

225. See, e.g., *id.* (“protesting note” on behalf of Aiken, Fisher, and Goddard).

226. See, e.g., *id.* (“Services in securing debts of Richardson” on behalf of John Penfold).

227. See, e.g., Daniel Lord, Daybook (1847–1856) (on file with John D. Gordon).

payouts.<sup>228</sup> Because insurance policies were steeped in legal language and process, clients hired Lord to interpret policies and to represent them in court in policy disputes.<sup>229</sup> The work ranged from writing opinions on the legality of the company's actions to consulting on "sundry" issues related to the insurance applications of ships.<sup>230</sup> Lord also provided advice respecting policy provisions and drafted insurance payout agreements to ensure that settlements were final.<sup>231</sup> In his insurance work, Lord's expertise assured his clients that the policies that they bought and sold actually covered (or excluded) what they intended. Much of Lord's insurance work took place out of court, and it helped his clients avoid litigation. The Atlantic Insurance Company, for example, was only involved in six lawsuits in the first twenty-four years of the company's existence.<sup>232</sup> Relying on Lord helped them avoid the cost, delay, and uncertainty of trial.

#### 4. Trade

As demonstrated in Elisha Whittlesey's practice, because of limitations on transportation and communication, businessmen in the early nineteenth century frequently relied on agents to act on their behalf. Although some of these agents, like Whittlesey and his colleagues on the Western Reserve, were lawyers, others were essentially temporary employees. For clients who relied on agents, Lord drafted power of attorney forms, which authorized purchases

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228. See Daniel Lord, Ledger (1815–1823) (on file with John D. Gordon).

229. In one of his first cases of great prominence, he argued that rats eating bear skins fell under an insurance clause that covered "perils of the sea." MEMORIAL, *supra* note 161, at 15.

230. Daniel Lord, Daybook, (1833–1835) (on file with John D. Gordon); Daniel Lord, Daybook (1837–1838) (on file with John D. Gordon).

231. See Daniel Lord, Daybook (1837–1838) (on file with John D. Gordon) (listing extensive work on behalf of the Atlantic Insurance company and charging for writing an "award between B De Forest & Co & Ocean Ins. Company").

232. At a dinner in honor of the founder of the firm, Lord remarked that in twenty-four years, "not more than *six* lawsuits have occurred to it, and I can recollect but *four*." See HUNT, *supra* note 211, at 419.

or sales of goods, stock transfers, or more general powers. These forms were in such demand that in six months, Lord drafted five of them for just one client, a merchant who needed them for employees in his dry good business.<sup>233</sup> A carefully drafted power of attorney form could limit an agent's powers and prevent him from abusing his position. Lord also prepared sales agreements for large purchases, ensuring that the terms of exchange would be valid in court.<sup>234</sup> His contractual work further included the review and drafting of contracts and other agreements.<sup>235</sup> In addition to regulating interactions between firms, Lord helped organize his clients' internal affairs. Articles of co-partnership, for example, set the rules for the division of power and money in a business, and opinions on corporate law helped his clients navigate internal power structures.<sup>236</sup>

#### F. *Legal Culture*

Like most commercial lawyers, Lord was in a position to take advantage of those with whom he did business. He held greater expertise than they did in legal matters, and his clients delegated to him significant discretion to make decisions on their behalf. In a complex economy they had little choice. Their enterprises were simply too large for them to personally oversee every transaction or carefully peruse every document. Unlike some of his client's other economic partners, however, Lord depended on repeat business. His good reputation was critical to his ability to win favor with his clients. Lord successfully developed—then maintained—this reputation during his career, winning the trust of his major clients. Instead of keeping Lord at arm's length, businesses and businessmen welcomed him into their inner

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233. See Daniel Lord, Ledger (1815–1823) (on file with John D. Gordon).

234. See, e.g., *id.* (listing the drawing of an agreement and a bill sale, as well as charges for “advice & services purchasing order & memorandum for silk goods”).

235. *Id.* (listing \$1 charge for examining agreement with J.J. Astor).

