

LEGAL ECONOMY:
LAWYERS AND THE DEVELOPMENT OF AMERICAN COMMERCE, 1780-1870

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ABSTRACT

LEGAL ECONOMY:

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The private work of lawyers played a significant role in the development of commerce in nineteenth century America. “Legal Economy” examines that role by exploring the papers, account books, and student notebooks of lawyers who attended the Litchfield Law School. Litchfield was the most successful law school in the early Republic, and it transmitted a practical, private-law focused education that was reflected in the work of its graduates. Their papers, and those of their colleagues, illustrate that by the beginning of the nineteenth century law was a business in addition to a profession and the greatest demand for lawyers came from those active in commerce. Ironically, a legal culture that distanced lawyers from the acquisitiveness of the market ideally positioned them to practice commercial law throughout the country. For their clients, they engaged in routine, often out-of-court practice that has usually been overlooked. In aggregate, however, the day-to-day work of lawyers on behalf of commercial clients shaped the American economy in unexpected ways. Lawyers created liquidity, enforced property rights, encouraged investment, and knit together a national economy. By playing a central role in American economic exchange, lawyers governed access to the market and its benefits. Thus, though undertaken under the guise of “private law,” their legal work was never wholly private. Their seemingly mundane work strongly linked them to their

commercial clients and furthered the development of the nineteenth century American economy.

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INTRODUCTION

In 1965 the National Park Service added the Litchfield Law School, along with the house of its founder, Tapping Reeve, to its list of official Historic Landmarks. Litchfield's elevation to the list was the culmination of decades of work. Shuttered in 1833, the school building was repurposed soon after by a poet who moved it across town before making it his home. The building then passed to a family who used it as a summer home, eventually constructing an addition that turned the old school into a parlor. In the early twentieth century, preservation efforts began, spurred by a lawyer who was also a local historian. A donation from a granddaughter of one of the school's students provided for the purchase of the building and, with help from the funds given by a group of lawyers, the school was moved back across town and given to the Litchfield Historical Society in 1911. Thirty years later, another group of lawyers raised \$100,000 to provide for the building's restoration and ongoing preservation.¹

Why was the Litchfield Law School worth saving? According to the nomination form submitted to the National Park Service, the building deserved recognition not only because it had housed the first law school in the United States but also because of the importance of its graduates, many of whom, it was noted, became "prominent lawyers, judges, and politicians." The school's earlier preservers had agreed. At the building's presentation to the Litchfield Historical Society a judge remarked that Litchfield had

¹ See Blanche Higgins Schroer and S. Sydney Bradford, "National Register of Historic Places—Nomination Form, Tapping Reeve House and Law School," Jan. 16, 1965, available at <http://focus.nps.gov/pdfhost/docs/NHLS/Text/66000879.pdf>; Dwight C. Kilbourn, "Presentation Address," in *Presentation Exercises of the Litchfield Law School* (Litchfield Historical Society, 1911), 11-13.

educated the best of the country's lawyers. Quoting a Litchfield student, he remarked that "The Boston bar exhibit[ed] [the school's] rich and ripened fruits. By them one may judge of the tree and declare it good."²

Like the graduate quoted in the presentation ceremony, most of the young men who studied at the Litchfield Law School in Connecticut highly valued their educations. We know this not only because they wrote in glowing prose about its teachers, but also because they traveled from all around the country to attend its lectures, because they paid for the pleasure, and because they carefully transcribed what they heard, eventually creating bound volumes they consulted over the following decades during their legal careers. These books, extending for hundreds of pages and up to nine volumes, held so much importance for these young men that many of their families also preserved them for generations, even while the school building lay in disrepair. Almost two hundred years after the school closed in 1833, more than two hundred of the notebooks still exist, carefully preserved in archives from Georgia to New York, many now digitized and available online.³

Filled with mostly obscure and sometimes opaque references to antiquated pleading requirements and narrowly applicable common law rules, these student notebooks lack the clear engagement with broader political and legal issues that attracts

² Ibid.; Morris F. Seymour, "Address," in *Presentation Exercises of the Litchfield Law School* (Litchfield Historical Society, 1911): 11-13.

³ Although there was no official graduation from Litchfield, for the sake of simplicity, I will refer to students who attended Litchfield as "graduates."

Notebooks by 101 different transcribers exist. Two of the surviving sets of notebooks were produced by the schools' teachers, Tapping Reeve and James Gould. "List of Notebooks," Documents Collection Center, Yale University, available at <http://documents.law.yale.edu/litchfield-notebooks/authors>. For a list of digitized Litchfield notebooks, see "All Known Digitized Notebooks," Documents Collection Center, Yale University, available at <http://documents.law.yale.edu/litchfield-notebooks/digitized>.

the interest of legal historians. They contain almost no constitutional law and little commentary on legal reform and seem to share little relation to the prominent politicians and judges that have generated Litchfield's fame. A historian seeking to understand their value must therefore look beyond the notebooks to the students who transcribed them. The Litchfield Law School educated roughly one thousand men, who came from every state in the union and took leading roles in the American bar. As recognized by its earliest boosters, some of the school's students achieved great renown. They became vice presidents, governors, congressmen, reformers, educators, speculators, traders, merchants, preachers, painters, and writers. Some grew rich, and a few died poor. Most of them, however, became private lawyers.⁴

When historians write about lawyers in the early nineteenth century, they usually focus their attention on judges or politicians rather than on private lawyers. Discussions of grand politics and grand doctrine predominate. Occasionally lawyers merit attention, but usually because of their advocacy work in appellate courts or the parts they played in

⁴ A few historians have written about the notebooks or the school, but they have tended to mine both for their political significance. See Angela Fernandez, "Spreading the Word from the Litchfield Law School to the Harvard Case Method" (J.S.D. thesis, Yale Law School, 2007); Angela Fernandez, "Copying and Copyright Issues at the Litchfield Law School," *Connecticut History Review* 47 (2008): 219; Donald F. Melhorn, "A Moot Court Exercise: Debating Judicial Review Prior to *Marbury v. Madison*," *Constitutional Commentary* 12 (1995): 327; Andrew Siegel, "'To Learn and Make Respectable Hereafter': The Litchfield Law School in Cultural Context," *New York University Law Review* 73 (1998): 1978. But see Paul Carrington who argues that the curriculum taught at Litchfield was "apolitical." Paul D. Carrington, *American Lawyers: Public Servants and the Development of a Nation* (Chicago: ABA Publishing, 2012), 53-61.

For most other historians, the Litchfield Law School and the notebooks its students produced merit a brief footnote as a stepping stone on the path to the development of modern legal education. See, e.g., John Langbein, "Blackstone, Litchfield, and Yale: The Founding of the Yale Law School" in *History of the Yale Law School: The Tercentennial Lectures*, ed. Anthony T. Kronman (New Haven: Yale University Press, 2004). For general information on the school see Marian C. McKenna, *Tapping Reeve and the Litchfield Law School* (Dobbs Ferry, NY: Oceana Publications, 1986); Samuel H. Fisher, "The Litchfield Law School 1775-1833," *Tercentenary Commission of Connecticut* (1933): 1-12; Siegel, "To Learn."

the political dramas of their day. The focus on these aspects of legal life makes sense; by focusing on the work of lawyers in appellate courts and politics, historians follow the lead of nineteenth century Americans, who published appellate cases in reporters and elevated legally trained politicians to the highest positions in government. Likewise, legal historians have made compelling cases for the importance of that work. Morton Horwitz, for example, relied on treaties and appellate reporters in *The Transformation of American Law* to argue that nineteenth century judges used legal discretion to “favor the active and powerful elements in American society.”⁵ In politics, Jack Greene has shown how legal ideas shaped the way Americans understood their conflict with England, and Alison Lacroix has traced the legal genealogy of American federalism.⁶ Dozens of other books illustrate the evolution and significance of legal doctrine and trace the important role that lawyers played in political office.

⁵ See, Morton Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, MA: Harvard University Press, 1977): 108. Horwitz’s work has strongly influenced historians of the American economy. See, e.g., Charles Sellers, *The Market Revolution: Jacksonian America, 1815-1846* (New York: Oxford University Press, 1991), 48, who argues that judges and lawyers used control of the courts to “shape the law to entrepreneurial ends;” John Lauritz Larson, *The Market Revolution in America: Liberty, Ambition, and the Eclipse of the Common Good* (Cambridge, Cambridge University Press, 2009), 23-25. Even very recent work on the history of capitalism focuses on lawyers as makers of the law, rather than as practitioners. See, e.g., Jonathan Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America* (Cambridge, MA: Harvard University Press, 2012), 39, 41, 233, who argues that judges played an important role in setting legal ground rules for insurance, futures trading, and other economic activities.

Historians who disagree with Horwitz and see the law as a regulator of markets, also tend to focus on grand legal doctrine and discourse rather than legal practice. See, e.g., William Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996), 42, who argues that the legal maxims *salus populi* and *sic utere tuo* “were the common law blueprints for governance in a well-regulated society;” Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge: Cambridge University Press, 2009), 13, who concentrates on the creation of a national legal structure and the importance of legal discourse in defining political issues; see also Daniel Walker Howe, *What God Hath Wrought: The Transformation of America, 1815-1848* (Oxford: Oxford University Press, 2009), 235-36.

⁶ See Jack Greene, *The Constitutional Origins of the American Revolution* (Cambridge: Cambridge University Press, 2010); Alison Lacroix, *The Ideological Origins of American Federalism* (Cambridge, MA: Harvard University Press, 2010)

For the young men who studied at Litchfield, however, law was primarily a career, a way to earn a respectable living. Examining lawyers' account books and papers, this dissertation explores the day-to-day work of Litchfield lawyers and their colleagues in the nineteenth century. Although their account books and business correspondence were rarely preserved as carefully as their student notes, the materials that have survived reveal much about the routine work of the law. In the late-eighteenth and early nineteenth century, nearly everyone, including lawyers, kept account books. They did so because few banks existed and because so little specie circulated that Americans relied on what amounted to legally sanctioned IOUs for transaction. Whereas appellate reporters preserved the processes and outcomes of lofty legal disputes, lawyers' account books preserve their day-to-day practice. 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. When a lawyer wrote in his books, he was thinking about his finances, not his legacy.⁷

Of the hundreds of tasks recorded in the notebooks, few involved the high-level doctrinal disputes that have tended to attract historians. Even elaborate trial work is relatively rare. Instead, the books show that lawyers spent much of their time drafting documents, giving advice, securing notes, and undertaking other straightforward, even mundane, legal tasks. Men who earned a living as lawyers did not confine themselves to narrowly defined "legal" work, however. Law intertwined with other tasks performed for clients. Lawyers drafted writs to redeem debts, but they also tracked down debtors and

⁷ For more on the history of early accounting techniques see William T. Baxter, "Observations on Money, Barter and Bookkeeping," *Accounting Historians* 31 (2004): 133.

negotiated settlements. They prepared mortgages, but they also examined land and performed titles searches. They wrote judicial opinions, but they also offered business advice and managed their clients' commercial accounts. Looking at account books thus begins to explain why Litchfield's students found the straightforward and technical law they transcribed in their notes worth preserving in leather-bound volumes. Their routine work did not require the regular use of constitutional law or well-honed oratorical skills. It did, however, benefit from the practical legal knowledge transmitted in the modest Litchfield school house.

Studying the routine of legal practice offers a bottom-up portrait of an elite profession. Such a strategy situates lawyers in the roles that they most frequently played, which were not always the roles they liked to talk about, or that historians have tended to write about. Thus it brings attention to the vast majority of legal work that took place underneath the profession's veneer. It shows that by 1800, law was a business in addition to a profession, and that the greatest demand for lawyers came from those active in commerce. Traders, merchants, financiers, and the companies they founded turned to lawyers to help them navigate the volatile nineteenth century economy. They benefited most directly from lawyers' services and paid the fees that made many lawyers rich.

The routine work of lawyers was never wholly private. When lawyers enforced promissory notes by negotiating with debtors, settling claims, or bringing suit, they helped to make a private substitute for cash function. When assisting their clients in dividing and selling land, lawyers helped to clarify titles and prime the frontier for development. When working on behalf of merchants and traders participating in volatile

commercial markets, lawyers helped to prevent buyers and sellers from shirking their promises. When providing debt redemption services for northern sellers operating in the South, lawyers facilitated national economic ties, even when the nation was on the brink of a Civil War. We normally associate all of this work—providing liquidity, preparing land for settlement, enforcing market constraints, and building national economic ties—with the state and public law, but in their routine work, lawyers used private law to accomplish most of it, and they often did so outside of court. In an era when state and federal governments in the United States held relatively little power, this work was essential to the regulation of the market.

In addition to providing controls on the market, a role normally associated with government, lawyers provided services later assumed by other private entities. Before banks provided checks and deposits, lawyers managed promissory notes. Before commercial enterprises established the capabilities to work across long distances, lawyers became correspondents and agents. Before credit reporting agencies offered reliable information about the risks of individual debtors, lawyers worked in local communities on behalf of distant commercial concerns to vet debtors. Lawyers helped capitalism to function not through grand gestures but through the negotiation of the day-to-day problems faced by their clients.⁸ Their routine work shaped the course of economic development in the United States in ways that can still be seen and felt today.

⁸ This dissertation therefore complements recent scholarship on the development of capitalism that illustrates how routine practices contributed to the development and maintenance of the market. See, e.g., Bernard Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (Cambridge, MA: Harvard University Press, 2011); Michael Zakim, “Producing Capitalism: The Clerk at Work,” in *Capitalism Takes Command: The Social Transformation of Nineteenth Century America*, ed. Michael Zakim and Gary J. Kornblith (Chicago: University of Chicago Press, 2011); Michael Zakim & Gary J. Kornblith, “Introduction” in *ibid.*

Despite assuming important economic roles, nineteenth century lawyers never fully embraced the acquisitive values of the market, nor recognized the significance of their routine work. They did, however, develop a professional identity tied to private law and technical skill earlier than most historians believe. Although some elite lawyers stressed their role as protectors of the Constitution and the Republic, lawyers had already adopted a narrower, private-law focused vision of the profession by the late-eighteenth century, a vision fully embraced even by elite members of the bar by the 1830s. Lawyers claimed to be outside the market and to adhere to higher values such as justice and integrity. They did so, however, through a narrow embrace of private law and routine practice.⁹ Later in the nineteenth century lawyers developed practices and institutions that linked them even closer to their commercial clients, but they still claimed adherence to these values.

Although lawyers did not fully embrace the market, their seemingly mundane

⁹ Most historical work on lawyers in the first two-thirds of the nineteenth century has focused on prominent jurists, litigators, and legal thinkers. See, e.g., G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (Oxford: Oxford University Press, 2007); G. Edward White, *The Marshall Court and Cultural Change, 1815-1835* (New York: Macmillan, 1988); Ellen Holmes Pearson, *Remaking Custom: Law and Identity in the Early American Republic* (Charlottesville: University of Virginia Press, 2011); Paul D. Carrington, *American Lawyers*. Some have highlighted the routine legal work of individual lawyers, but have not drawn broader conclusions from this work. See, e.g., Alfred S. Konefsky, "Introduction," in *The New Hampshire Practice, The Papers of Daniel Webster, Legal Papers*, vol. 2, eds. Alfred S. Konefsky and Andrew J. King (Hanover, NH: University Press of New England, 1982); John Adams, *The Legal Papers of John Adams*, ed. L. Kinvin Wroth and Hillier B. Zobel (Cambridge, MA: Belknap Press, 1965).

A few historians have taken broader looks at the profession in this time period. See, e.g., Gerard W. Gawalt, *The Promise of Power: The Emergence of the Legal Profession in Massachusetts 1760-1840* (Westport, CT: Greenwood Press, 1979); Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776-1876* (Cambridge, MA: Harvard University Press, 1976); Robert A. Ferguson, *Law and Letters in American Culture* (Cambridge, MA: Harvard University Press, 1987).

Most historians agree that lawyers did not embrace routine commercial law until later. See Ferguson, *Law and Letters*, 273-287; Robert Gordon, "The Legal Profession" in *Looking Back at Law's Century* eds. Austin Sarat, Bryant Garth, and Robert A. Kagan (Ithaca, NY: Cornell University Press, 2002).

work had dramatic economic consequences. By playing a central role in the American economy, lawyers governed access to the market and its benefits. Wealthy commercial actors could more easily afford a lawyer than the less well-off and could therefore better navigate a system based on private law. As markets expanded and anonymous transaction became commonplace, lawyers helped to insulate their clients against the most destructive tendencies of a burgeoning capitalist economy. Moreover, by consistently playing this economic role, lawyers ensured their continuing importance in American economic life. Their persistent embrace of legalism and routine practice, however, ensured that the capitalist goals of their clients—and not their profession’s oft stated devotion to justice—would most strongly shape the path of the development of the American economy. Lawyers thus furthered a commercial vision for the country to which even they did not fully subscribe.

All of these dramatic changes began with an education, and the one offered by Tapping Reeve proved especially influential. The dissertation begins in the late-eighteenth century in Litchfield, Connecticut, with the founding of Reeve’s school. Reeve did not set out to establish the first and most successful law school in the United States, but the Litchfield Law School’s gradual evolution out of the legal apprenticeship tradition helped to make it the most popular and acclaimed law school in the country. Unlike other early innovators, Reeve focused his curriculum almost exclusively on the private law legal subjects most relevant to legal practitioners. The young men who attended his school learned law that would help them redeem notes, draft mortgages, interpret contracts, and counsel businessmen. Grounded in private and commercial law rather than

political theory, Litchfield's lectures did not address how or on behalf of whom legal skills should be employed. Litchfield's alumni, however, found their new legal skills in great demand by American businessmen. The next four chapters of the dissertation follow these lawyers into practice, tracing the development and deployment of private law in nearby southern Connecticut, on the rugged Western Reserve of Ohio, in bustling New York City, and in Georgia's slave society.