236. *Id.*; Daniel Lord, Daybook (1837–1838) (on file with John D. Gordon).

circles. With the Atlantic Insurance Company, for example, Lord's relationship grew strong enough that he was referred to as a "counsellor to the . . . company" and was invited to give a speech at a celebratory affair honoring the company's founder and chairmen.<sup>237</sup> Similarly, when Astor died in 1845, he not only provided for Lord to act as the executor of his estate (with a \$5000 yearly allowance) but also appointed him to oversee his charitable bequests.<sup>238</sup> Business relationships thus became personal, building the confidence that Lord's clients had in him and strengthening Lord's economic ties to his clients. Sustained relationships like this were the hallmark of other elite members of the New York Bar.<sup>239</sup>

One of the reasons lawyers like Lord were able to build these close relationships with their clients was that the legal profession's values made its members seem more trustworthy. Lord and other members of the bar claimed that they kept a critical distance from the market: "the profession of the law was not in and of itself the pursuit of gain," they declared, saying that a good lawyer like Lord worked hard but not for his own benefit.<sup>240</sup> Instead, he strove to harness and discipline market forces on behalf of clients. Lord was singled out for special commendation by his colleagues because he continued to practice diligently even after he grew wealthy later in his career.<sup>241</sup> In the mind of his fellow

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237. HUNT, *supra* note 211, at 419.

238. *Astor Will Nets \$5,000 A Year as Executor*, BOS. DAILY ATLAS, Apr. 1, 1848; *John Jacob Astor's Gift*, N.Y. TIMES, Oct. 30, 1881. Daniel Lord was one of twelve trustees. The others were Washington Irving (the author), William B. Astor (John Jacob Astor's son), James G. King (businessmen, politician, and Litchfield graduate), Joseph G. Cogswell, Fitz-Green Halleck (the poet), Henry Brevoort (rich New York landowner), Samuel B. Ruggles (politician and large New York landowner), Samuel Ward (banker), Charles Astor Bristed (scholar and Astor's son-in-law), the Chancellor of New York, and the Mayor of the City of New York. *Id.*

239. See *infra* notes 241–42 and accompanying text.

240. MEMORIAL, *supra* note 161, at 74–75. Lord worked, William Evarts said, "as if work was all that there was of life that was worthy to be done." *Id.* at 69.

241. See MEMORIAL, *supra* note 161, at 12 (noting that Lord "did not suffer the

lawyers, this proved that he worked not for the love of money but out of devotion to his profession and its highest values.<sup>242</sup>

Lawyers thus presented themselves—or at least the leaders of the profession such as Lord—as motivated by ability and integrity more than by desire to get rich.<sup>243</sup> Lord apparently viewed his work the same way. For him, financial “success was a thing of the slightest importance compared with the administration of justice—with bringing the Court and the Bar and every one to the administration of justice.”<sup>244</sup> Lord thus claimed to adhere to the values espoused by his profession, even when they conflicted with the acquisitiveness of the market.

Conveniently, this perspective did not discourage elite lawyers from working for wealthy commercial clients. Instead of shunning the world of commerce, the bar classified its work on behalf of commercial clients as consistent with the profession’s values. Lord’s colleagues thus praised him with one breath for earning the “confidence of commercial circles on commercial questions,” and with another for his “good service to the interests of justice and advancement of truth.”<sup>245</sup> Commercial work, according to the bar, was “worthy work, for worthy ends, and by worthy means.”<sup>246</sup> It was so worthy, in fact, that Lord’s colleagues claimed that a practice devoted to commercial work was just as “as useful

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withdrawal of the absolute necessity for work to check the ardor with which he continued his accustomed labor”).

242. *See id.* at 73–75. The irony of one of the richest lawyers in New York praising another of the richest lawyers in New York for his modest fees appears to have been lost on Evarts.

243. *See id.* at 62. Lawyers who seemed overly concerned with money were criticized for this concern. The similarity to the way that modern lawyers function is striking. *See RILES, supra* note 32, at 69 (describing lawyers as “[b]eing intimately involved by being just a little distant” which prevents them “from lapsing into the (slightly vulgar, in lawyers’ eyes) role of an actual market participant”).

244. E.C. Benedict, *Speech of E.C. Benedict, reprinted in Local Intelligence: Death of Daniel Lord*, N.Y. TIMES, Mar. 6, 1868.

245. *Id.*

246. MEMORIAL, *supra* note 161, at 69.

and as influential” as the work of those who “held judicial or official station or [were] honored by political distinctions.”<sup>247</sup> Working for commercial clients thus fulfilled core professional values in the same way as traditionally prestigious legal callings.