In the 1790s, the dearth of specie and lack of cash forced businessmen to rely on promissory notes and other forms of commercial paper in order to facilitate exchange. The resulting webs of debt often led to default. Chapter Two examines the debt collection work that Robert Minott Sherman, a 1794 graduate of Litchfield, performed on behalf of commercial clients in southern Connecticut. This work depended on the doctrine Sherman had learned at Litchfield, but Sherman's application of law in practice was not always as neat or as orderly as Reeve's lessons at Litchfield suggested. Nevertheless, the collection work of Sherman and his colleagues played a critical role in supporting exchange in the early Republic; this role was hidden, however, by a developing professional ethos of client service that distanced the practice of law from its economic consequences.

Like their counterparts on the East Coast, lawyers on the Western Reserve in northeastern Ohio associated themselves with those active in commerce. Chapter Three examines the practices of the enterprising lawyers who left Connecticut for a relatively unpopulated frontier and found work as the agents of wealthy eastern land speculators. For speculators, Reserve lawyers managed laborers, paid taxes, and drafted mortgages in

addition to performing the debt work that occupied Sherman and other eastern lawyers. By assisting in the division and sale of land, Reserve lawyers not only helped to encourage settlement, they also expanded the reach of eastern legal norms. Although lawyers' clients often did not profit much from their land sales, the legal order that lawyers helped install benefited the profession tremendously. As they spread a capitalist order west, lawyers laid the framework for the expansion of Ohio and for their profession's continued significance.

Meanwhile, in New York City, capitalism was booming. Chapter Four explores the work of lawyers in New York through an analysis of the career of Daniel Lord. An 1823 graduate of Litchfield, Lord was a leader of the New York commercial bar, and he worked for some of the largest companies in the city. Lord's day-to-day practice on behalf of these clients mirrored the diversity of the New York economy. He performed title searches, interpreted contracts, drafted insurance policies, and, like his classmates before him, helped redeem debt. The work of Lord and other lawyers in New York City encouraged their clients' participation in the market both by reducing risks and by building their clients' confidence. The commercial bar's legal culture, which emphasized the profession's distance from the market but also encouraged commercial work, helped make them effective. Private law work was a fact of life for the first generation of Litchfield alumni; for Lord and his colleagues, it was a calling. Even politics was seen as a distraction from a life devoted to private law. Through dutiful service on behalf of capitalists, Lord and his colleagues facilitated economic exchange on behalf of some of the richest men in New York, but they viewed this work as noble and just. After building

the commercial bar, Lord and other elite lawyers helped secure its future and strengthen its ties to commerce, by developing law firms that could perform routine commercial work on a larger scale.

Just as routine commercial law helped Lord and his colleagues become useful to commercial actors in New York, it also allowed men like Lord's classmate, E.A. Nisbet, to play an important role in a southern slave society. Chapter Five follows Nisbet, one of Litchfield's many southern graduates, back to Georgia where he started a commercial practice and served on the Georgia Supreme Court. Debt collection, this time on behalf on behalf of northerners engaged in southern trade, played a central role in Nisbet's practice. His work helped to secure and encourage northern investment in the South even as sectional tensions increased in the lead up to the Civil War. Nisbet could play this role—and could help to make a national economy linked to slavery function—because his profession's legalistic ethos placed few ethical limitations on the kind of work a lawyer could pursue and because the private law he learned at Litchfield prepared him for commercial routine. Although lawyers ended up on both sides of the conflict over secession, they quickly restored financial and legal ties between North and South after the Civil War.

By aligning themselves with commerce, lawyers secured their profession's future and shaped its present. Private practice and the embrace of commercial routine drove economic expansion and lifted the profession into prominence in a country increasingly wedded to capitalism. Only by understanding the importance of practice to nineteenth century American lawyers can we recover the extent and significance of the ties between

law and commerce. Uncovering a history of routine commercial practice shows how lawyers linked farmers with speculators, northerners with southerners, and merchants with insurers. It reveals work that even its practitioners barely mentioned, and illustrates the importance of lawyers to the development of American capitalism.

If most historians have underestimated the importance of routine commercial practice, we cannot blame the men and women who worked to preserve the Litchfield Law School for missing it as well. It is much easier to recognize the power of senators, congressmen, and judges than of lawyers toiling away on day-to-day commercial matters. But the school's preservation itself is a sign of the continued power and significance of the routine work to which many of its graduates devoted their careers. Perhaps the Litchfield Law School could not have been restored if not for the \$100,000 gift from the bar, money its members likely earned as a result of their private legal work. Such were the school's "rich and ripened fruits."

CHAPTER 1: LEARNING PRIVATE LAW

The young lawyer Tapping Reeve faced a challenging situation in the 1780s. In the aftermath of the Revolutionary War the economy was depressed, and the legal work generated by commerce had slowed. Despite owning impressive academic credentials from the College of New Jersey and a having completed a prestigious clerkship, Reeve had little money to fall back on. He came from a poor family, and his father, a reverend with a drinking problem, could offer his son little support. Tutoring and grammar school teaching, which Reeve had pursued before learning the law, had added little to Reeve's fortune.¹⁰

Reeve, however, had managed to find a new source of income during the war: training lawyers. Reeve's first student was his brother-in-law, long time pupil, and future Vice President, Aaron Burr, whom Reeve trained in 1774. The next year Reeve took on Stephen Row Bradley, a recent Yale graduate. After these first two apprentices, students began arriving steadily. In 1778 Oliver Wolcott, Uriah Tracy, and Thomas Ives came from Yale to Litchfield, Connecticut to apprentice with Reeve. Reeve taught even more apprentices after the war. By the mid-1780s, Reeve was teaching three students a year and by the 1790s, the number had grown to six. What had started as a series of apprenticeships developed into a school. By 1833, Reeve and his partner, James Gould,

¹⁰ James McLachlan, *Princetonians, 1748-1768*, vol. 1 (Princeton: Princeton University Press, 1976), 441; George Rogers Taylor, "American Economic Growth Before 1840: An Exploratory Essay," *Journal of Economic History* 24 (1964): 427, 437; Samuel H. Fisher, *The Litchfield Law School 1775-1833: A Biographical Catalogue of Students* (New Haven, Yale University Press, 1933), 1, 12; Eleanor P. Swanson, *Tapping Reeve: American Law Pioneer*: 11-12. Reeve was also constrained by his wife's illness. See *ibid.*

who studied with Reeve and practiced law before returning to teach in 1798, educated roughly one thousand students at the Litchfield Law School.

Their school was an outlier. In the nineteenth century, nearly every lawyer in the English common law world learned by clerking for a practicing attorney. Reeve and Gould, however, attracted so many students because they offered what young lawyers demanded: an education both prestigious and practical. Other American law teachers, who focused on politics and theory at the expense of practical education, had brief runs of success, but none trained nearly as many students as Reeve and Gould. Litchfield succeeded where legal luminaries such as George Wythe, James Wilson, and James Kent failed.

The success of Reeve's model of legal education shaped the future of the legal profession. By the time it closed its doors in 1833 after Reeve and Gould retired from teaching, the Litchfield Law School had trained lawyers from every state in the Union, and its students had spread throughout the United States and become leaders of the American bar, its graduates accounting for nearly 5 percent of the lawyers in the United States.¹¹ Litchfield's success represented a victory for its teachers and a boost to a commercial vision of the legal profession. The school's education in private law eventually wedded its students to their most reliable clients, businessmen, and helped lay

¹¹ Rough estimates suggest that there were between 22,000 and 24,000 lawyers in the United States in 1850. Lawrence Friedman, *A History of American Law* (New York: Simon & Schuster, 2005), 483; Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983), 22. Between 1794 and 1833, approximately 1000 lawyers attended Litchfield. Even though some of these Litchfield alumni had died or left legal practice by the 1850s, they still made up a significant portion of the bar. My calculations (comparing contemporary law schools over a similar period of time) suggest that Litchfield accounted for the same proportion of the legal profession as the combined graduates of Yale, Harvard, Stanford, Chicago, and Penn do today.

the groundwork for the partnership between elite lawyers and capitalism that developed throughout the nineteenth century.

Reeve was an unlikely legal innovator. Other early law teachers came from wealthy backgrounds and served in political office, but Reeve had not. Born in Brook Haven, Long Island in 1744, Reeve left New York at the age of fifteen to attend the College of New Jersey (later Princeton), where he graduated in 1763, first in his class. In order to earn money to pay for tuition and board, Reeve tutored privately and taught at a local grammar school. After earning a degree, Reeve continued to pursue a career as a teacher, starting a school with a fellow graduate in Elizabeth Town, New Jersey that was affiliated with the local Presbyterian church. Three years later, Reeve left for a tutorship at the College of New Jersey. There he supervised classes, disciplined students, and oversaw the student body.¹²

Serving as a tutor was prestigious work for recent graduates, but it was a temporary position and it paid little. Reeve, who had fallen in love with one of his earlier pupils, Sally Burr, needed a more stable income to make himself a suitable husband, so he moved to Hartford, Connecticut to start a legal apprenticeship under Jesse Root, a fellow graduate of the College of New Jersey. Although Root would later become the Chief Justice of the Connecticut Supreme Court, when Reeve began his apprenticeship, Root was a young litigator who charged his apprentices less than other lawyers. Luckily for Reeve, his apprenticeship with Root improved his marriage prospects. Now

¹² Florence S. Marcy Crofut, *Guide to the History and the Historic Sites of Connecticut*, vol. 1 (New Haven, CT: Yale University Press, 1937): 400; Fisher, *Litchfield Law School*, 13; Marian C. McKenna, *Tapping Reeve and the Litchfield Law School* (New York: Oceana, 1986), 21; Edwin Francis Hatfield, *History of Elizabeth, New Jersey: Including the Early History of Union County* (New York, 1868), 520; Christopher J. Lucas, *American Higher Education: A History* (New York: St. Martin's Press, 1994), 124.

recognized as having the potential for professional and financial success, Reeve earned the approval of Sally Burr's family. After finishing his legal training in 1772, Reeve moved with his bride to Litchfield and began to practice law.¹³

By learning through a legal apprenticeship, Reeve participated in an ancient form of education. The tradition originated in England in the twelfth century, when young would-be lawyers began learning the law by working alongside experienced attorneys and observing court proceedings.¹⁴ American lawyers followed their model. As early as 1725, for example, the tiny New York Bar had begun to train its own members. Before Reeve established his law school, nearly every lawyer in the United States learned by working alongside an experienced attorney.¹⁵

Few alternative models for legal education existed. The closest British lawyers came to establishing an organized law school were the Inns of Court, where prospective lawyers attended court sessions and performed a series of increasingly difficult oral pleading exercises to hone their skills.¹⁶ By the late-seventeenth century, however, the

¹³ Thomas Jefferson Wertenbaker, *Princeton, 1746-1896* (Princeton: Princeton University Press), 99; Fisher, *Litchfield Law School*, 13; James Pierce Root, *Root Genealogical Records, 1600-1870: Comprising the General History of the Root and Roots Families in America* (New York, 1870), 140; McKenna, *Tapping Reeve*, 33.

Root was appointed to the Connecticut Supreme Court in 1789 and became that court's chief justice in 1798. Root's training was cheap enough that it induced some apprentices to switch to him for their training in the middle of their apprenticeships. See Root, *Root Genealogical Records*, 141, 143; Timothy Hall, *Supreme Court Justices: A Biographical Dictionary* (New York: Facts on File, 2001), 37.

¹⁴ Students may have supplemented these practical exercises with instruction from judges and attendance at lectures. Paul Brand, "Legal Education Before the Inns of Court," in *Teaching and Transmission of Law in England 1150-1900*, eds. Jonathan A. Bush and Alain Wiffels (New York: Hambledon Press, 1999), 51-84, 62-68.

¹⁵ George Wythe's professorship at William & Mary, established in 1779, provided a notable exception. See *infra*.

¹⁶ John H. Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Oxford University Press, 2002), 159-60. Originally boarding houses for civil servants and lawyers who were in London during Parliamentary sessions, the Inns began educating lawyers in the mid-fourteenth century. In addition to attending court, trainees attended lectures (called readings) that focused on statutes, but also discussed the

Inns of Court had begun to deteriorate. As the Inns lost influence they also lost money. No longer able to sustain their educational standards, they had devolved back into social clubs by the early eighteenth century. Apprenticeships, then, were the main way that lawyers in the late-eighteenth and early nineteenth century common law world learned law.¹⁷

The apprenticeship form did not gain preeminence because of its virtues. Lawyers rarely offered direct instruction to their clerks, and even when they did, their lessons were often lackluster. Moreover, the work that lawyers expected apprentices to perform—mostly copying documents—was tedious. Apprentices were supposed to learn by doing and to take advantage of the collection of expensive legal books in their master’s legal library. This was not easy to do. Consumed by their monotonous work, clerks often had little time to read. When they did, they were expected to learn from a limited number of notoriously difficult treatises. Sir Edmund Coke’s *Commentary on Littleton*, the most widely read treatise before the introduction of William Blackstone’s *Commentaries*, was so opaque that it literally reduced future Supreme Court Justice Joseph Story to tears. The

common law. These lectures did not provide organized or exhaustive coverage of the law; they were designed to supplement, not supplant attendance. Education at the Inns was lengthy—it took most apprentices seven years to complete their training. *Ibid.*, 159-61.

¹⁷ English legal historians John Baker and David Lemmings attribute the decline of the Inns to repercussions from the English Civil War and from changing sources of power in British society. See Baker, *An Introduction*, 162. David Lemmings, *Gentlemen and Barristers: The Inns of Court and the English Bar, 1680-1730* (Oxford: Oxford University Press, 1990), 258. Attempted revivals failed, and after 1684 Inns no longer offered public readings or lectures because of the difficulty of getting senior members to contribute lectures. Lemmings, *ibid.*, 258.

The modern English law school is a relatively recent creation. William Blackstone established a successful tenure as a lecturer on law at Oxford University from 1758 to 1766, but Oxford was unable to find a worthy successor. Cambridge University, in 1800, also tried and failed to establish a chair in civil law. The law school at University College London, the earliest successful British law school, was founded in 1826 and had graduated only 135 students by 1900. See William Twining, *Blackstone’s Tower: The English Law School* (London: Sweet and Maxwell, 1994), 24-26; Baker, *An Introduction*, 170-71.

introduction of Blackstone's four-volume *Commentaries* in 1765 made learning the common law much more accessible, but even this simplifying treatise did not offer a complete solution to the problems faced by lawyers-in-training. The *Commentaries*, which originated as lectures at Oxford, did not provide comprehensive coverage of the law, nor did they offer analysis of topics or cases unique to American law. Attorneys and their apprentices therefore continued to rely on the difficult works that gave prior lawyers so much trouble.¹⁸ The difficulty of the works was compounded by the limited educations many young apprentices had. In Massachusetts, for example, between 1738 and 1809 only 38 percent of the bar had earned liberal arts degrees, and between 1810 and 1880, only 55 percent had attended college.¹⁹

Most prospective lawyers loathed clerking. “[I]f [lawyers] deserve the imputation of injustice and dishonesty,” one former clerk noted, “it is no instance more visible and notorious, than in their conduct towards their apprentices.” Thomas Jefferson confirmed this view, saying that “the services expected” from apprentices were worth “more than the instructions” they received. Even great lawyers, such as James Wilson, could be terrible teachers. According to one account Wilson was “almost useless” as a teacher, “never engag[ing] [his apprentices] in professional discussion” and constantly

¹⁸ Charles R. McKirdy, “The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts,” *Journal of Legal Education* 28 (1976): 127-28; Hamlin, *Legal Education*, 42, 130-33; George Dargo, *Law in the New Republic: Private Law and the Public Estate* (New York: Knopf, 1983), 51; John Langbein, “Blackstone, Litchfield, and Yale: The Founding of the Yale Law School in History of the Yale Law School,” *History of the Yale Law School: The Tercentennial Lectures*, ed. Anthony T. Kronman (New Haven: Yale University Press, 2004), 24.

¹⁹ Among lawyers who practiced in commercially active cities, however, liberal arts degrees were more common. Gerard Gawalt, *The Promise of Power: The Emergence of the Legal Profession in Massachusetts, 1760-1840* (Westport, CT: Greenwood, Press, 1979), 141-48. In Massachusetts from 1740 to 1840, “[t]he educational level of lawyers ranked between ministers and doctors and above the average for the three learned professions.” In Maine, lawyers were more educated than ministers. *Ibid.* See also Paul M. Hamlin, *Legal Education in Colonial New York* (New York: New York University Quarterly Review, 1939), 3-4.

“evad[ing]” their questions. John Adams, who studied with some of the Massachusetts bar’s best lawyers, called his apprenticeship a “dreary ramble.” Clerks, it seemed, “mastered the law not because of their legal apprenticeship, but in spite of it.”²⁰

American legal training needed reform, but aside from Reeve, early American legal educators demonstrated little interest in offering improved versions of the professional legal education apprenticeships were supposed to provide; instead, they wanted to introduce a new form of legal education, one that would prepare their students to play crucial roles in a young Republic.²¹ Thus, George Wythe, who was appointed in 1779 as a professor of Law and Police at William and Mary felt an obligation to use his position to “form such characters as may be fit to succeed those which have been ornamental and useful in the national councils of America.”²² James Wilson, who began lecturing in 1790 at the College of Philadelphia, displayed a similar interest in creating the next generation of American leaders.²³ For him, law was “something higher than a mere instrument of private gain.” He expected his students to master both “metaphysical” and “historical knowledge,” and to “pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discover the abstract reason of all laws.” Wilson therefore envisioned a course of legal education that included

²⁰ William Livingston (signed Tyro Philolegis), “Sic Vos, Non Vobis, Mellificatis Opis,” *New York Weekly Post-Boy*, Aug. 19, 1745, reprinted in Hamlin, *Legal Education*, app. VI; Thomas Jefferson to John Garland Jefferson, June 11, 1790, quoted in McKenna, *Tapping Reeve*; Charles Warren, *A History of the American Bar* (Boston: Little, Brown and Co., 1911), 166; McKenna, *Tapping Reeve*, 12; McKirdy, “Legal Education,” 136.

²¹ Both George Wythe and James Kent disliked their clerkships. See John Theodore Horton, *James Kent: A Study in Conservatism, 1763-1847* (New York: D. Appleton, 1939), 27; Alonzo Thomas Dill, *George Wythe: Teacher of Liberty* (Williamsburg, Va.: Virginia Independence Bicentennial Commission, 1979), 9, 18.

²² George Wythe to John Adams, Dec. 5, 1783, quoted in Dill, *George Wythe*, 2.

²³ The College of Philadelphia became the University of Pennsylvania the next year. George B. Wood, *The History of the University of Pennsylvania, from Its Origin to the Year 1827* (Philadelphia, 1834), 60.

extensive analysis of “the causes, the origins, the progress, the history, the kinds, the parts, and the properties of government.”²⁴ James Kent, who began his lectures at Columbia three years later, agreed with this broad vision of legal education encompassing law, philosophy, and politics. In his inaugural lecture he spoke of the “singular obligation” Americans had “to place the Study of the Law at least on a level with the pursuits of Classical Learning,” which at the time made up the prestigious core of a gentleman’s education. Through sustained study, he hoped his students would acquire the “masterly acquaintance with the leading principles of our Constitutional Polity, and the maxims and general detail of our Municipal Institutions” that they would need to serve as judges, executives, and legislators. Thus, Kent, like Wilson and Wythe, envisioned legal education that addressed political theory and governance, broadly conceived. Only this curriculum, Kent believed, could “preserve [the] Fruits of . . . Independence.”²⁵

These professors thus staked out ambitious claims for the role of the law and lawyers in American life. As Wilson put it, a legal education was “useful entertainment to gentlemen of all professions, but particularly [critical] in forming the legislator, the magistrate, & the lawyer.”²⁶ Kent agreed. Learning law was a central part of “complete

²⁴ James Wilson, *Lectures on Law*, in *Collected Works of James Wilson*, vol. 1, eds. Kermit L. Hall and Mark David Hall (Indianapolis: Liberty Fund, 2007), 457-58; *Ibid.*, 458, quoting Henry St. John, the first Viscount of Bolingbroke.

²⁵ James Kent, “An Introductory Lecture to a Course of Law Lectures” (1794) in *American Political Writings During the Founding Era*, vol. 1, eds. Charles S. Hyneman and Donald S. Lutz (Indianapolis: Liberty Fund, 1983), 937-38, 949. For the importance of classical learning see Caroline Winterer, *The Culture of Classicism: Ancient Greece and Rome in American Intellectual Life, 1760-1910* (Baltimore: John Hopkins University Press, 2001).

²⁶ Wilson, *Lectures on Law*, 403. Wilson was invited to give the lectures by the Board of Trustees of the College of Philadelphia. This quote comes from a plan for the lectures written by Wilson and two members

course of public Education” in a country no longer “degraded by the fetters of . . . tyranny.” A thorough legal education would therefore be useful both for lawyers and for anyone else interested in taking part in American political life. It would not only prepare students to become working lawyers but also enable them to participate in a novel scheme of constitutional governance, to “maintain[] social order and promote[] social prosperity.” Law was the key to sustaining the Republic and so were those who knew the most about law: lawyers.²⁷

As Robert Ferguson has recognized, many elite lawyers in the early nineteenth century held similar views, believing that they were “republican intellectual[s]” capable of acting as “guardians of the state and of law.” Such a perspective grew naturally from the roles lawyers had assumed in the fight for independence and the drafting of the Constitution. The American Revolution thrust law and legal arguments to the fore, and after the Revolution, the legal profession continued to play an important role in the governing and development of the new country. Lawyers like Wythe, Kent, and Wilson had witnessed firsthand the important role the profession had played in the Revolution and its aftermath. Before he began teaching, Wythe had served as the attorney general for colonial Virginia, and as a member of the House of Burgesses. Wythe had participated actively in revolutionary activities, served as member of the Second Continental Congress, and signed the Declaration of Independence. He worked with Thomas Jefferson, his former apprentice, to revise and codify Virginia’s laws, helped to establish the state’s court system, served as the speaker of the Virginia House of Delegates, and

of the Board of Trustees. Wilson appears to have been the main drafter of the plan. See Page Smith, *James Wilson: Founding Father, 1742-1798* (Chapel Hill: University of North Carolina Press, 1956), 308.

²⁷ James Kent, “An Introductory Lecture,” 937. See also Dill, *George Wythe*, 43.

represented Virginia at the Constitutional Convention. James Wilson had served alongside Wythe in the Second Continental Congress as one of Pennsylvania's representatives. He too had signed the Declaration of Independence, and, in 1787, he was one of the most important framers at the Constitutional Convention. James Kent had a less prominent political career but had served in the Assembly of New York and was deeply interested in constitutional law questions before he began his lectures.²⁸

Wythe, Wilson, and Kent's broad curricula reflected their experience with constitutional law and governance and their belief that their students needed to master the tools that would allow them to play similar roles in American life. Wythe, who began lecturing at William and Mary in 1779, assigned and taught legal texts, such as William Blackstone's *Commentaries*, Matthew Bacon's *Abridgement of the Law*, and the statutes compiled in *Acts of Virginia*, that most apprentices would have been expected to read during their clerkships. He also included, however, readings in political theory by David Hume and Montesquieu, and he expected his students to burnish their education with classes in science, ethics, and religion. Wythe's vision for legal education included organized moot courts, in which students would pretend to be judges and litigators, and a mock legislature, where they would play the role of politicians and lawmakers. By educating his students in law, political theory, the classics, and governance, Wythe

²⁸ Robert A. Ferguson, *Law and Letters in American Culture* (Cambridge, MA: Harvard University Press, 1984), 84; Jack Greene, *The Constitutional Origins of the American Revolution* (Cambridge: Cambridge University Press, 2010); Thomas Hunter, "The Teaching of George Wythe," in *The History of Legal Education in the United States: Commentaries and Primary Sources*, vol. 1, ed. Steve Sheppard (Pasadena, CA: Salem Press, 1999), 138-42; William Ewald III, "James Wilson and the Drafting of the Constitution," *Pennsylvania Journal of Constitutional Law* 10 (2008): 905; Horton, *James Kent*, 35, 55-59. Kent would later evidence his interest in these questions in his judicial decisions and his *Commentaries*.

prepared them to play the critical role in law and governance that he and other elite lawyers envisioned for the profession.²⁹

Wilson instituted a similarly broad curriculum at the College of Philadelphia, when he began lecturing in 1790. He made space in his lectures for lengthy lessons on “general principles of law and obligation;” the “principles,” “nature,” and “history” of the common law; “the nature and philosophy of evidence;” “the nature, the history, and the jurisdiction of courts in general;” “the powers and duties of judges, juries, sheriffs, coroners, counselors, and attorneys;” “the causes, the origins, the progress, the history, the kinds, the parts, and the properties of government;” and the legislative, executive, and judicial powers of the United States and the states.³⁰ Wilson supported his lessons with citations both to legal authorities, such as William Blackstone, Samuel von Puffendorf, Hugo Grotius, and Lord Coke, and philosophical ones, such as George Berkeley, Thomas Hobbes, John Locke, and Thomas Reid. Like Wythe, he organized moot court and mock legislative sessions for his students. Even these involved theoretical issues. His first moot court was on the question of whether “the law [had] the importance and dignity of a profession” and mock legislative sessions involved issues such as restrictions on manufacturing and trade and the representation of property in the Pennsylvania house.³¹

James Kent, who began his lectures at Columbia in 1793, also shared an expansive vision of legal education. His plan for his lectures included discussion of “the

²⁹ Joyce Blackburn, *George Wythe of Williamsburg* (New York: Harper and Row, 1975), 105; Hunter, “Teaching,” 142; W. Hamilton Bryson, “Introduction,” in *Legal Education in Virginia, 1779-1979: A Biographical Approach*, ed. W. Hamilton Bryson (Charlottesville: University of Virginia Press, 1982), 22-3; Imogene E. Brown, *American Aristides: A Biography of George Wythe* (Madison, NJ: Fairleigh Dickinson University Press, 1981), 203.

³⁰ James Wilson, *Collected Works*, 343, 344, 460-61.

³¹ Smith, *James Wilson*, 336-38. Even a more practical moot on “profert and ofer,” was preceded by a lecture on “Process Proceedings and Pleadings,” praising the “mysterious science of the law.” Ibid.

nature and duties of Government in general;” treatment of the various forms of government; a political history of the United States; coverage of the law of nations, extensive treatment of the Constitution and laws, including the powers of the branches, executive departments, and courts; “an historical and critical examination of the elementary parts of a Suit at Law;” an analysis of the federal government; lessons on admiralty law, equity law, criminal law, and state constitutions; and, finally, a discussion of New York municipal law, with particular attention to property, contracts, private actions, and crimes. A full legal education, Kent believed, should also include a study of the British constitution and its code of laws, Roman civil law, logic and math, moral philosophy, and public speaking.³²

These broad curricula, Wythe, Wilson, and Kent believed, would prepare their students to fulfill the role lawyers would surely play in the novel American scheme of government—to make them, in Kent’s words, “fit for the administration of public affairs” and ready “to govern the commonwealth by his councils, establish it by his Laws, and correct it by his Example.”³³ Wythe and Wilson concurred. For them, a liberal legal education was not just noble, but practical. They taught constitutional law and political theory because they believed it was important, and because they had found it useful in their own legal careers. They aimed, in other words, to prepare their students to fulfill the same roles that they and their colleagues had in organizing and manning the basic institutions of American government.

³² Horton, *James Kent*, 87; Kent, “An Introductory,” 944-48.

³³ *Ibid.*, 944.

Wythe, Wilson, and Kent's desire to create students ready to govern reflected a concern outside of the legal profession. As Kent noted, "the general attention of mankind [was] strongly engaged in speculations on the Principles of Public Policy."³⁴ The ambitious course of lectures offered by Kent and his colleagues thus reflected trends in American education more generally, at a time when other educators were interested in training their fellow citizens to function as a self-governing people.³⁵ It is not surprising, then, that Wythe, Wilson, and Kent's lectures began with the support of those who had been involved in framing the American government. Wythe's chair was established at William and Mary with the help of his former clerk, Thomas Jefferson. The public viewed Wilson's lectures, held in the nation's capital (then Philadelphia), as an important political event. The audience at the first lecture included the President, the First Lady, the Vice President, members of both houses of Congress, and both houses of the Pennsylvania legislature. At a time when there were fewer than 200 lawyers in the entire state of Massachusetts, Kent's lectures attracted more than forty students in his first year, including professional lawyers who had already started their careers. All three courses of lectures promised to give the profession—and the country—what it needed: a replacement for the apprenticeship form that taught American lawyers the diverse skills they needed in a young republic.³⁶

³⁴ Ibid., 937

³⁵ See Lawrence Cremin, *American Education: The National Experience, 1783-1876* (New York: Harper and Row, 1980), 103-105. According to Cremin, the "virtuous republic" style of education, in which education was deemed important as a tool of self-governance, had gained popularity by the 1820s and was manifested in universities, colleges, primary education, newspapers, and churches. Ibid. 103-217. Notably, Native Americans and slaves were excluded. Ibid. 218-51.

³⁶ Hunter, "Teaching," 143; Mark David Hall, "Bibliographical Essay: History of James Wilson's Law Lectures," in James Wilson, *Collected Works*, vol. 1, 403; Craig Evan Klafter, *Reason over Precedents:*

In practice, however, the legal training provided at William and Mary, the College of Philadelphia, and Columbia failed to replace apprenticeship or significantly shape the course of the profession. None of the schools educated a significant number of lawyers. Of the three, William and Mary was the most successful. Wythe taught there for nine years until he resigned in 1788. His successor, St. George Tucker, took over the chair for another fourteen years, before leaving the college. In total, however, they educated less than one hundred law students.³⁷ Wilson and Kent trained even fewer young men. Wilson discontinued his lectures after finishing only half of his initial course.³⁸ Only a few of his students became lawyers. Kent's enrollment decreased from forty-three in his first year to merely two in his second. He resigned his chair in the spring of 1797, just four years after he had begun.³⁹

Why did these attempts at building a new American system of legal education fail? One problem might have been that the lectures were hindered by their settings in universities. As part of larger educational institutions, Wythe, Wilson, and Kent faced bureaucratic hurdles. According to one account, Wythe resigned after an administrative reorganization left William and Mary in more conservative hands. His successor, St. George Tucker, resigned following a similar dispute with the college administration.⁴⁰ In

Origins of American Legal Thought (Westport, CT: Greenwood Press, 1993), 10. According to Gawalt, there were 71 lawyers in Massachusetts in 1775 and 200 in 1800. Gawalt, *Promise of Power*, 200.

³⁷ Craig Evan Klafter, "The Influence of Vocational Law Schools on the Origins of American Legal Thought, 1779- 1829," *American Journal of Legal History* 37 (1993): 322.

³⁸ Wilson's later lectures were supposed to have been more practical, focusing on the "retail business" of the law. Ewald, "James Wilson," 914.

³⁹ Klafter, *Reason over Precedents*, 10.

⁴⁰ Hunter, "George Wythe," 157-58; In Tucker's case, university administrators complained of his habit of giving lectures at his house, which Tucker did because he liked being able to access his law library during lectures. Charles T. Cullen, "St. George Tucker: College of William and Mary, 1790-1804," in *Legal*

addition to dealing with bureaucracies, law teachers in universities needed to develop legal curriculums that fit within the context of collegiate institutions. Until the late-nineteenth century, colleges lacked departmental structure, shunned specialization, and were dominated by religion. They focused on classics and math and had yet to become the breeding grounds of professionalization that they would in the future.⁴¹ Within this environment, a more practically focused legal education may have drawn the ire of other professors and the university administration.

A second problem may have been a lack of interest on the part of the professors. Wythe and Wilson, especially, had many other obligations and opportunities. Wythe, who had been named the sole judge of the Virginia Chancery Court in 1788, needed to be able to sit in Richmond to fulfill those duties. Wilson received his commission to serve on the United States Supreme Court in 1789, just a few months before he began his lectures. He also had plans to work on digests of the law, which he may have thought were a better—and more lucrative—place to exert his energies.⁴² Kent was named Recorder of New York City the same year he resigned his chair at Columbia. A year later

Education in Virginia, 1779-1979: A Biographical Approach, ed. W. Hamilton Bryson (Charlottesville: University Press of Virginia, 1982), 683-84

⁴¹ See Laurence R. Veysey, *The Emergence of the American University* (Chicago: University of Chicago Press, 1965). But see John R. Thelin, *A History of American Higher Education* (Baltimore: John Hopkins University Press, 2004). For more on the later development of universities and their relationship to professionalization see Christopher J. Lucas, *American Higher Education*; Thomas L. Haskell, *The Emergence of Professional Social Science* (Baltimore: John Hopkins University Press, 2000); Burton Bledstein, *The Culture of Professionalism: The Middle Class and the Development of Higher Education in America* (New York: W.W. Norton and Co., 1978).

⁴² Ewald, "James Wilson," 914. Wilson's decision may also have been motivated by financial difficulties and his courting of his future wife. See Paul D. Carrington, "The Revolutionary Idea of University Legal Education," *William and Mary Law Review* 31 (1990): 549-50.

he was appointed as a justice on the New York Supreme Court.⁴³ With these other opportunities, the teachers had less reason to make the compromises that may have been required to attract students.

Finally, the success of the schools might have been hindered by the quality of the instruction. Reports of Wythe's teaching are mixed. Even though Jefferson supported Wythe's appointment as a professor, he had not been impressed with his clerkship experience.⁴⁴ Wilson's clerks, too, had criticized him, for his less-than-stellar teaching.⁴⁵ Likewise, Kent met with criticism for being "unusually bookish" and distant.⁴⁶

In any case, students appeared to have found broad legal education impractical. One of Wythe's students, for example, complained that his "theoretical study" had not prepared him to practice law. Even after St. George Tucker took over for Wythe at William and Mary and instituted a "more pragmatic and less scholarly" curriculum, his students complained that their school's broad focus on constitutional law and political

⁴³ At the time Kent was appointed, recorders served as a judge on the Court of Common Pleas for the City and County of New York. When he was appointed to the Supreme Court, it was the highest court in the State of New York. Horton, *James Kent*, 111-12.

⁴⁴ See Thomas Jefferson to John Garland Jefferson (June 11, 1790) quoted in McKenna, *Tapping Reeve*. Jefferson seemed, however, to have changed his mind about Wythe as a teacher, remarking that when Wythe left his legal chair, the experiment in legal education was "all over." See Bryson, "Introduction," 24.

⁴⁵ According to his biographer,

Wilson devoted little of his time to the students in his office . . . and rarely entered it, except for the purpose of consulting books. Hence his intercourse with them was rare, distant, and reserved. As an instructor he was almost useless to those who were under his direction. He would never engage them in professional discussion; to a direct question he gave the shortest possible answer and a general request for information was always evaded.

See Robert Waln, *Biography of the Signers to the Declaration of Independence*, vol. 6 (Philadelphia, 1824), 171-72.

⁴⁶ Horton, *James Kent*, 389.

theory inadequately prepared them for careers as lawyers.⁴⁷ Wilson, who according to a biographer had “forgotten” or tired of the technical details of pleading at the common law, discontinued his lectures before teaching his students the practical skills of a working lawyer. His failure to teach basic legal skills may explain why someone with his stature in the profession did not retain a larger audience of students.⁴⁸ Similarly, Kent’s “[a]cademical” lecture style explain why so few of his students completed a full course of his lectures.⁴⁹ As for the “gentlemen of all professions” seeking a “complete course of public Education,” they too appear to not have attended the lectures in significant numbers. By 1804 all three lectureships had been discontinued. Little demand existed for an expansive legal education, at least from the people who were supposed to benefit from it.