It is tempting to dismiss the bar’s self-presentation as a self-serving delusion, especially because the same lawyers who professed a devotion to integrity over money were among the richest men in the city. Indeed, many of Lord’s contemporaries, especially those in the middle class who could not afford to develop the close relationship with a lawyer that Lord shared with his clients, saw lawyers as cynical, expensive con artists, and they sought—mostly unsuccessfully—to limit the profession’s influence.<sup>248</sup> But the bar’s focus on principle was too pervasive and too often touted in private settings for it to be dismissed out-of-hand. Moreover, we need not assume an altruistic motive for the bar’s adherence to these values, as it was in the long-term interest of lawyers to develop lucrative relationships with commercial clients who wanted lawyers and had the means to pay them. Although this legal culture was not as pure as elite lawyers professed or imagined, it was nevertheless powerful and well received by the commercial bar’s clients. Members of the middle class were often less convinced of the profession’s integrity, but they were not the profession’s main patrons.<sup>249</sup> By emphasizing values like integrity and honesty, elite lawyers signaled businessmen that they were reliable navigators of the risky world of economic exchange, thereby encouraging those active in commerce to pay for—and trust—legal counsel. Ironically, the profession’s lofty ideals suited them to support economic exchange.

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247. *Id.*

248. See generally Maxwell Bloomfield, *Lawyers and Public Criticism: Challenge and Response in Nineteenth Century America*, 15 AM. J. LEGAL HIST. 269 (1971); BLOOMFIELD, *supra* note 51, at 44–58. Most of these criticisms came from middle-class Americans. *Id.*

249. BLOOMFIELD, *supra* note 51, at 42.

G. *Effects of Legal Work*

The commercial work for businessmen that the bar's culture encouraged exerted significant influence. As North and others have noted, by helping to enforce agreements in courts, lawyers like Lord supported the formal constraints on human behavior that contribute to the functioning of markets.<sup>250</sup> Thus, by helping clients redeem notes in default or sue for enforcement of contracts, lawyers encouraged their clients to participate in trade. In complex suits, in which precedent did not clearly dictate an outcome, lawyers helped to set formal rules for future transactions.<sup>251</sup> As Lord's account books reveal, however, he was more often an advisor or drafter than a litigator.<sup>252</sup> By drafting documents, a lawyer placed these agreements within the aegis of the legal system. Legal expertise, in other words, ensured that clients could turn to the courts if a transaction went bad. Lord and his colleagues thus served as liaisons between courts and their clients, making it possible, for example, for outstanding notes to be redeemed and property seized.

Although properly drafted documents could prove useful in courts, most party wall agreements, mortgages, and notes never appeared before a judge and would therefore not formally constrain the behavior of the parties. But a combination of the belief in the power of law and lawyers, and a pervasive legal culture that enforced that belief likely served to increase the meaningfulness of these documents. As the self-help business and legal guides suggest, commercial actors accepted the importance of law to

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250. The formal role of lawyers as gatekeepers of the court system has been acknowledged by North and others. See NORTH, *supra* note 4, at 54–59.

251. By probing, for instance, whether a term like “perils of the sea” in an insurance policy covered damage by rats, Lord helped to set the formal constraints for future transactions. See *Aymar v. Astor*, 6 Cow. 267, 267–69 (N.Y. Sup. Ct. 1826).

252. Even as a young lawyer, Lord offered advice to his clients—about suits, business, and notes. See, e.g., Daniel Lord, Ledger (1815–1823) (on file with John D. Gordon) (listing charges for “advice” and “advice related to deed”).

economic activity. Moreover, other historians have found that Americans appealed to law and legal language in many different settings.<sup>253</sup> John Philip Reid, for example, maintains that even on the Overland Trail, “law-mindedness” persisted.<sup>254</sup> No wonder then that the dozens of editions of legal self-help and form books published across the country targeted not only “businessmen” but also “farmers . . . and town officers,” “young conveyancers,” “Country Merchant[s], . . . Mechanic[s], . . . Emigrants, . . . Landlords and Tenants, and Married Men and Women,” among others.<sup>255</sup> Even critics of the profession acknowledged that lawyers held significant power.<sup>256</sup> Participants in the market were primed to believe in the law’s constraining force.

The legal profession’s jargon therefore fell on willing ears. In this context, legal documents were important not only for what they said but also for their aesthetic and symbolic properties.<sup>257</sup> A retailer or trader might not completely understand the purposes or legal significance of the form he used or the contract his lawyer drafted for him, but he could recognize it—and value it—as something “legal.” A legal document could therefore cement a transaction, memorializing terms of an agreement, giving it

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253. See generally JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* (2011); JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956); WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996); JOHN PHILIP REID, *LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL* (1980).