For young men interested in a legal career, the preference for a legal education grounded in practice was understandable. Although some lawyers would apply political theory and constitutional law in their work, many more would not. The federal government in early America was small, and it played a relatively minor role in most American’s lives. The Federal Constitution was even more remote. Constitutional issues that did arise were often contested—and resolved—outside of the courts. The United States Supreme Court decided only 63 cases before John Marshall became Chief Justice

⁴⁷ George Short, quoted in Hunter, “George Wythe,” 152; Charles T. Cullen, *St. George Tucker and Law in Virginia, 1772–1804* (New York: Garland Publishing, 1987); 121-22, 134, 136, 145; Cullen, “St. George Tucker,” 682-83.

⁴⁸ See *Charles Warren, A History of the American Bar* (Boston: Little, Brown, and Co., 1911), 173.

Accounts of the quality of Wilson’s teaching differ. See Paul D. Carrington, “Revolutionary Idea,” 549-50.

⁴⁹ See Kent, “An Introductory,” 944.

in 1801.⁵⁰ The highest court in New York, by contrast, decided 143 cases in 1800, and the Court of Common Pleas for a single county in Massachusetts docketed more than 2,500. Even after Justice Marshall joined the Supreme Court and helped to expand its prestige and importance, the Court decided few constitutional cases. For every *Marbury vs. Madison* or *Dartmouth College v. Woodward*, the justices considered dozens of cases involving private law. Although state constitutions exerted a bigger influence on the lives of most Americans than the Federal Constitution, cases involving state constitutional issues were also rare, and state court dockets reflected a similar focus on private law. The number of attorneys who devoted their primary practice to constitutional cases was tiny. Most lawyers, even those actively engaged in politics and constitutional theorizing, earned a living through the practice of private law, especially on behalf of commercial clients.⁵¹ Political theory did not pay the bills. Lectures, no matter how erudite, therefore

⁵⁰ George Lee Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall 1801-1815, The Oliver Wendell Holmes Devise History of the United States Supreme Court*, vol. 2 (Cambridge: Cambridge University Press, 1981), 379. The numbers for the New York Supreme Court are based on a Westlaw search, and the Connecticut numbers come from Middlesex County. See Gawalt, *Promise of Power*, 29.

⁵¹ For a discussion of the limitations of the federal government and Constitution see John M. Murrin, "A Roof without Walls: The Dilemma of American National Identity," in *Beyond Confederation: Origins of the Constitution and American Identity*, eds. Richard Beeman, Stephen Botein, Edward C. Carter III (Chapel Hill: University of North Carolina Press, 1987); Richard Bense, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (Cambridge: Cambridge University Press, 1991); Christian Fritz, "Out from the Shadow of the Federal Constitution: An Overlooked American Constitutionalism," *Rutgers Journal of Law* 41 (2011): 851-79, arguing that the Federal Constitution was not important in the lives of most people until after the Civil War. But see Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge: Cambridge University Press, 2009). Even Balogh, however, argues that the national government intervened indirectly, often through state and local governments.

State constitution, were generally more powerful than the Federal Constitution but still limited. See Mark W. Kruman, *Between Authority and Liberty: State Constitution-making in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1997); Fritz, "Out from the Shadow."

For the role of the court and people in Constitutional interpretation see Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2005).

faced a substantial barrier to acceptance if they did not teach the skills and knowledge lawyers regularly needed in practice. It was one thing for successful lawyers to praise the value of expansive visions of the law's place in American life and another to convince young men to pursue legal training along these lines.⁵²

A strong demand did exist, however, for a practical legal education. Tapping Reeve, the man who would help fill it, was an eccentric figurehead for the most successful law school in the common law world. His idiosyncrasies were legendary. Edward Deering Mansfield, who attended Litchfield in 1823, reported that Reeve was so absent-minded that "he was seen walking up North street, with a bridle in his hand, but without his horse, which had quietly slipped out and walked off." According to Mansfield, Reeve never realizing the horses, absence, "calmly fastened the bridle to a post, and walked into the house." More reliable stories confirmed Reeve's eccentricity. According to an article published in his local paper, Reeve kept a pet robin (named Bob) whom he trained to do a number of tricks, including providing morning wake-up calls to

Despite strikingly different approaches, Morton Horwitz, William Nelson, Bruce Mann, Dan Hulsebosch, and Laura Edwards have all written of the dynamic relationship between lawyers and commerce. See Morton Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, MA: Harvard University Press, 1977); William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge, MA: Harvard University Press, 1975); Bruce Mann, *Neighbors and Strangers*, especially 6 for his discussion of the frequency of debt-related litigation; Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005); Laura Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009)

⁵² Bowing to this reality, Wythe, Tucker, Wilson, and Kent found alternative ways to transmit their visions of law. All four served as judges: Wythe as Virginia Chancellor; Tucker as a member of the General Court of Virginia, Virginian Supreme Court of Appeals, and the U.S. District Court for the Eastern District of Virginia; Wilson as a justice on the U.S. Supreme Court; and Kent as a justice on the New York Supreme Court and as the Chancellor of New York. And three published versions of their legal visions: Tucker, in his American edition of Blackstone's *Commentaries* (1803), Wilson in his posthumously published legal lectures (1804), and Kent in his *Commentaries on American Law* (1826-1830). In these sources the former law teachers gained more renown, contributing to the legal culture they had hoped to spur in their lectures.

the boarder who lived in Reeve's house. After his first wife Sally died, Reeve married his housekeeper, a fact that occasioned commentary from his contemporaries, especially because, as the daughter of Litchfield's famous preacher, Lyman Beecher, put it, Reeve's second wife "was the largest woman [she] ever saw" and "had no pretensions to beauty." Reeve also had problems with his vocal chords, forcing him to conduct most of his lessons in "a whisper." In addition to his peculiarities, Reeve lacked the legal pedigree of Wythe, Wilson, and Kent. When he started taking apprentices, Reeve had not served in political office, drafted constitutions, or signed the Declaration of Independence. Nor did Reeve appear to harbor ambitions to become a great legal thinker or a transformer of American legal education. He also lacked institutional support; when he started his school, he was the only teacher, and he neither sought or nor established an affiliation with a college or university.⁵³

Reeve's apparent weaknesses seem to have contributed to his school's popularity. Eccentricity, for example, was part of Reeve's charm. When William Dickinson Martin arrived in Litchfield and encountered his teacher, he "found Reeve the man [he had] so often hear'd him describ'd—Kind, Hospitable, & eccentric."⁵⁴ Moreover, Reeve's modest background likely contributed to his effectiveness as a teacher because it forced him to acquire the extensive teaching experience that some other legal educators lacked.

⁵³ Edward Deering Mansfield, *Personal Memories, Social, Political, and Literary, with Sketches of Many Noted People, 1803-1843* (Cincinnati: 1879), 42, 127; "Extract of T. Reeve, Esq. (an eminent Counsellor in Connecticut to Mr. R. Smith of Litchfield)," *Litchfield Monitor*, March, 21, 1798; C.E. Beecher, "Reminiscences of Litchfield," in *Autobiography, Correspondence, Etc. of Lyman Beecher, D.D.*, vol. 1 ed. Charles Beecher (New York: 1865), 224. According to Beecher, although Reeve "always spoke in a whisper," he spoke "so distinctly that a hundred students at once could take notes as he delivered his law lectures."

⁵⁴ William Dickinson Martin, *Journal: A Journey from South Carolina in the Year 1809*, ed. Anna D. Elmore (Charlotte: Heritage House, 1959), 42.

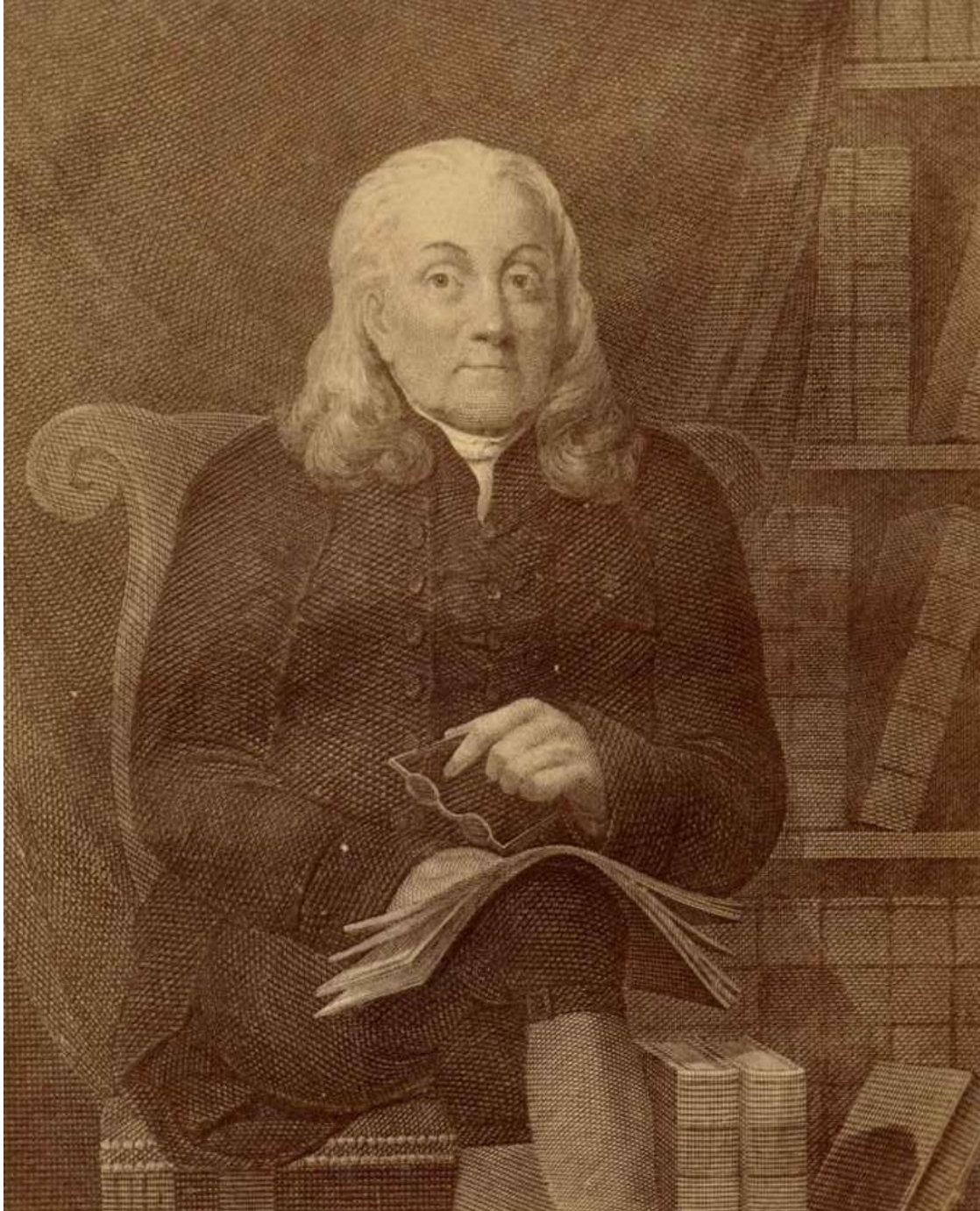
Finally, Reeve's lack of a university affiliation both allowed and encouraged him to offer a practical professional education. Reeve's need to attract students who were willing to pay for a legal education meant that he had to stay attuned to what his students wanted. The law school's proprietary nature also insulated Reeve from university administrators and the pressure of trying to justify his curriculum's place among more traditional subjects of university education like philosophy and the classics.

Reeve's school grew gradually out of the apprenticeship tradition. After he attracted more apprentices, he started giving organized lectures, which he began in 1782. By 1784, Reeve had attracted enough students to justify building a school house next to his home and by 1798, a large enough number to justify adding his former student, James Gould, as an instructor. Gould, who was born in Branford, Connecticut in 1770 into a family of doctors, shared Reeve's legal and educational credentials. He attended Yale, where he graduated first in his class in 1791, and like Reeve, he had worked as a teacher before beginning his legal studies, which he had commenced at Litchfield in 1795. Although Gould lacked extensive legal experience before he began teaching alongside Reeve, he became an accomplished practitioner while working at the law school and was named to the Connecticut Superior Court in 1816. Gould took over giving all lectures when Reeve retired in 1820. Even at the Litchfield Law School's peak in popularity, both Reeve and Gould continued to practice, and Reeve continued to refer to the school as a law office, reflecting the institution's focus on practical legal education rather than theoretical instruction. Others, however, came to call it the Litchfield Law School.⁵⁵

⁵⁵ Andrew M. Siegel, "To Learn and Make Respectable Hereafter": The Litchfield Law School in Cultural Context," *New York University Law Review* 73 (1998): 2003. For Reeve's description of his law school as

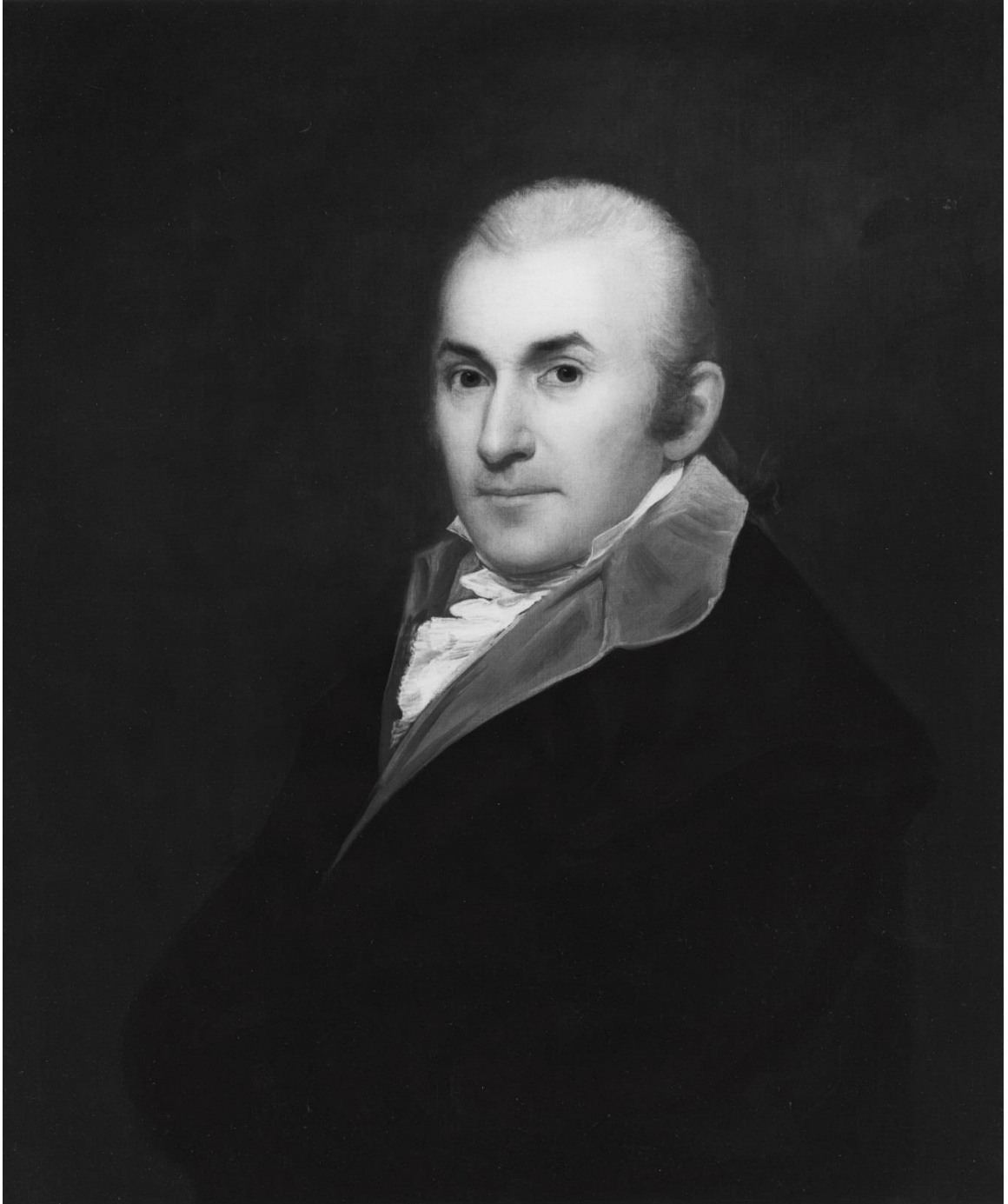
an office see Litchfield Law School Program (1827), Litchfield Law School Collection, Helga J. Ingram Memorial Research Library, Litchfield Historical Society, Litchfield, CT (hereinafter “LHS”); Edgar L. Ormsbee to Augustus Hand, July 19, 1827, Litchfield Law School Collection, LHS; McKenna, *Tapping Reeve*, 59.

For more on Gould see Simeon E. Baldwin, “James Gould 1770-1838,” in *Great American Lawyers*, vol. 2, ed. William Draper Lewis (Philadelphia: J.C. Winston Co., 1907), 456-457, 474. Gould only served on the Connecticut Superior Court for two years, after which he was removed as part of an attack on Federalist judges. *Ibid.*



*Tapping Reeve, Founder of the Litchfield Law School*⁵⁶

⁵⁶ Engraving of Tapping Reeve by Peter Maverick, based on a portrait by George Catlin, who had trained at the Litchfield Law School before becoming a successful painter. Catlin is best known for his portraits of Native Americans. See Benita Eisler, *The Red Man's Bones: George Catlin, Artist and Showman* (New York: W. W. Norton and Co., 2013).