254. REID, *supra* note 253, at 10.

255. JACOB J. MULTER, *THE FARMERS’ LAW BOOK AND TOWN OFFICERS’ GUIDE* (Albany, John Munsell, Law Printer, 1851); *THE NEW AMERICAN CLERK’S MAGAZINE*, *supra* note 200; WELLS, *supra* note 201, at iii.

256. Part of the reason that reformers wanted to change the profession was to take away some of the power of lawyers. See BLOOMFIELD, *supra* note 51, at 44–45.

257. See RILES, *supra* note 32, at 52–73, 230–32 (discussing the importance of technicality and aesthetics to legal practice in twentieth-century Japan and the way this practice serves as a form of “private governance”).

an air of formality, and placing it within the shadow of the law. Legal jargon thus could have a kind of talismanic quality. Advice and counsel from a lawyer held power for similar reasons. Lawyers were legal experts and their professed devotion to the values underlying the law likely could help to give a client the confidence needed to participate in a transaction. This may be one reason why clients continued to employ Lord and his firm to perform basic legal tasks. Just as modern lawyers have been understood to “deploy[] evocative symbols” when reporting on “due diligence” investigations or using standard-form contracts, Lord and his fellow commercial lawyers did the same when they reported on title searches or drafted power-of-attorney forms.<sup>258</sup>

Because some of the benefits of legal work were aesthetic, confidence adhered even when that work could not completely guard against fraud and failure. Lord and other lawyers could not get their clients' money when no money existed, and even court orders were worthless if a debtor was judgment-proof. With a well-trained lawyer on his side, however, especially one with whom he shared a long-term relationship, a businessmen was more likely to feel that his commercial transactions were calculated risks rather than gambles.<sup>259</sup> This is likely one reason why clients continued to turn to experienced members of the bar, rather than cheaper, less established lawyers, for basic legal tasks, even at greater expense. Thus, despite their inability to guard against all possible harms, by providing a buffer of legal power around transactions, Lord and his colleagues likely encouraged the real estate, finance, insurance, and business transactions that made their clients rich. This confidence-building work

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258. Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 L. & SOC. INQ. 679, 681–82 (1996).

259. Suchman and Cahill argue that Silicon Valley lawyers have helped their clients to face a “complex, turbulent, and unpredictable social environment.” *Id.* at 681.

was especially important in an economy in which confidence was in short supply. In such a context, trust was one of the most important services Lord and other New York lawyers offered their clients; this trust was often built outside the courtroom, and clients were willing to pay good money for it.<sup>260</sup>

By providing formal and informal constraints on behavior and by encouraging confidence in the market, lawyers not only helped increase their clients' wealth but also strengthened American capitalism. On a formal level, the enforcement of property law, the maintenance of clear titles, and the clarification of legal precedent encouraged the transactions that drove growth.<sup>261</sup> At an informal level, discouraging the breaking of promises by memorializing them in legal terms likely did the same thing. The private governance of lawyers, as market constrainers and confidence builders, thus helped to organize a burgeoning New York market, and in an increasingly connected national economy, commercial activity in New York affected Americans across the country. When the great New York fire of 1835 caused significant damage to the warehouses and goods of elite New York merchants, many of them Lord's clients, petitions to Congress arrived from across the country, encouraging Congress to offer support to New York's merchants.<sup>262</sup> By strengthening elite New Yorkers' confidence in the market, lawyers not only encouraged them to trade with one another, they also encouraged the

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260. Economists have also discussed the importance of confidence and trusts in functioning markets, even if they have not fully recognized the contributions of lawyers. See GEORGE A. AKERLOFF AND ROBERT J. SHILLER, *ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM* 11–18 (2009); NORTH, *supra* note 4, at 59, 138–40; Stephen Knack, *Social Capital, Growth and Poverty: A Survey of Cross-Country Evidence* 16–19 (The World Bank, Working Paper No. 7, 1999).

261. See NORTH, *supra* note 4, at 54–59.

262. Jane Manners, 'Storehouse of the Industry of the Nation': *The Great New York Fire of 1835 and the Politics of Disaster Relief*, Law and Society Association Annual Meeting (June 3, 2016).

circulation of capital and goods in the American economy, affecting the millions of Americans who were connected to New York through the market. A lawyer's presence encouraged the transactions that made economic growth possible.