James Gould, Second Teacher of the Litchfield Law School⁵⁷

⁵⁷ Samuel Lovett Waldo, The Honorable James Gould (1770-1838), B. A. 1791, M. A. 1794, LL.D, 1819, Yale University Art Gallery.



Interior of the Law School



Exterior of the Law School⁵⁸

⁵⁸ This version of the school measured just over 400 square feet. Crofut, *Guide to the History*, 400. Both pictures taken by Justin Simard in Litchfield, CT.

The Litchfield Law School's curriculum reflected its roots in the apprenticeship tradition. Reeve's and Gould's students took meticulous notes, recording lectures in detail and later copying them into bound volumes designed to serve as a reference tool in practice. Surviving student notebooks illustrate that the curriculum focused almost exclusively on private law rather than on public law or philosophy. The lectures thus provided students with a comprehensive overview of major common law subjects. They learned about the law of the household in lectures they recorded under headings such as domestic law, master and servant, baron and femme, parent and child, and guardian and ward, and they learned how inheritance worked in discussions of executors and administrators. Reeve and Gould also devoted time to teaching their students how to address private wrongs, and their students recorded these lectures in their notebooks under headings such as trespass on the case *ex delicto*, trespass *vi et armis*, slander, assault and battery, false imprisonment, malicious prosecution, and nuisance.

Although Reeve and Gould provided comprehensive treatment of the law, they devoted the bulk of their lectures to skills that lawyers would find useful when practicing on behalf of commercial clients. To prepare their students for work related to debt, a subject which would play a major role in many of their practices, Reeve and Gould lectured on bills of exchange, promissory notes, usury, notice and demand (for overdue payment), and action of account (used to recover money). They also taught students how to navigate the rules of exchange related to personal property and real estate. Students recorded these lessons under headings such as mortgages, real property, alienation by deed, ejectionment (used to evict a tenant), disseisin (used to recover land), and real actions

(used for suits related to property). To prepare students to deal with contracts, they taught them about devises, inducement, fraudulent conveyances, covenants, assumpsit (used to sue for breach of contract), and tender. Students also recorded lectures geared toward commercial practice, which they classified under headings such as mercantile law, partnerships, law merchant and *lex mercatoria* (special rules used in certain commercial suits), bailments (for lending property), sailors, inn keepers, and insurance.

In addition, Reeve and Gould's lectures taught their students how to threaten and bring suit. Their students recorded lectures on pleading, including information on the general rules of the subject, declaration, joinder (used to bring multiple issues into a single trial), traverse (used to deny a factual allegation), protestation (used to deny a fact in subsequent litigation), bills of exception (used for appeals), and new trials. They also learned about the law of evidence and statutes of limitations. As to remedies, they learned how to request the exercise of governmental power on behalf of their clients in lectures they recorded under headings such as sheriffs & gaolers, levy of execution, powers of chancery, award & arbitrament, mandamus, and prerogative writs.

Students recorded a few lectures on public law such as those on municipal law and murder, but they avoided constitutional law almost completely; some students' notebooks contained a page or two on the subject, others nothing at all. With this extensive coverage of the common law, Reeve and Gould outlined the essential knowledge needed by a practicing American lawyer, placing emphasis on the fields related to commercial law that would dominate many of their students' practices.⁵⁹

⁵⁹ See Asa Bacon, *Student Notebooks, 1794*, Litchfield Law School Collection, LHS; Ebenzer Baldwin, *Student Notebooks, 1810*, Litchfield Law School Collection, LHS; William S. Andrews, *Lectures Upon the*

Befitting their practical orientation, lectures given by Litchfield's teachers built on legal sources cited and relied on by litigators and judges. Student notebooks contain references to English sources such as William Blackstone's *Commentaries*, the writings of Lord Coke, William Hawkins' *Pleas of the Crown*, Edmund Plowden's *Commentaries and Reports*, Matthew Bacon's *Abridgement*, Charles Viner's *Abridgement of Law and Equity*, William Salkeld's *King's Bench Reports*, and American sources including Ephraim Kirby's *Reports of the Superior Court of Connecticut*, other state reporters, and U.S. treatises.⁶⁰ Reeve and Gould thus relied on classic common law sources, the type also studied by apprentices. In their lectures, Litchfield's teachers discussed these sources in concert rather than one at a time, modeling the way that lawyers in practice relied on citations to multiple treatises to strengthen their arguments. Despite their breadth, the lectures did not include references to the sources on political philosophy and metaphysics found in the lessons of other professors.

The substance of the lectures reflected the practical focus that their topics and citations suggested. Reeve's lecture on evidence, for example, dispensed with elaborate theoretical opening, in favor of a two-sentence introduction to the concept of evidence. He then proceeded to the "the general rule respecting testimony," that the "best evidence the matter in dispute will admit of is to be and must be provided." This advice was

Various Branches of Law by Reeves and Gould at the Law School in Litchfield, Conn, 1812-1813, vol. 2, Harvard Law School Library (hereinafter "HLS"); Notes of Reeve's Lectures on Various Legal Subjects in the Litchfield Law School, 1808, vol. 2, HLS; Nash Lonson; Lectures on Various Legal Subjects Delivered in the Litchfield Law School, 1803, vol. 1, HLS; Henry Holton Fuller, Lectures of Tapping Reeve, Litchfield Law School, 1812-13, vol. 1, HLS; Caleb Stark, Lectures of James Gould, Litchfield Law School, 1824-25, vol. 3, HLS; Samuel Cheever, Lectures of Reeve and Gould, Litchfield Law School, 1812, vol. 2, HLS; T. S. Fullerton, Lectures of James Gould, Litchfield Law School, 1810, vol. 7, HLS.
⁶⁰ See Unknown, Student Notes, Litchfield Law School Collection, LHS, citing sources in margins; George Gould, Student Notes, Litchfield Law School Collection, LHS.

followed by the flagging of a real-world exception. The best evidence rule, according to Reeve, was “not be found to prevail in its full extent in many cases.” Reeve followed his introduction with an in-depth analysis of specific evidentiary rules related to written testimony, records, and legislative acts. Under these headings, Reeve worked methodically; on written testimony, for example, he distinguished between “Records by which are meant Legislative or Judiciary acts,” and “other matters of record which are not properly judiciary acts as records of marriages, births,” which he explained fell into a different category, the “memorandum.” Reeve proceeded carefully through the rest of the subject, discussing, for instance, when copies of documents were admissible, how to provide evidence for statutes, the admissibility of executions, the rules for depositions, the standards for production of deeds, and the use of handwriting comparisons. Through his discussion of evidence, Reeve laid out the basic legal framework and covered the type of issues that students later encountered in disputes over contracts, mortgages, and promissory notes.⁶¹

A comparison with Wilson’s treatment of the same subject is illustrative. Wilson began his lecture on evidence with a wide-ranging discussion that included citations to Locke, the Marquis of Beccaria, Thomas Reid, Blackstone, and the Bible. This was necessary, Wilson maintained, to “remove the sandy and unsound foundation, on which the principles of the law of evidence have been placed.” After he established this foundation, a discussion that occupies more than thirty pages in the printed version of his lecture, Wilson acknowledged that he had not discussed the “artificial rules of evidence”

⁶¹ Notebook of Moses Ogden Edwards, 1801, Lillian Goldman Law Library, Yale University, New Haven, CT (Hereinafter “LGLL”); Notebook of Robert Fairchild, 1794, Litchfield Law School Collection, LHS.

which govern in the courts. These rules he believed “ought to be studied and known,” but there were other times and places for that study, such as “in the several law books” where “[p]articular rules may be seen [and] adapted to particular cases” to assist practitioners in “the retail business of law.” Wilson claimed that the legal rules of evidence should not “be neglected,” but he felt that it was “far more essential” to understand “the study and the practice too of the law, as a science founded on principle, and on the nature of man.” After all, he continued, “The powers and the operations of the human mind [were] the native and original fountains of evidence.” Once his students mastered this philosophical foundation they would have no trouble using evidence “on proper occasions, in all the forms, and with all the ornaments, suggested and prepared by the most artificial contrivances.”⁶² Philosophical understanding, in other words, would ground legal practice. For Wilson, this grounding was not merely useful, but necessary. The contrast with Reeve could not have been starker. Wilson, concerned with big ideas and philosophical principles, could hardly be bothered to delve into the “retail business of the law.” Reeve, on the other hand, understood the retail business of law as the core of his curriculum. He showed less interest in the “powers and the operations of the human mind” than in how lawyers ought to present specific pieces of evidence in court.⁶³

Reeve’s focus on legal rules has led historians to see his lectures, and the school he founded, as relatively uninteresting, its significance deriving mostly from its position

⁶² Wilson, *Lectures on Law*, 798, 825.

⁶³ See also Siegel, “To Learn,” and Angela Fernandez, “Spreading the Word: From the Litchfield Law School to the Harvard Case Method,” (J.S.D. thesis, Yale Law School, 2007). Siegel and Fernandez argue for the Federalist political orientation of Reeve’s school and point out some areas in which Reeve’s lessons reflected his preferences rather than precedent. They also acknowledge, however, the technical legal content of the Litchfield curriculum, and have found Reeve’s interventions in legal subjects, such as domestic law, outside of the commercial legal content that defined the work of Litchfield lawyers.

as a stepping stone to later forms of legal education.⁶⁴ This approach underestimates the importance of the Litchfield Law School for several reasons. First, because Reeve and Gould did more than read directly from Blackstone or the other treatises they cited. It is true that many Litchfield lectures were structured like Blackstone's treatise and used many of the same categories, but lectures were also synthetic; they brought together disparate sources and perspectives on legal issues. Reeve and Gould admitted when law in a given area was unsettled, and would give students a picture of legal conflicts. In a lecture on bonds, for instance, Reeve discussed the result reached by the Vermont Court of Appeals and compared it to that argued for in two different English treatises.⁶⁵ The Litchfield curriculum, also placed a greater emphasis on commercial law than most of the treatises from which it drew, focusing extensive coverage on the rules of contracts and bills of exchange that its graduates frequently encountered in practice. Blackstone, for example, had devoted a much greater portion of his lectures to giving his English readers "Acquaintance with the Constitution and legal Polity of their native Country" than Reeve or Gould did.⁶⁶ Second, this perspective underrates the value of teaching. Although Litchfield lectures seem dry to modern readers, especially when reconstructed from student notes, Litchfield's students valued them immensely both for the clarity they

⁶⁴ John Langbein, for example, argues that the production of hand copied notes "became a fools' errand" due to the increase in the availability of legal publications. John Langbein, *Blackstone*, 30; see also Angela Fernandez, "Copying and Copyright Issues at the Litchfield Law School," *Connecticut History Review* 47 (2008), who argues that a failure to make use of printed law school helped lead to school's downfall and that access to copies of students notes allowed "the nation . . . to obtain[] a Litchfield education without ever having set foot in Litchfield."

⁶⁵ Unknown, Student Notes, L71 1800, LGLL.

⁶⁶ See Wilfrid Prest, "William Blackstone and the 'Free Constitution of Britain,'" *Constitutions and Classics: Patterns of Constitutional Thought from Fortescue to Bentham*, ed. D.J. Galligan (Oxford: Oxford University Press, 2014), 210, quoting William Blackstone, *A Discourse on the Study of the Law* (Oxford, 1758), 2.

brought to the law and for the enthusiasm for the profession they generated. Students deemed Reeve's lessons "masterly productions" and remembered him with "respect and affection."⁶⁷ They wrote that his "genial enthusiasm and generous feelings and noble sentiments" engendered a respect for law, and that "no instructor was ever more generally beloved by his pupils."⁶⁸ Gould was less revered, but he was still greatly admired for the clarity and knowledge he brought to his lectures, his passion for the material, and his "kind and affectionate" manner with his students.⁶⁹ Litchfield, then, gave attendees more than a read-through of Blackstone and other treatises. It exposed students to a variety of legal sources, identified legal conflicts, and helped them develop tools to resolve these conflicts in their legal practice. In short, Litchfield provided its students with the extensive knowledge of private law and legal techniques that they needed for a practice devoted to commercial routine.

Viewing Litchfield purely as a stepping stone also ignores the benefits of the community that the law school helped create. Litchfield students had access to Reeve's extensive legal library, participated in an elaborate moot court, and observed legal

⁶⁷ John Y. Mason to Edmunds Mason, January 28, 1818 reprinted in Francis Leigh Williams, "The Heritage and Preparation of a Statesman, John Young Mason, 1799-1859," *Virginia Magazine of History and Biography* 75 (1967): 322; John P. Cushman to Virgil Maxcy, Aug. 21, 1822, Tapping Reeve Collection, LHS.

⁶⁸ Charles G. Loring quoted in Simeon E. Baldwin, "James Gould," 473; David S. Boardman, "Sketches of the Early Lights of the Litchfield Bar" (1860), reprinted in Dwight C. Kilbourn, *The Bench and Bar of Litchfield County, Connecticut 1709-1909: Biographical Sketches of Members History, and Catalogue of the Litchfield Law School, Historical Notes* (Litchfield, CT: Dwight C. Kilbourn, 1909), 187.

⁶⁹ According to a former student, Gould's lectures were meticulously composed: "He was an admirable English scholar; every word was pure English, undefiled, and every sentence fell from his lips perfectly finished, as clear, transparent, and penetrating as light, and every rule and principle as exactly defined and limited as the outline of a building against the sky . . ." Charles G. Loring cited in Boardman, "Sketches," 187; see also Samuel Church, "Historical Address Delivered at Litchfield, Connecticut, on the Occasion of the Centennial Celebration," (1851) quoted in Kilbourn, *Bench and Bar*, 28, in which the Litchfield student Samuel Church refers to Gould as "a man of impassioned eloquence" who was also "clear and logical." He also praises Gould's "kind and affectionate" demeanor and his extensive knowledge of common law.

practice in the courthouse down the street from the school.⁷⁰ They also benefited from a network of Litchfield alumni and other Litchfield residents that would help them to generate work, and become more effective lawyers, later in their careers. During the school's heyday, Litchfield's population of 4,600 ranked it as Connecticut's fourth largest city. Even though it was landlocked, roads and turnpikes enabled relatively easy access to Litchfield; New Haven was a day away and New York less than two. The town was also served by numerous daily mail stages headed to Albany, Poughkeepsie, Norwalk, and New Haven. Litchfield was a vibrant town. It had its own weekly newspaper and was home to some of Connecticut's most prominent citizens including Oliver Wolcott, a signer of the Declaration of Independence and future Lieutenant Governor of Connecticut, Benjamin Tallmadge, a Colonel in the Revolutionary Army and a member of Congress, and Jedediah Strong, a member of the Continental Congress

⁷⁰ Siegel, "To Learn," 2006-07.

Started as a student-run organization in 1796, the moot court was more elaborate than moot courts today. Each week, the four members assigned for the argument would choose an unsettled legal topic to debate. Two students would argue each side and then each member of a three judge panel would give his decision, which was recorded by the club's reporter. Surviving copies of the reports indicate that students took moot court seriously. Arguments are long, organized, and well-reasoned. Judges' decisions closely mimic the style and format of professional judicial opinions. After students had finished a court session, they often asked Reeve for his thoughts. Reeve usually agreed with the opinion of the majority of the court.

Cases covered at moot court varied widely. Topics ranged from the settling of wills, to the transfer of property, to illegal arrest. ("The question was whether at law the property of an heir is liable for a debt of the testator after the expiration of two years from the publication of the notice to the creditors if the creditor in this case lived of this state & the note did not become due until after notice."); ("A sells a horse to B that has a secret disorder. A affirms him to be sound to B. B before he discovers the disorder sells him to C & in the hands of C the horse dies. Can C have an action directly against A?"); ("An officer having an attachment to force upon a man seizes him on Sunday & keeps him in custody till Monday when he serves the attachment upon him & arrests him. Is this arrest a valid one?").

Although the rules of the club required that legal cases be debated, the students could also decide to suspend the rules to discuss policy issues. See Debate Society Rules. In one moot, for instance, students debated whether judicial review was permissible. Debate Society Rules, ca. 1796, Tapping Reeve Collection, LHS; Record of Moot Court Society, 1797, Litchfield Law School Collection, LHS; see also Donald F. Melhorn, "A Moot Court Exercise: Debating Judicial Review Prior to *Marbury v. Madison*," *Constitutional Commentary* 12 (1995): 327-54;

and a delegate to the Connecticut Convention that ratified the U.S. Constitution.⁷¹

Because there was no official law school boarding house, students usually stayed with local families and could easily participate in the town's vibrant intellectual life. In addition to the first law school in America, Litchfield boasted the Litchfield Female Academy, one of the first schools of higher education for young women in the country. Sarah Peirce's Academy students were the self-acknowledged "catalysts of the town's social activity." In the evening, Reeve's students would attend their musical and theatrical performances and join with the young women in social or intellectual activities. Romantic relationships often developed out of these social contacts, and the resulting marriages broadened a young lawyer's network.⁷²

Reeve's first students came mostly from Connecticut, but by the 1790s the school began to draw students from out of state, and by early nineteenth century it drew these students in significant numbers. As the reputation of the school spread, young men from further away began to come to Litchfield, and the school developed as one student put it,

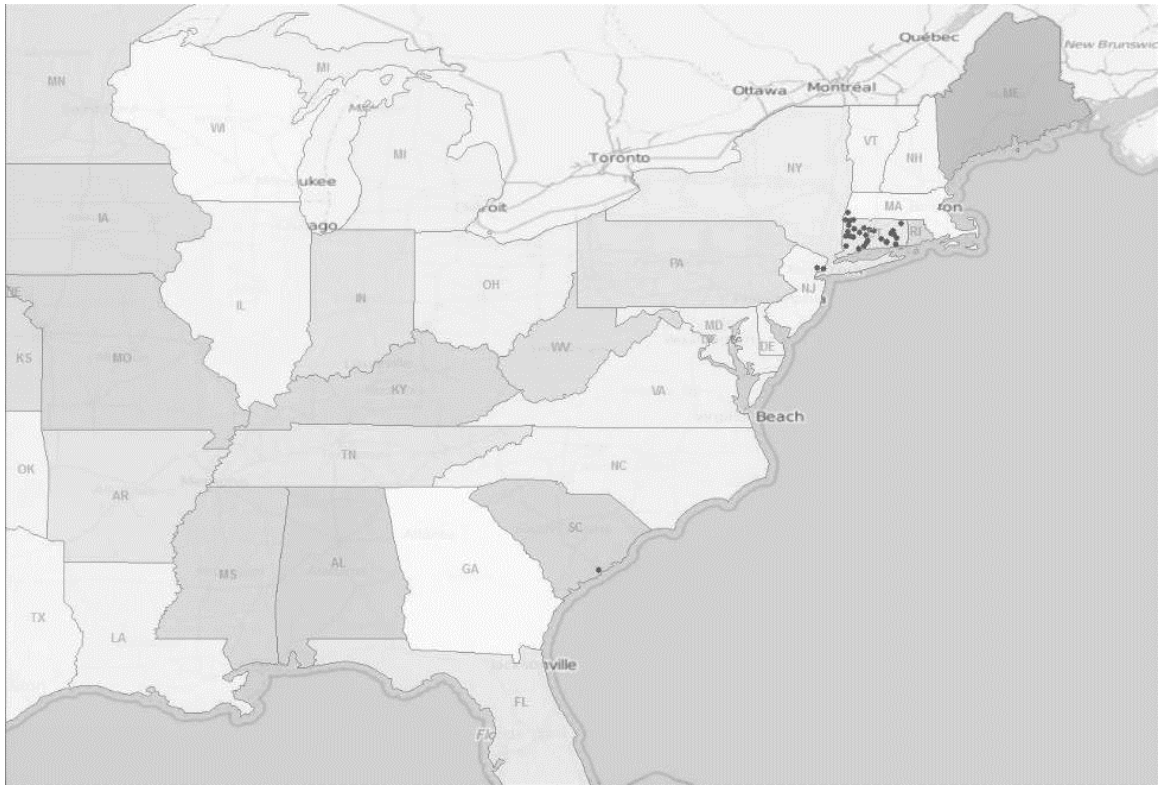
⁷¹ Siegel, "To Learn," 105; Crofut, *Guide to the History*, 395-400; Mark Boonshoft, "The Litchfield Network: Education, Social Capital, and the Rise and Fall of a Political Dynasty, 1784-1833," *Journal of the Early Republic* 34 (2014): 561-95; Baldwin, *James Gould*, 464-68; Fisher, *Litchfield Law School*, 17

⁷² Cornelius Dubois Jr. to Edgar Van Winkle, Oct. 28, 1830, Tapping Reeve Collection, LHS; Fisher, *Litchfield Law School*, 8. Lynne Templeton Brickley, *Sarah Pierce's Litchfield Female Academy, 1792-1833* (Ph.D. thesis, Harvard University, 1985): 394, 410. Templeton Brickley provides an extensive overview of the Litchfield Female Academy.

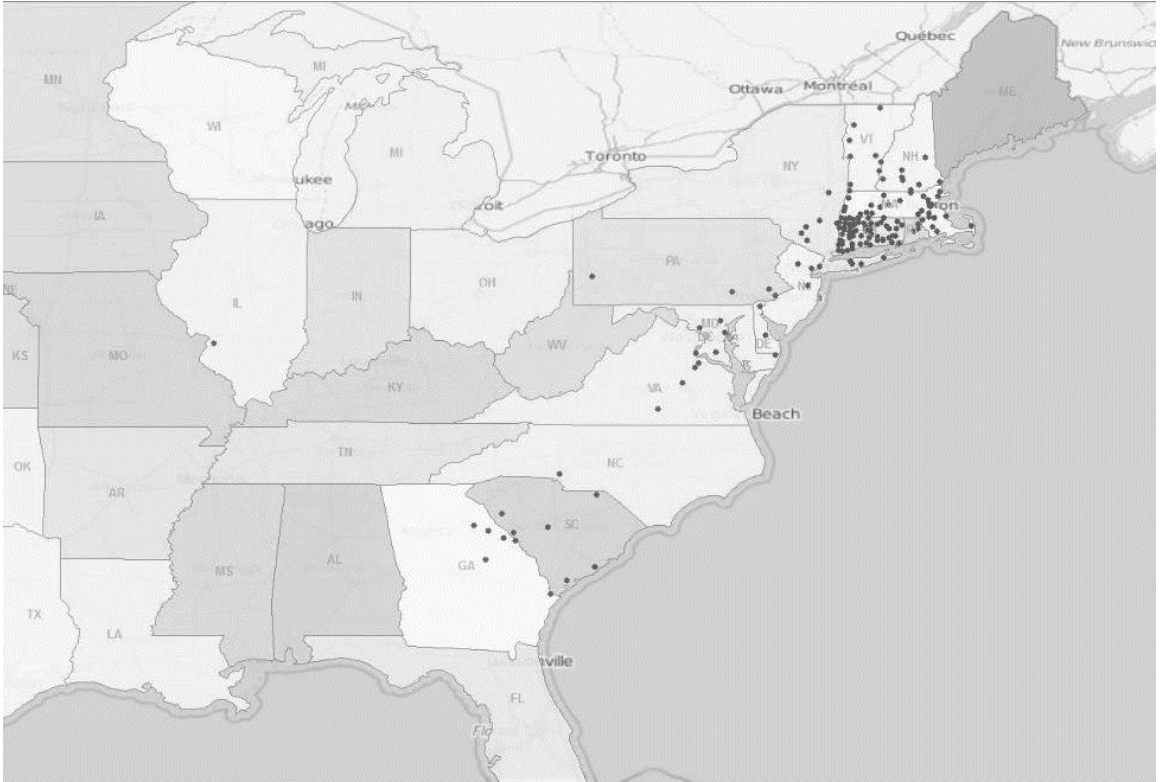
Litchfield earned a reputation for matchmaking, leading one law student to write to his friend assuring him his bachelorship was safe. See Cornelius Dubois Jr. to Edgar Van Winkle, Oct. 28, 1830: "I understand from Mrs. Reeve that all the marriable young ladies have been married off, and there is at present only young fry in town, consequently that it will not be as gay as usual. The young ladies, she tells me, all marry law students, but as it will take 2 to 3 years for the crop to become fit for harvest you need apprehend no danger of me throwing up my bachelorship;" see also Boonshoft, "The Litchfield Network."

a “reputation well established from Maine to Georgia,” that attracted young men from
“all the states of the union.”⁷³

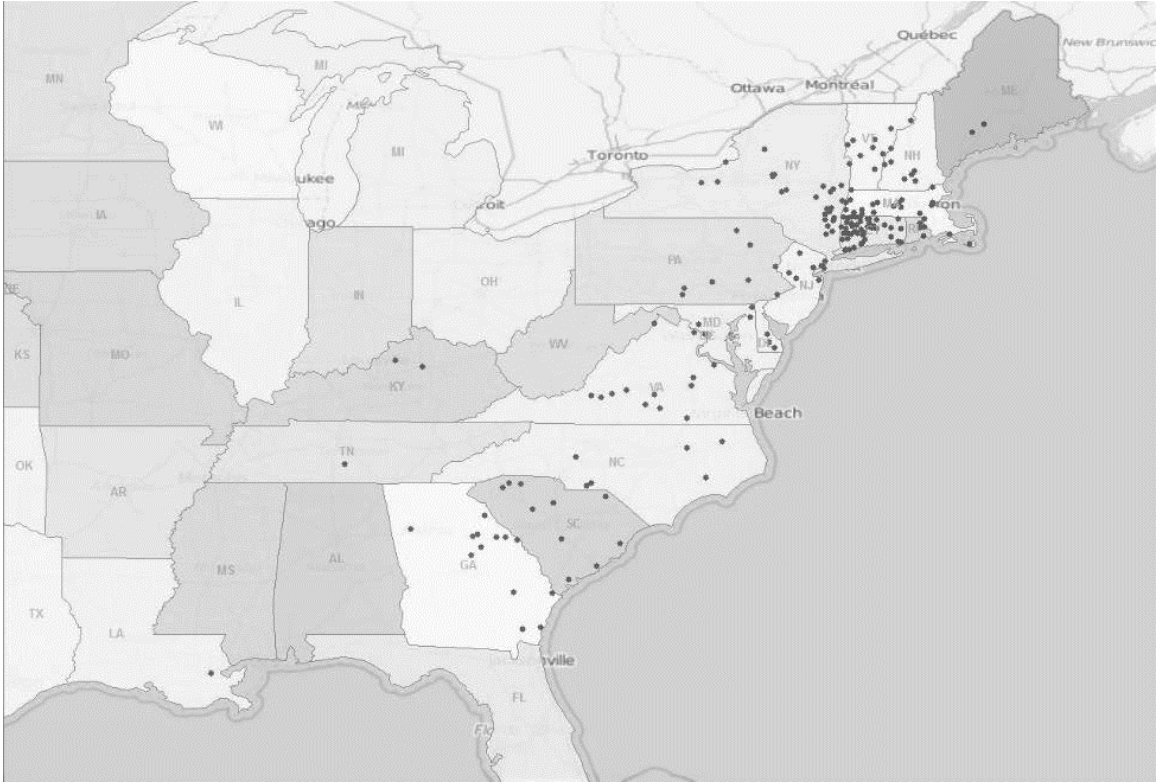
⁷³ John Lloyd Stephens to Benjamin Stephens, quoted in Victor W. von Hagen, “Introduction” in John Lloyd Stephens, *Incidents of Travel in Egypt, Arabia Petraea, and the Holy Land*, ed. Victor W. von Hagen (Norman: Oklahoma Univ. Press 1970), x-xi.



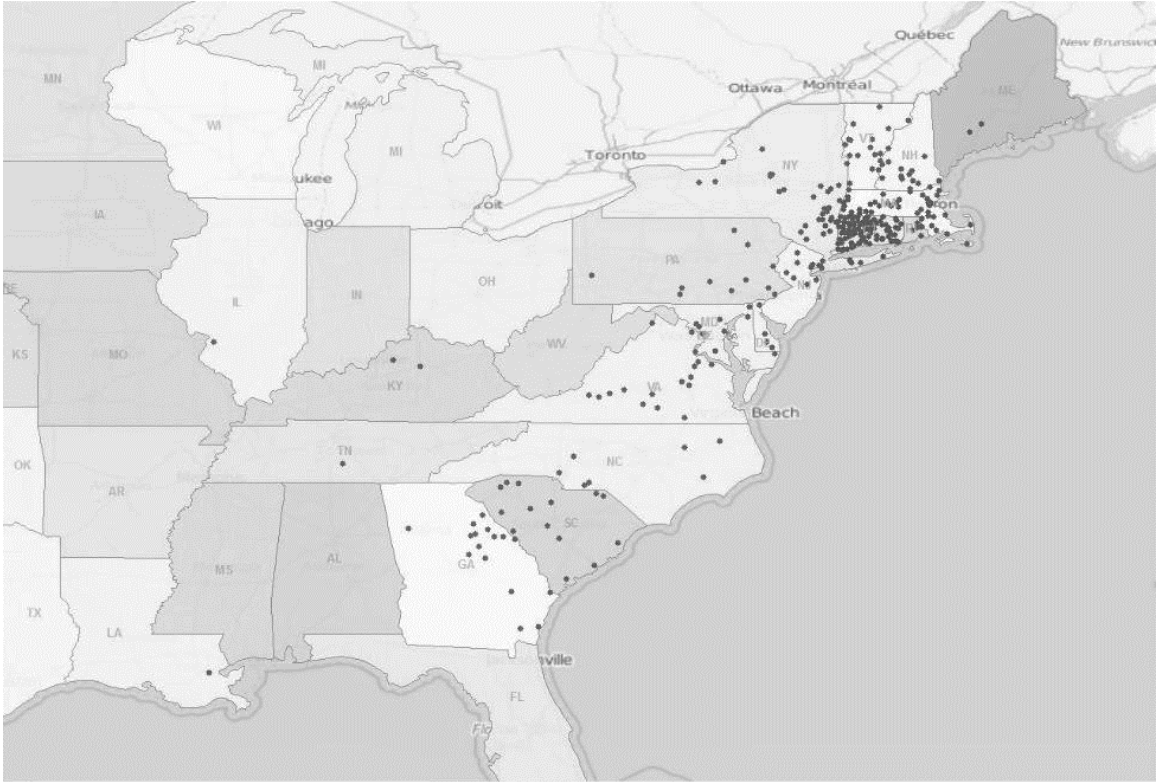
Hometowns of Litchfield Students Who Attended before 1794



Hometowns of Litchfield Students Who Attended from 1794-1813

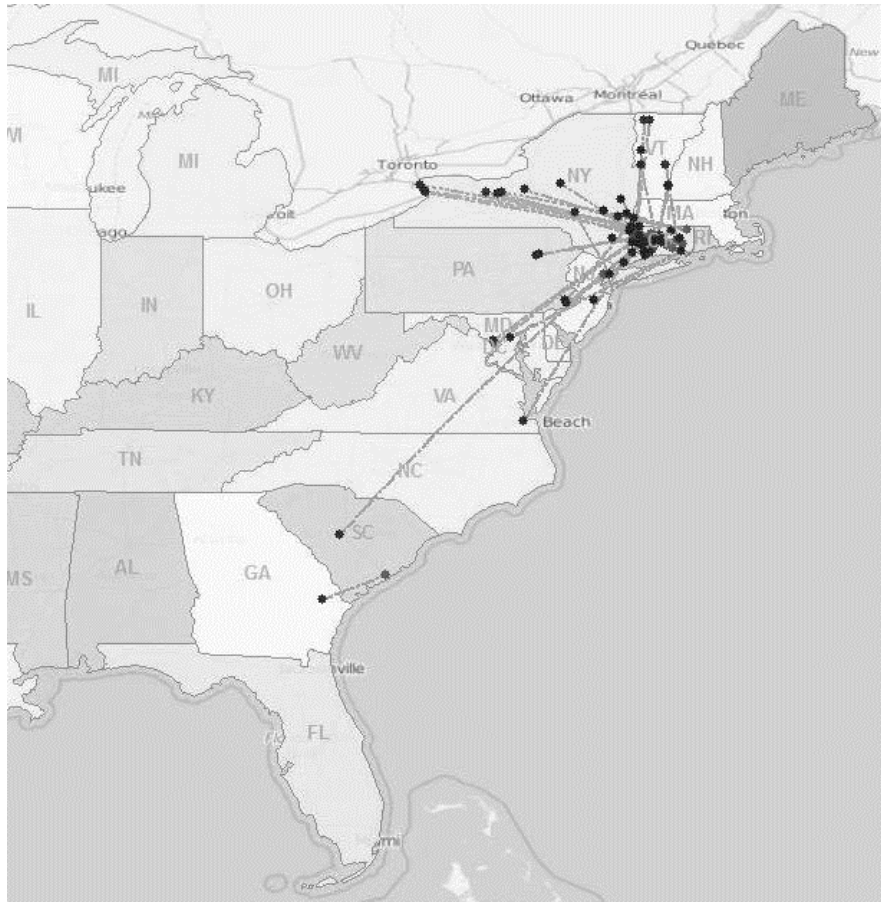


Hometowns of Litchfield Students Who Attended from 1814-1833



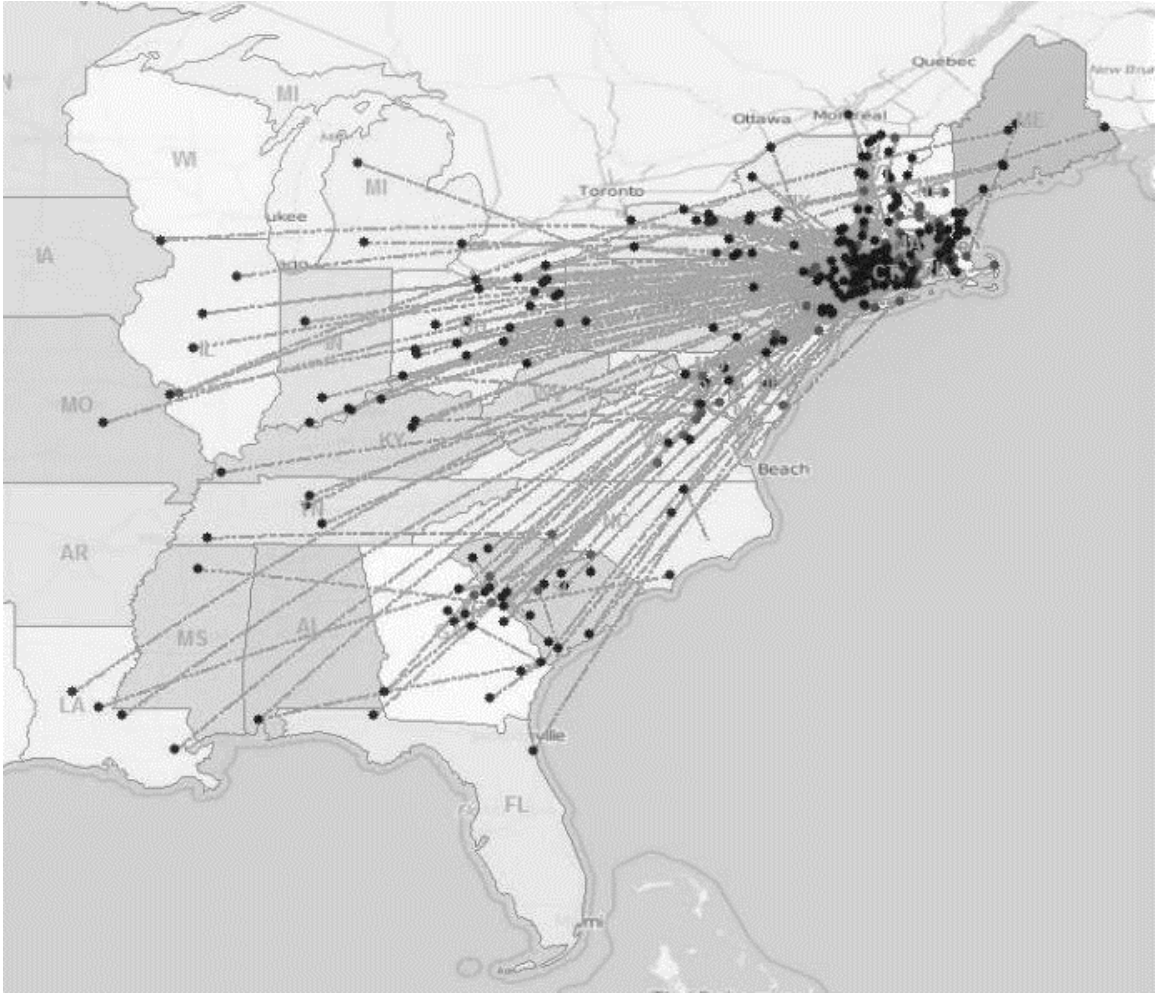
Composite Map of Hometowns of All Litchfield Students

Armed with their practical training, Litchfield Law School students pursued careers throughout the United States.