#### IV. ADAPTING TO COMMERCIAL LAW

Lawyers embraced their commercial role and increased their effect on the market by building institutions that allowed them to serve the growing demands of their clients. The first law firms, founded in the mid-nineteenth century, capitalized on the commercial-law tradition and adapted the profession to serve its commercial clientele. They helped to solidify the relationship between lawyers and commerce, securing the role in commerce that large firms still hold today.

Lord was at the forefront of institutional development. During the nineteenth century, most lawyers practiced alone.<sup>263</sup> Even legal partnerships were rare: only a "handful" existed in New York, and just a few multi-member firms existed in the entire country.<sup>264</sup> Solo practices likely proliferated because they allowed lawyers to build the one-on-one relationships of trust that helped to build their client's confidence. But as the size and scope of a business increased, a single lawyer could not respond to the needs and demands of his clients, especially a lawyer like Lord, whose reputation and expertise were in such demand. The new multi-lawyer model for practice offered benefits to commercial lawyers and their clients, and it was adopted widely, first in New York and then across the country.<sup>265</sup>

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263. FRIEDMAN, *supra* note 52, at 232.

264. *Id.*; see also KERMIT L. HALL AND PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 232 (2009).

265. Lawrence Friedman calls the development of the law firm "one of the most striking developments of the late nineteenth century." FRIEDMAN, *supra* note 52, at 489. For more on the development of the firm see generally Wayne K. Hobson, *Symbol of the New Profession: Emergence of the Large Law Firm, 1870–1915*, in

Larger firms allowed for division of work, specialization, and the training of young lawyers.<sup>266</sup> By delegating work, lawyers could represent more clients and establish client relationships that outlasted the career of a single lawyer. The more flexible and capacious law firm was thus better suited to the work of commercial lawyers. Its success as an institution tied the bar ever more closely to its business clients and set the tone both for the development of the New York Bar and of the American legal profession.

A. *Lord, Day & Lord*

In 1848, Lord formed Lord, Day & Lord, with two young lawyers: Daniel De Forest Lord and Henry Day.<sup>267</sup> Lord, Day & Lord was a family firm. Daniel De Forest Lord was Daniel Lord's son, and Henry Day joined the family by marrying Lord's daughter Phebe, in February 1849, less than a year after the firm was established.<sup>268</sup> The next partner, George De Forest Lord, joined the firm in 1859, after graduating from Harvard Law School.<sup>269</sup> He, too, was Daniel Lord's son. By the time Lord died in 1873, his firm also included two grandsons, Daniel Lord, Jr. and Franklin B. Lord, as partners.<sup>270</sup> Most other early law firms also relied on kinship. The Cadwalader firm, founded in New York in 1818, was full of Stronges and Griffins.<sup>271</sup> Cravath, another elite New York

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THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 3 (Gerald W. Gawalt ed., 1984).

266. FRIEDMAN, *supra* note 52, at 489.

267. *See Obituary of Henry Day*, N.Y. TIMES, June 10, 1893.

268. *See* PERSONAL RECORDS OF THE BRICK PRESBYTERIAN CHURCH IN THE CITY OF NEW YORK, 1809–1908, at 60 (Shepherd Knapp ed., 1909).

269. George De Forest Lord was born in 1833. He graduated second in his class at Yale and then went to Harvard Law School. After “spending some time in travel in Europe” he joined the firm. *See Memorial of George De Forest Lord, in THE ‘MEMORIAL BOOK’ AND MORTUARY ROLE OF THE ASSOCIATION OF THE BAR OF NEW YORK, reprinted in THE ASSOCIATION OF THE BAR OF NEW YORK, YEARBOOK, 1889–1893, at 84 (1893).*

270. *Id.*

271. *See* HENRY W. TAFT, A CENTURY AND A HALF AT THE NEW YORK BAR, BEING

firm, was established by a father, son, and brother-in-law.<sup>272</sup> The same pattern was repeated outside of New York: In Philadelphia, Morgan, Lewis & Bockius was organized by a set of brothers, and in Houston, Baker and Botts by a father and son.<sup>273</sup> Kinship allowed Lord and other early legal innovators to overcome the difficulties posed by the novel form of organization. Keeping firm work within the family gave lawyers better insights into the character and potential of their partners, helping shelter a firm's founders from the market's potential for fraud and encouraging the longevity of their enterprise.<sup>274</sup>

Just as professed devotion to values outside the market helped lawyers to attract clients and build trust, their elite firms, based largely on pre-market relationships, improved their commercial capabilities. As larger entities, firms could undertake much more work on behalf of their clients. Lord's account books show a significant increase in business, both in the number of clients and in returns, after he formed Lord, Day & Lord. By the early 1850s, Lord's firm generated more than \$30,000 a year in revenue.<sup>275</sup> Even when work declined during the Civil War, Lord, Day & Lord still brought in thousands of dollars.<sup>276</sup> After the war, the firm grew even

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THE ANNALS OF A LAW FIRM AND SKETCHES OF ITS MEMBERS 26–27, 70 (1938).

272. See ROBERT T. SWAINE, 1 THE CRAVATH FIRM AND ITS PREDECESSORS, 1819–1947, at 2 (1946).

273. See PARK B. DILKS, JR., MORGAN, LEWIS & BOCKIUS: A LAW FIRM AND ITS TIMES 1873–1993, at 1–7 (1994); KENNETH LIPARTITO & JOSEPH PRATT, BAKER AND BOTTS IN THE DEVELOPMENT OF MODERN HOUSTON 2–3 (1991). See also William Bryson, *The Virginia Bar 1870–1900*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 175 (Gerard W. Gawalt, ed., 1984) (finding that “[b]efore 1870, and after, there were few partnerships of two lawyers working together; more often than not, they would have resulted from a close family relationship”).

274. See Lamoreaux, *supra* note 193, at 285 (finding that in Boston, family firms tended to have longer lifespans).

275. These calculations are based on records for 1851, 1856, 1857, and 1858. See Daniel Lord, Daybook (1847–1856) (on file with John D. Gordon III); Daniel Lord, Ledger (1859–1866) (John D. Gordon III).

276. See Daniel Lord, Ledger (1859–1866) (on file with John D. Gordon III).

faster, cementing its place as one of the top commercial law offices in New York. Along with this increase in volume came an increasing ability for intra-firm specialization. At first, the younger, less experienced lawyers performed relatively less complex tasks like drafting documents and title searches. Later, each lawyer developed a specialized practice area. Daniel Lord, for example, focused his work at the end of his career on in-court representation. Henry Day, on the other hand, developed an expertise as an out-of-court lawyer and client counselor.<sup>277</sup> This more diverse practice expanded the firm's capabilities in an increasingly complex commercial law environment. A firm also offered improved efficiency, because its lawyers worked together in one office, splitting rent and other resources. More significantly, Lord's firm shared the extensive law library that Daniel Lord accumulated across his career and that he continued to add to throughout his life. Lord's account records include constant reference to the purchase of treatises, reporters, and other legal sources. In just once purchase in 1849, for example, he spent \$65.50 to buy a treatise written by Justice Story, several editions of the English Exchequer Reports, a volume on marine insurance law, another on common carriers, and several other American reporters.<sup>278</sup> By sharing the expenses of new acquisitions, the three lawyers could more readily afford to acquire treatises and reporters for their library, a cost Willard Hurst has identified as one of the largest expenses of running a law office.<sup>279</sup> Finally, the firm lasted longer than a sole proprietorship or partnership could have. As Lord gradually reduced his workload during the 1860s, he transferred power and responsibility to his partners. The firm's remarkable longevity (it lasted until

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277. See *Obituary of Henry Day*, *supra* note 266 (noting that Day "seldom, if ever, appear[ed] in court" but earned a "handsome income through relations that reposed in him, implicit confidence as a manager, and trustee").

278. See Daniel Lord, Daybook (1847–1856) (on file with John D. Gordon III).

279. According to Hurst, the requirements for law books were extensive, especially toward the end of the nineteenth century. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 308 (1950).

1994) was tied to its ability to recruit new lawyers who could continue its work.<sup>280</sup> By the late nineteenth century, a growing number of its clients were corporations or other businesses that would outlast their founders, too. All of these advantages meant that a firm, especially one grounded on family relationships, could transfer the reputation and trust-building capabilities its leading lawyer developed into a much larger enterprise. Lord's partners did not need to go through the same gradual evolution in practice that Lord had—from working for family members to working for strangers—to develop close ties to clients; instead, they built on the ties and reputation that Lord already established. Lord's clients, on the other hand, could benefit from the confidence they received from being associated with a firm that bore Lord's name and reputation, without solely relying on Lord to represent them. Being represented by Lord's firm could reassure them and send a signal to their trading partners, even if one of the firm's less famous members provided counsel in some matters.