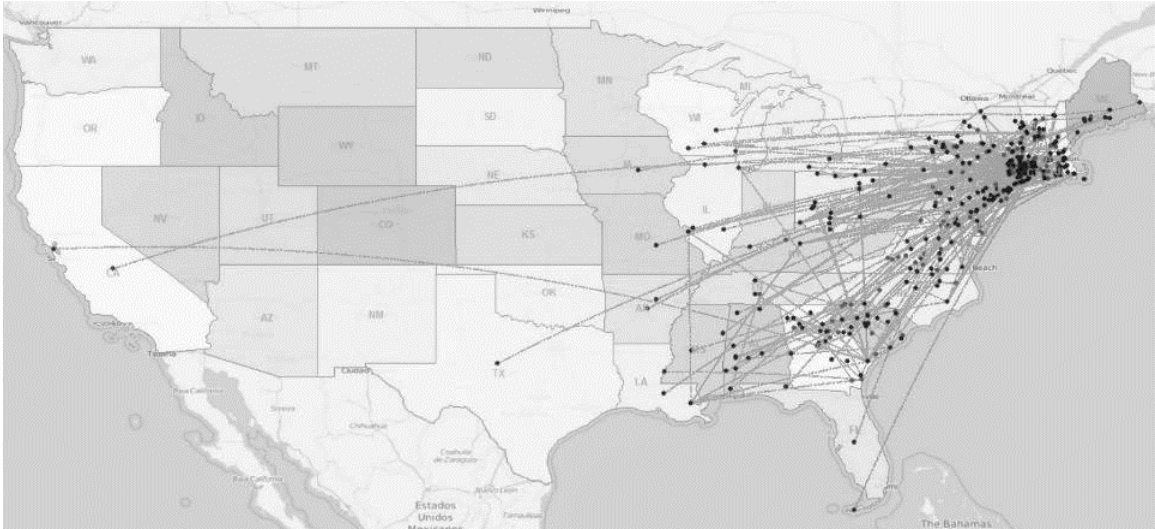
Flowmap of First Litchfield Students

This map illustrates the hometowns and eventual residences of students who attended Litchfield before 1794. Most elected to stay close to home, but several journeyed south and west.



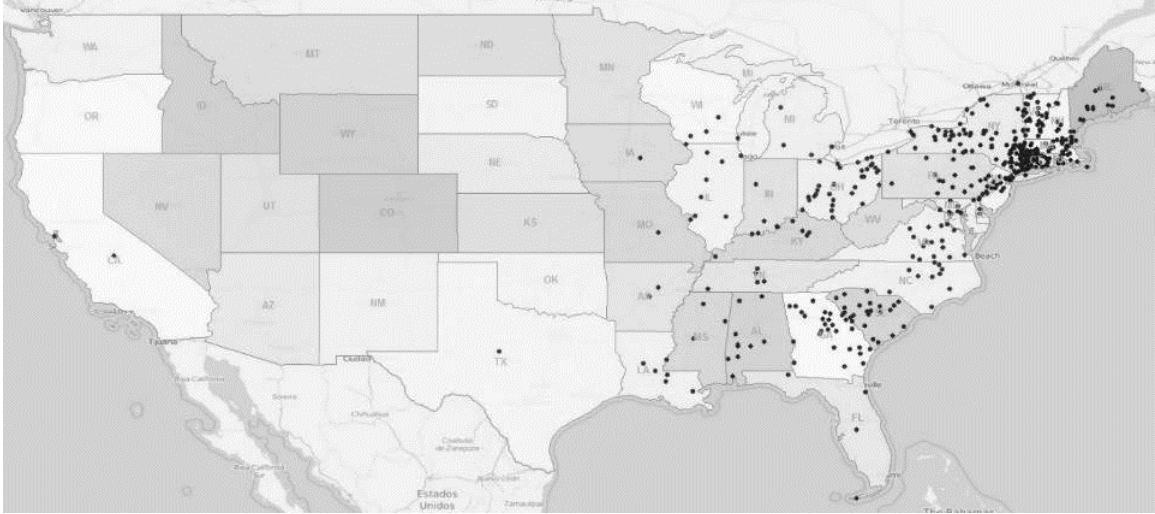
Flowmap of Students who Attended Litchfield from 1794-1813

The map above, of the hometowns and destinations of the next Litchfield students, reflects the expanding boundaries of the United States and the demand for young lawyers even in remote parts of the country.



Flowmap of Students Who Attended Litchfield from 1814-1833

This maps illustrates the truly national scope of the last generation of Litchfield students, who found work in the North, South, and West. Note particularly, the significant number of lawyers moving to the edges of the country.



Destinations of All Litchfield Students

This map provides the destination of all Litchfield students who settled in the contiguous United States for whom information is available. A number of students who settled abroad, from Canada to England, are not accounted for on this map.

At their destinations throughout the United States, Litchfield students applied their educations in a variety of fields. Reeve's most famous students were those who served in political office. This group included Vice Presidents (Aaron Burr and John C. Calhoun), six cabinet members, one hundred one Congressmen, thirty-eight United States Senators, fourteen governors, and ten lieutenant governors. Reeve's school thrived, however, not because it catered to these students but rather because it did not. For the most part, students studied with Reeve not to prepare themselves to become guardians of the state but rather, as one particularly straightforward student put it, to make a "living by it." Law, he continued, was a valuable and interesting career, but it was not so valuable and interesting that "a person should sacrifice a probability of doing well at commerce to a possibility of scraping (sic) a livelihood at law." In short, the "profession [was] no fairy-land in which a person [could] indulge his heart; content in *building castles* in the air; facts, stubborn facts stare[d] him too broadly in the face to suffer that he should long rove in this world of his own creation."⁷⁴ Many students were less candid in their evaluation of the profession, but the ones who spoke of it admitted that they wanted to benefit from the "auspicious prospects" that came from "an honorable standing" in the profession. Litchfield's education tapped into the strong demand for respectable yet practical curriculum.⁷⁵

⁷⁴ Stephens, quoted in von Hagen, "Introduction," xiv.

⁷⁵ Martin, *A Journey*, 4. William W. Ellsworth to Roger M. Sherman, Nov. 10 1823, quoted in William A. Beers, *A Biographical Sketch of Roger Minott Sherman, The Eminent Connecticut Jurist, 1773-1845* (Fairfield, CT, 1882), 37

Fittingly, Litchfield's students exerted their most lasting influence as private lawyers rather than as government officials. In private practice, the same practical bent that distinguished Reeve's teaching informed the way these lawyers pursued their day-to-day work and the way they, like their teacher, used their profession to improve their lot in life. Their account books reveal, as Reeve's student predicted, "no fairy-land," but instead a commercial world in which wealthy men active in commerce paid for legal assistance. Eventually Litchfield graduates would meet the demand for commercial practice across the United States, sometimes in its remotest locales. The first generation, however, found work closer to home.

CHAPTER 2: PRACTICING PRIVATE LAW

Like many of his fellow graduates, Roger Minott Sherman, who attended Litchfield in 1794, did so not because he wanted to change the world, but because he needed to earn a living. Sherman, who was born in Woburn, Massachusetts, came from a well-connected family. His father, a reverend, had graduated from Reeve's alma mater, the College of New Jersey, and his uncle, Roger Sherman, had been a delegate to the Continental Congress, member of the House of Representatives, U.S. Senator, and mayor of New Haven. Despite Sherman's links to the Connecticut aristocracy, his immediate family possessed little wealth. When his father died during Sherman's freshman year at Yale, Sherman was forced to teach in order to bear the cost of tuition. He continued teaching after college in order to pay for his education at Litchfield and support himself during two apprenticeships thereafter. Law was one of the few career paths available in the early Republic that promised the potential of improving one's station in life, and beginning a legal practice promised to transform Sherman's professional education into social and financial success.⁷⁶

⁷⁶ See William A. Beers, *A Biographical Sketch of Roger Minott Sherman, The Eminent Connecticut Jurist, 1773-1845* (Fairfield, CT, 1882), 3; Lyman H. Atwater, *Death Disarmed of Its Sting: A Tribute to the Memory of the Hon. Roger Minott Sherman, Being the Discourse Preached at His Funeral, January 2, 1845* (New Haven, 1845), 4.

Roger Sherman was the only person to sign the Continental Association, the Declaration of Independence, the Articles of Confederation, and the Constitution. For more on Roger Minott Sherman's uncle see Mark David Hall, *Roger Sherman and the Creation of the American Republic* (Oxford: Oxford University Press, 2013).

The lawyers under whom Roger Minott Sherman apprenticed were Oliver Ellsworth, who became the third Chief Justice of the United States, and Simeon Baldwin, Sherman's cousin's husband, who eventually served on the Connecticut Supreme Court. Beers, *A Biographical Sketch*, 4. See also William Garrott Brown, *The Life of Oliver Ellsworth* (London: Macmillan, 1905), 342; "Baldwin, Simeon," *Connecticut*

A lawyer on the make, however, could not afford to be picky about the kind of work he undertook. When Sherman began his career in Norwalk, Connecticut, he filled his account books with routine services for commercial clients, mostly work related to redeeming, securing, and negotiating about the promissory notes that passed among commercial debtors. It was the kind of practice that garnered little attention and that rarely made it to trial, much less an appellate court. After nine years, Sherman moved to Fairfield, Connecticut, where he spent the rest of his career. There he eventually established a lofty reputation, took on more appellate cases, served in the Connecticut General Assembly, on the Governor's Council, and became a judge near the end of his life.⁷⁷ The demand for routine debt work, however, persisted. Many other Litchfield students followed a similar pattern after they left school: they took on routine commercial work, much of it debt-related, and many eventually achieved professional and political notoriety.

When writing about lawyers, historians tend to focus on the kind of work that Sherman undertook at the end of his career. They highlight the important role that appellate cases played in accommodating the legal system to the needs of those active in commerce and to the powerful part that legally trained men played in early American politics. From these perspectives, lawyers look alternatively like “shock troops of

Biographical Dictionary, 2008-2009 Edition, vol. 1, eds. Caryn Hannan and Jennifer L. Herman (Hamburg, MI: State History Publications, 2008), 65-66.

On the power of a legal career to create wealth see Lawrence Friedman, *A History of American Law*, 4th. ed. (New York: Simon and Schuster, 2005), 227-28. Anton Chroust, “Dilemma of the American Lawyer in the Post-Revolutionary Era,” *Notre Dame Law Review* 35 (1959): 48-50. Jackson Turner Main, *The Social Structure of Revolutionary America* (Princeton: Princeton University Press), 190-92.

⁷⁷ Beers, *A Biographical Sketch*, 5-8.

capitalism” or “republican guardians.”⁷⁸ Yet such viewpoints overlook the immensely important, though routine, debt work of lawyers like Sherman. When neither the state nor the federal government provided enough currency for trade, it was lawyers who played a vital role in allowing a substitute system based on promissory notes to function. Indeed, the records of Sherman's practice demonstrate that he spent most of his time facilitating commercial action from within the legal order rather than changing its ground rules. Understanding the significance of this seemingly inconsequential debt collection work provides a new perspective on the role lawyers played in the early American economy. Liquidity was central to economic exchange and lawyers were vital to providing liquidity. They managed to encourage exchange, even before the doctrine of negotiability—normally seen as key to the usefulness of private notes—had been widely adopted. Although Sherman and his colleagues did not seem to recognize the significance of their routine work to the early American economy, this did not hinder their advocacy for their commercial clients. An analysis of Sherman’s records shows that lawyers did not need to view their work instrumentally for it to have a significant impact on the American economy.

Sherman and other American lawyers encountered so much debt work because their economy was suffering from what economists would now call a “crisis of liquidity.”⁷⁹ There was not enough cash to go around. This dearth of a medium of

⁷⁸ See Charles Sellers, *The Market Revolution: Jacksonian America, 1815-1846* (New York: Oxford University Press, 1991), 47; Robert Ferguson, *Law and Letters in American Culture* (Cambridge, MA: Harvard University Press, 1984), 27.

⁷⁹ Robert Wright, *Origins of Commercial Banking in America, 1750-1800* (New York: Rowman and Littlefield, 2001), 4. Economists lack a consensus definition for liquidity, but Milton Friedman and Anna Jacobson Schwartz have defined it as the ability to “sell an asset on demand . . . for a nominal sum fixed in advance” or more simply as “ready salability.” Milton Friedman and Anna Jacobson Schwartz, *Monetary*

exchange dated back to colonial times when many states had printed their own paper currency as a way to circumvent the lack of circulating specie in the colonial economy. The effects varied, but the printed money was blamed for a host of ills including uncertain pricing, currency gluts, and depreciation significant enough to lead some to revert to bartering.⁸⁰ Article I, Section 10 of the Constitution was drafted to prevent these problems in the future. It barred states from coining money, emitting “Bills of Credit,” and making “any Thing but gold and silver Coin a Tender in Payment of Debts.”⁸¹ Although this provision prevented the confusing array of regionally-bound, 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. 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.⁸²

Statistics of the United States: Estimates, Sources, Methods (New York: Columbia University Press, 1970), 129. See also Morton Horwitz’s discussion of the problem of “scarcity of money.” Morton Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, MA: Harvard University Press, 1979), 215.

⁸⁰ See Christine Desan, “Contesting the Character of the Political Economy in the Early Republic: Rights and Remedies in *Chisholm v. Georgia*,” in *The House and Senate in the 1790s: Petitioning, Lobbying, and Institutional Development*, eds. Kenneth R. Bowling and Donald R. Kennon (Athens: Ohio University Press, 2002), 193; Claire Priest, “Currency Policies and Legal Development in Colonial New England,” *Yale Law Journal* 110 (2001): 1314-15, 1385. Even the printing of currency could not solve the problem of exchange. As Bruce Mann has illustrated, Connecticut Communities relied on credit as a means of exchange throughout the seventeenth and eighteenth century when colonial currency was still in circulation. See Bruce Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill: University of North Carolina Press, 1987)

⁸¹ See Desan, “Rights and Remedies,” 199; U.S. Constitution, Art. I. Sec. 10.

⁸² Margaret Good Myers, *A Financial History of the United States* (New York: Columbia University Press, 1970), 72, 163, discussing effect of National Banking Acts of 1863 and 1864. See National Banking Act of 1863, *U.S. Statutes at Large* 12 (1863), 665; National Banking Act of 1864, *U.S. Statutes at Large* 13 (1864), 99.

⁸² See Wright, *Origins*, 88-91.

As a result, exchange was difficult. The shortage was noticed by rich and poor alike. The Whiskey Rebellion of 1791, in which farmers on the western frontier resisted the imposition of a tax on homemade distilled spirits, was at least in part a protest against a lack of circulating money; westerners resented being taxed on whiskey because they used it to pay one another. 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.” 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.” The shortage of currency seemingly affected everyone from farmers, to merchants, to tax collectors.⁸³

In local economies, barter and other less formal means of exchange helped some to work around the lack of cash in America. For large and anonymous transactions, however, barter was insufficient; it discouraged granting credit and made profit hard to compute and accumulate. Nor could financial institutions fill the need for a medium of exchange. The first bank did not open in Connecticut until 1792, and the number of banks grew slowly before 1810 because chartering them required a special act by the legislature. In 1800, there were only 29 banks in the United States, and by 1811, only 90—less than one bank for every 80,000 U.S. residents. An insular banking culture made bank credit yet harder to access. When banks had money to lend, they tended to lend it to

⁸³ See Wright, *Origins*, 88-91, 97-98; Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill and Wang, 2007), 268; William Bingham in Bray Hammond, *Banks and Politics in America from the Revolution to the Civil War* (Princeton, Princeton University Press, 1991), 96; Myers, *Financial History*, 72.

friends and associates. Even later in the nineteenth century, banknotes, especially those from afar, were traded at high discounts and subject to counterfeiting. In the early nineteenth century, when Sherman and other lawyers were beginning their practices in Connecticut, financial institutions could not consistently provide cash, checks, or loans needed for transactions.⁸⁴

Sherman's clients and other Americans engaged in commerce thus relied on two primary instruments that substituted for specie and paper money: book debts and commercial paper. Book debts were a relatively simple method of payment. Trading partners kept track of money owed in their account books and recorded when debts were paid or cancelled in subsequent transactions. Commercial paper took two major forms. The first, bills of exchange, were written promises made from a debtor to a creditor to pay back a certain amount of money at a defined time. Traders used them to facilitate large, often international, commercial transactions, and they included endorsers who would vouch for the debtor. The second, more common form of commercial paper was the promissory note. These basic financial instruments required only a written agreement to pay a specified amount of money on a set date along with the signature of the debtor. Americans used them for both commercial and personal exchange. Book debts replaced

⁸⁴ See Mann, *Neighbors and Strangers*, 12-13; Priest, "Currency Policies," 1321; Howard Bodenhorn, *State Banking in Early America: A New Economic History* (Oxford: Oxford University Press, 2001), 73-79; Myers, *Financial History*, 69; Hammond, *Banks and Politics*, 145; Naomi R. Lamoreaux, *Insider Lending: Banks, Personal Connections and Economic Development in Industrial New England* (Cambridge, Cambridge University Press, 1994).