#### B. *Spread of the Firm*

Likely as a result of the benefits they offered, successful firms moved to the head of the commercial bar in the second half of the nineteenth century. Lord, Day & Lord; Shearman & Sterling; Cadwalader; and Cravath grew naturally from small partnerships to the specialized and capacious legal representatives of the late nineteenth and early twentieth century. Shearman expanded: from two partners, three law clerks, a bookkeeper, and an office boy in 1873, to two partners, nine associates, and associated support staff in 1910.<sup>281</sup> The Cadwalader firm also developed with the economy, establishing a practice with work ranging from

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280. Lord, Day & Lord dissolved in 1994 following a vote by its partners. See Jan Hoffman, *Oldest Law Firm Is Courtly, Loyal and Defunct* N.Y. TIMES, Oct. 2, 1994 at 33, 40.

281. WALTER KEESE EARLE & CHARLES COOLIDGE PARLIN, SHEARMAN AND STERLING, 1873–1973, at xxiii, 178 (1973).

commercial suits to title examinations and corporate finance, on behalf of banks, trusts, estates, and railroads.<sup>282</sup> Likewise, Cravath grew dramatically. It transitioned from work on debt collection, real estate, wills, and trusts to patent litigation, corporate litigation, and wall street finance.<sup>283</sup> The firm model spread among elite lawyers outside New York as well. In Philadelphia, Morgan, Lewis & Bockius grew from a partnership between Charles E. Morgan and Francis Bockius in 1873 to a fifteen lawyer firm in 1920.<sup>284</sup> In Houston, Baker and Botts grew from a father-son partnership in 1840, to a major corporate law firm in the late nineteenth century.<sup>285</sup> Like their counterparts in New York, these firms distinguished themselves by their advanced work that extended far beyond the boundaries of their cities.<sup>286</sup> However, despite their benefits, large law firms remained relatively uncommon.<sup>287</sup>

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282. See TAFT, *supra* note 271, at 175–78, 191–201.

283. See SWAINE, *supra* note 272, at 2. Historians tend to underemphasize the long history of the Cravath firm. See, e.g., FRIEDMAN, *supra* note 52, at 486–87 (discussing large firms in the late nineteenth century with no mention of Cravath).

284. See DILKS, *supra* note 273 at 7, 24.

285. See LIPARTITO & PRATT, *supra* note 273, at 2–3; see also Kenneth Lipartito, *What Have Lawyers Done for American Business? The Case of Baker & Botts of Houston*, 64 BUS. HIST. R. 489 (1990).

286. See Lipartito, *supra* note 285, at 499 (“Unlike their peers who were still wedded to the local economy, these regional firms gradually deemphasized land conveyancing, debt collection, and title investigations and oriented their practices around major corporate clients.”).

287. In 1904 just twenty-nine existed in New York. Hobson, *supra* note 265, at 11. Why did only a few top lawyers start firms? First, the firm’s financial arrangements required meticulous record keeping. Lord’s books, for example, include quarterly summaries, breakdowns of fees by client and type-of-service, and schedules for the division of income between the firm’s partners. See Daniel Lord, Daybook (1847–1856) (on file with John D. Gordon III); Daniel Lord, Ledger (1859–1866) (on file with John D. Gordon III). Such detailed breakdowns were unusual when most lawyers still mixed personal and business expenses. Second, a firm required a significant business to sustain itself. Only the most prominent lawyers, such as Daniel Lord, could bring in enough work to support himself and two young attorneys. Third, a firm required substantial cooperation. Running a firm would have been difficult if Lord, Day & Lord and other early firms could not have relied on kinship ties.

By founding firms, Lord and other early legal innovators built institutions designed to support the specialized, commercial economy of the second half of the nineteenth century. Their firms' increased specialization and longer lifespans suited them for corporate practice. Placing the development of the firm in a long history of private practice challenges the traditional story of the rise of the firm that usually begins in the 1880s.<sup>288</sup> According to this account, multi-member firms grew to serve the needs of business clients who began to value "technical competence and the skills of the negotiator and facilitator" over "the skills of rhetoric and courtroom advocacy."<sup>289</sup> The new breed of lawyer was an advisor rather than an advocate, his job was to avoid litigation rather than to win it.<sup>290</sup> Leading lawyers (such as Lord and Whittlesey), however, had long been providing advice and counsel.<sup>291</sup> The law firm, then, grew out of the profession's existing close ties to business and its emphasis on private law. Lord, and other firm founders, built their firms to do more effectively what he and other members were already doing: helping commercial clients navigate the market. Rather than inaugurating a new form of legal

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288. See, e.g., HALL & KARSTEN, *supra* note 264, at 232 (arguing that "it was not until the post-Civil war era that professionalization of law practice surged.").

289. Hobson, *supra* note 265, at 3.

290. See, e.g., EARLE & PARLIN *supra* note 281, at 27–28 (arguing that before the rise of the large firm, "businessmen seldom saw the need of consulting their lawyers until and unless something happened which called for legal talent to enforce a claim or defend against one," and that lawyers in the early nineteenth century "aspire[d] to the glamorous career of advocacy"); HURST, *supra* note 279, at 302 (discussing "shift in emphasis from advocacy to counseling" and noting that "[t]he years after 1870 showed a more matter-of-fact attitude, a prevailing distaste for litigation as a costly luxury, and increasing effort to use law and lawyers preventively"); FRIEDMAN, *supra* note 52, at 552; HALL & KARSTEN, *supra* note 264, at 232; Gordon Morris Bakken, *Industrialization and the Nineteenth-Century California Bar*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 125, 137 (Gerard W. Gawalt ed., 1984); Jean M. Lynch, *The Corporate Law Firm: Organizational and Ecological Perspectives* 15 (1989) (unpublished Ph.D. dissertation, Brown university).

291. See generally Justin Simard, *Legal Economy: Lawyers and the Development of American Commerce, 1780–1860* (Aug. 25, 2016) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with author).

representation, firms represented the evolution of an already established relationship between lawyers and their clients.<sup>292</sup> The law firm was not merely a response to a changing business and economic environment; by serving commercially active clients and encouraging them to participate in the market, firms and the commercial lawyers that preceded them helped to create the conditions that made this environment possible.

### CONCLUSION

By aligning themselves with commerce, lawyers secured their profession's future. Top law firms continue to rely on their ties to business for much of their revenue and to look for ways to adapt their work to the needs of their clients.<sup>293</sup> There are so many lawyers in the United States today because their nineteenth-century predecessors helped to build a system that demands their participation. More study of the routine work of the legal profession is needed to understand the full importance of the role that lawyers

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292. Like Lord, Day & Lord; Shearman & Sterling; Cadwalader; and Cravath all grew from partnerships of well-established lawyers. Shearman's first partner was the advocate for codification, David Dudley Field. See EARLE & PARLIN, *supra* note 281, at 20; TAFT, *supra* note 271, at 3–7; SWAINE, *supra* note 272, at 2.

293. See, e.g., John Coates, et al., *Hiring Teams, Firms, and Lawyers: Evidence of the Evolving Relationships in the Corporate Legal Market*, 36 L. & SOC. INQUIRY 999, 1029 (2011) (addressing literature on modern ties between firms and commercial clients); David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2076–104 (2010) (explaining evolving relationship between large firms and their clients); see also David B. Wilkins, *Law Firms*, in 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 578 (2d ed. 2015) (arguing that traditional “Cravath model” firm is under pressure in global economy). Prescriptions for legal education are not far behind. See, e.g., Ben W. Heinemen, Jr. et al., *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century*, HARVARD LAW SCH. CTR. ON THE LEGAL PROFESSION 49–62 (2014) (discussing educational preparation needed for students at elite law schools who are “ready to practice on day one”); Neil J. Dilloff, *Born to Run: How Law Schools Can Meet Law Firm Expectations for New Litigators*, 33 REV. LITIG. 857, 866–69 (2014) (providing perspective of senior law firm's partner on what law schools should teach in response to changing legal landscape).

played in encouraging economic growth in the United States and the role they continue to play in governing the market.

Understanding the place of lawyers in American economic development is not just of scholarly concern. Today, lawyers still adhere to the ideals espoused by the leaders of the nineteenth-century bar, continuing to view their work narrowly and in terms of service to their clients.<sup>294</sup> But this focus on integrity, diligence, and expertise in client service obscures the way that lawyers serve essential roles in the maintenance of modern capitalism. Lawyers challenged by recent changes in the market should embrace these roles to justify their presence in American economic life. They should also, however, take their presence as technical caretakers of the economy seriously and recognize that private legal work is its own form of governance. With roots this deep, their economic role is unlikely to diminish soon.

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294. See MODEL RULES OF PROF'L CONDUCT Preamble, r. 1.1, r. 1.3, r. 8.4 (AM. BAR ASS'N 2012).