The demand for currency was so strong, however, that even counterfeit notes served an important role in exchange. See Steven Mihm, *A Nation of Counterfeiters* (Cambridge, MA: Harvard University Press, 2007); Jane Kamensky, *The Exchange Artist: A Tale of High Flying Speculation and America's First Banking Collapse* (New York: Viking, 2008), 51-52; Mann, *Neighbors and Strangers*, 14-17, 28-35. Also see Wright, *Origins*, who argues that banks recognized the crisis of liquidity in the late-eighteenth century but were still in their infancy and thus unable to address it on a large scale.

cash in one-to-one transactions, but their utility was limited. Unless parties traded with one another frequently, they would eventually have to settle the book debt with a different kind of transaction. This form of exchange had therefore been declining in popularity since the first quarter of the eighteenth century because of its limitations outside of small communities. Commercial paper, however, provided more versatility. It allowed for large transactions—records of Litchfield alumni show exchanges for hundreds and thousands of dollars—and the bills could also take on a second life as circulating currency. Rather than writing out new bills for every transaction, merchants paid with bills that they had previously acquired.⁸⁵

In theory, the system of private credit could solve the problem of liquidity, but without a method of enforcement, the written promises to pay that Americans used in lieu of cash were not worth much. As early as the 1730s, cases related to promissory notes dominated the docket of Connecticut courts, where borrowers used the court system to help them redeem money owed to them by their trading partners.⁸⁶ Even in relatively small and insular communities, lawyers played an important role in helping navigate an economy in which exchange depended on credit.⁸⁷ By the early nineteenth century, traders could no longer depend on the application of social pressure in close-knit communities to force the repayment of their debts, and the volatile nineteenth century economy guaranteed that even well intentioned debtors could default on their

⁸⁵ See Wright, *Origins*, 8; Mann, *Neighbors and Strangers*, 14-17, 27, 33-34; Some bills carried the signature of an endorser who was obligated to pay if the creditor did not. Ibid. Book debts were most useful in “communities where information about borrowers’ characters, economic successes, and uses of loans were readily available.” See Priest, “Currency Policies,” 1335.

⁸⁶ Mann, *Neighbors and Strangers*, 39-40. In the eighteenth century, paper colonial currency was still available as “a public variant of private credit instruments.” Ibid., 39.

⁸⁷ According to Mann, lawyers began playing this role as courts focused more on technical pleading rules than the facts of disputes. Mann, *Neighbors and Strangers*, 93

obligations.⁸⁸ Increasingly distant and anonymous transaction also meant that businesses could not rely on direct observation of trading partners or clients. Transportation, although improving, was time consuming and expensive.⁸⁹ Businessmen turned to lawyers to help them with enforcement.

Sherman left Litchfield ready to meet the need for routine debt work because Reeve spent a significant portion of his lectures on the law of bills and notes. One student's notebook, for example, devotes more than sixty pages to the subject. His index reveals the extent of his coverage:

⁸⁸ In the seventeenth century, when commerce was mostly local, it was easier to apply social pressure and use other informal means of persuasion to ensure that loans were repaid. Resort to formal legal means to redeem debts was rare. Communal connections, however, eroded significantly by the mid-eighteenth century, making informal forms of debt redemption less effective. See Mann, *Neighbors and Strangers*, 101-136. See also Claire Priest, "Currency Policy," 1395, who argues that the rise of debt cases had less to do with the erosion of communities than with a series of depreciation, currency scarcity, and economic recession.

The effectiveness of social pressure was even slighter for trading partners who were separated by significant distance and shared only commercial connections. By the early nineteenth century, social pressure was therefore both less effective and less appealing than it once had been. See Wright, *Origins*, 29.

⁸⁹ See Scott Sandage, *Born Losers: A History of Failure in America* (Cambridge, MA: Harvard University Press, 2005): 99-188, on the development of credit reporting and Daniel Walker Howe, *What God Hath Wrought: The Transformation of America, 1815-1848* (Oxford: Oxford University Press, 2009), 211-42, 563-69, 690-98, on transportation.

Bills of Exchange inland & foreign V^o 2. p. 792. 797.
 Who may draw them V^o 2. p. 800. Drawer, see 826.
 Their qualities. V^o 2. p. 804-5.
 Consideration not necessary, after 8^o V^o 2. 810.
 What amounts to an acceptance & its consequences V^o 2. 816.
 Their transfer V^o 2. 818. Indorsment D^o.
 Damages for non-acceptance V^o 2. 828
 Indorsers engagements relative to them V^o 2. 826.
 Notice of non-acceptance to the drawer V^o 2. 828.
 Manner of giving notice V^o 2. 832.
 Manner of protesting a Bill V^o 2. 832.
 Protest for better security V^o 2. 834.
 Effect of notice V^o 2. 834.
 The holder's remedy & what actions V^o 2. 840.
 Indorser, drawer & acceptor liable to the holder. V^o 2. 846.
 Evidence necessary to be produced. V^o 2. p. 848.
 Bank Bills. Banks Notes V^o 2. 854.

Lonson Nash Student Notebook, 1803, vol. 3⁹⁰

⁹⁰ See Lonson Nash, Student Notebook, 1803, vol. 3, Harvard Law School Library, Cambridge, MA. (Hereinafter "HLS").

Under the heading of “Bills of Exchange” he includes a lengthy list of sub-topics: “Who may draw them,” “Their qualities,” “Consideration not necessary, after,” “What amounts to an acceptance & its consequences,” “Their transfer,” “Damages for non-acceptance,” “Indorsees engagements relation to them,” “Notice of non-acceptance to the drawer,” “Manner of giving notice,” “Manner of protesting,” “Protest for better security,” “Effect of notice,” “The holder's remedy & what actions,” “Indorser, drawer & acceptor liable to the holder,” “Evidence necessary to be produced,” and “Bank Bills, Banks, Notes.” This list dwarfed that of nearly every other topic covered in the student’s index. Bail, burglary, libel, lunacy, larceny, municipal law, public wrongs, powers of chancery, slander, all merited merely one or two entries. Only contracts, mortgages, and a few other areas of private law generated similarly extensive coverage.

The educational focus on bills of exchange proved relevant to Sherman's early career. His records demonstrate that his clients frequently called on him to collect debts, settle outstanding loans, and sue delinquent payers and that almost all of the clients who wanted his help actively engaged in commerce. For example, his daybook, in which Sherman recorded work from his clients as it came in, often recounts the drafting of writs as part of the debt redemption process. From October 28th to November 9th, 1797, every piece of work he did was related to redeeming debt. On October 28th he drew an indenture for “James Sellech & Sons;” on November 7th he accounted for court fees in “Ebenezer Church’s” case against his debtors and drew three “writs on notes” for “Thaddeus Hoyt;” on November 8th he participated in an debt-related arbitration for

“James Brundige;” and on November 9th he drew two more writes on a note for “Samuel J. Camp.”

28 th	<p>East James Selleck & Sons Dr to drawing indenture for their creditors to sign 2 1/2 pages in folio</p>	2 50
Nov- 7 th	<p>Benjamin Church - Cr by cash for trust fees in his 2 copies against debts & c</p>	1 50
	<p>Maddeus Knight of Stamford Dr to drawing 3 writs on Hester vs. Austin vs. Hester</p>	1
11 th	<p>James Munday of Hopeden Dr to attending Arbitration one whole day at Hopeden in his coat with Ipswich Merd</p>	7
	<p>J. Munday Cr by cash 2 Crowns & 2 Dollars</p>	4 20
9 th	<p>Oliver Camp - Dr to drawing indenture on note vs. A. & Stephen Bellis</p>	34
	<p>Saml J. Camp - Dr to drawing one writ on note vs. A. & Stephen Bellis</p>	34

Picture of Sherman's 1797-1803 Day Book⁹¹

⁹¹ Roger Minott Sherman, Day Book, 1797-1803, Roger Minott Sherman Papers, Fairfield Museum and History Center Library, Fairfield, CT. (Hereinafter "FMHC").

Matthew Morain Esq. or Joel Smith	+ Note
Wm or David Sherman	Defunct + Note
M. Morain Esq. or John Freeman	Defunct Note
M. Morain Esq. or Lewis Hazard	Defunct +
Chas. Holmes Esq. or Samuel Brandt	Note Capt. ant.
Chas. Holmes Esq. or Samuel Brandt	Capt. ant. Note

Picture of Sherman's Docket Book, 1800-1804⁹⁴

⁹⁴ Roger Minott Sherman, Docket Book, 1800-1804, Roger Minott Sherman Papers, FMHC.

Sherman was not the only lawyer who practiced frequently on behalf of creditors. The Fairfield bar, which established a fee schedule for legal work in Fairfield County where Sherman practiced, specially accounted for routine debt work. Whereas the 1797 schedule generally listed charges based on the type of legal action, it specifically denoted fees for work related to the redemption of debt. It also listed special provisions for fees when “Notes & Book Debts [were] settled before court” and made allowance—and listed a higher fee—for debt work involving a creditor who lived outside the state. A second table of fees, recorded by Sherman in 1803, contains the same special provisions for fees in debt cases.⁹⁵ Debt work was so common among all members of the Fairfield bar that it justified much more attention than other areas of law.

Outside of the county, work related to notes and bills regularly appeared in other lawyers’ records as well, even those who achieved political and legal renown. Roger Sherman Baldwin, an 1812 graduate of the Litchfield Law School who eventually served as the thirty-second governor of Connecticut and a United States Senator, spent most of his life practicing private law. Like Sherman, his early practice frequently involved notes and bills. He meticulously tracked dozens of these disputes in an account book, and his papers reveal a variety of clients, notes, and services. Clients included companies and individuals; some notes were for as little as \$1, others more than \$500.⁹⁶ Other Litchfield lawyers and their colleagues worked for creditors on the Ohio frontier, in New York City,

⁹⁵ Sherman’s recorded the “Table of Fees” in the back of his first account book. He notes that they were “Adopted by the Bar in Fairfield County at the adj. session of the County Court held at Danbury in February 1797.” See Roger Minott Sherman, Account Book, 1796-1803, Roger Minott Sherman Papers, FMHC. He recorded the second in another account book. See Roger Minott Sherman, Account Book 1800-1804, Roger Minott Sherman Papers, FMHC.

⁹⁶ See Roger Sherman Baldwin, Account Book, 1797-1805, Baldwin Family Papers, Sterling Memorial Library, New Haven, CT. (“Hereinafter SML”)

and in the South. Nearly every lawyer historians have studied seems to have had a significant debt practice.⁹⁷ As a treatise writer put it in 1807, “there [was] no branch of the Law so important to the Merchant, as well as to the Lawyers, as that relating to these instruments [of credit and debt].”⁹⁸

Although the details of credit and debt law could be complex, the basic structure of the law of debt that Reeve taught and Sherman and other lawyers applied was straightforward. A bill, according to a Litchfield lecture recorded by a student, was “nothing more than a letter to one person directing him to pay money to a third.” Promissory notes were even simpler because they only required two parties. If everything went smoothly, the recipient of the bill or note simply presented it when it came due. Notes were “sometimes payable on sight and sometimes payable so many days after sight.” As long as the debtor accepted the bill and paid the debt, the process ended there.⁹⁹ The large quantity of notes in circulation combined with the instability of the economy, however, meant that debtors often could not afford to pay when presented with a note. Creditors then enlisted lawyers like Sherman to help.

Reeve’s lectures explained the standard procedure for redeeming a debt in court that Sherman and other lawyers followed when the debtor refused to pay. The process began out of court: If a creditor did not receive payment within the specified payment

⁹⁷ See, e.g., Alfred S. Konefsky, “Introduction,” in *The Papers of Daniel Webster, Legal Papers, The New Hampshire Practice*, vol. 1, eds. Alfred S. Konefsky and Andrew J. King (Hanover, NH: University Press of New England, 1982); John Adams, *The Legal Papers of John Adams*, eds. L. Kinvin Wroth and Hillier B. Zobel (Cambridge, MA: Belknap Press, 1965); Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776-1876* (Cambridge, MA: Harvard University Press, 1976), 271-301.

⁹⁸ This statement was the advertisement printed at the beginning of the treatise. See Joseph Chitty, *Treatise on the Law of Bills of Exchange, Checks on Bankers, Promissory Notes, Bankers’ Cash Notes, and Bank Notes* (London, 1807).

⁹⁹ Nash, Student Notebook, 792, 796, 830. In a promissory note, the drawer and indorser were the same person.

period—or the grace period—he needed to give notice to anyone who might be brought in as a party to the suit. For bills of exchange this included the original indorser and sometimes included prior holders depending on the form of the bill. For promissory notes, the debtor and indorser were the same person. Next, in the case of promissory notes from out of state or out of the country, the creditor/holder had to officially protest the bill or note for non-payment. This requiring getting a notary to attempt to present the bill to the debtor and then draw up an official document noting the debtor’s refusal to pay.¹⁰⁰ These steps seemed to have usually occurred before clients handed notes to Sherman for collection, but some Litchfield lawyers record protests as part of their work.¹⁰¹

After protest came suit. Suits, according to Reeve’s lectures fell into two categories, and both categories came into play in Sherman’s practice. For promissory notes and bills of exchange in which both parties were from Connecticut, suits had to be brought under Connecticut law either as debt or assumpsit actions. Out-of-state suits involving parties in privity—i.e. that had a direct legal relationship—could also be brought using this process. If privity did not exist and the parties were from different states, a creditor could bring a suit under the *Lex Mercatoria* or the “Custom of Merchants.” This allowed for the use of a more lenient set of rules for whom could be sued and under what circumstances.¹⁰²

In both kinds of cases, Sherman drafted many writs on behalf of his clients. As explained in Reeve’s lectures, a writ needed to follow a specified format in order to avoid

¹⁰⁰ *Ibid.*, 830. For more, see Chitty, *Treatise*, 228

¹⁰¹ See Daniel Lord, *Daybook, 1824-1826*, Collection of John D. Gordan III, Norwalk, CT.

¹⁰² Nash, *Student Notebook*, 834, 840-42, HLS.

being thrown out on legal technicalities. It had to include the time the bill or note was drawn, when the drawer delivered the bill, when the bill was indorsed, proof that it was presented for payment and refused, and a declaration that notice and protest had been accomplished when they were necessary. Misspellings, improper formatting, or failure to comply with other legal niceties invalidated the document. Perhaps this is why most creditors turned to a lawyer like Sherman rather than attempting the work themselves. If the case proceeded to trial, a lawyer had to prove that the note or bill was authentic. A judgement in his client's favor would result in a right to seize the debtor's property in the amount owed in a sheriff's sale.¹⁰³

Although Sherman's records, which are peppered with charges for drafting writs and representing clients in court, illustrate the application of these basic legal procedures, they also demonstrate that monetary disputes varied from the neat and orderly fashion specified by legal rules. When Sherman's clients hired him to collect overdue notes, they often did not expect him to proceed directly to court. Sherman's job instead was to track down and confront delinquent debtors, forcing them to pay. Collection was the goal of the New York merchants, Cannon & Jarvis, who wrote to Sherman on October 2, 1797. Enclosing a note against "Abel Belknap & Son," the merchants requested that the lawyer first "call on Mr. Belknap" to ascertain whether he would "pay the note" at "ten & half Dollars per Barrell." If so, they wanted Sherman to "settle in that way." If Belknap were unwilling to settle, however, they requested that Sherman "attach sufficient property" in

¹⁰³ Ibid., 840-42.

Belknap's mill to "secure the payment." They expected Sherman to update them on the process at his "first opportunity."¹⁰⁴

When collection efforts were unsuccessful, as was the case for Cannon & Jarvis, Sherman's clients had a more difficult choice. Bringing a case to court could cost—and might waste—time and money. As Bruce Mann has illustrated, debtors sometimes took advantage of procedural tactics to delay financial embarrassment or repossession of their property. In addition to relying on procedure to buy time, debtors could also hide their property (or themselves) from legal process, relying on laws that shielded certain types of property from seizure.¹⁰⁵ In any case, turning to court meant that Sherman's client would have to pay fees and sometimes deal with appeals. Even if Sherman's client prevailed in court, he could face the difficulty of collecting money from a debtor who had no assets to seize. Thus, confronted with the cost, difficulty, and delay of trial, many of Sherman's clients preferred to avoid court altogether. Some directly ordered Sherman to settle. Others gave him the power to pursue legal remedies if settlement attempts failed.¹⁰⁶

Sherman's knowledge of the law, proximity to debtors, and prominence in the community allowed him to settle on behalf of his clients effectively. Sherman's clients

¹⁰⁴ See Roger Minott Sherman, Account Book, 1796-1804, Roger Minott Sherman Papers, FMHC. Cannon and Jarvis to Roger Minott Sherman, February 1797, Roger Minott Sherman Papers, FMHC.

¹⁰⁵ Bruce Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (Cambridge, MA: Harvard University Press, 2009), 18-23, 30.

¹⁰⁶ See, e.g., Robert Fairchild to Roger Minott Sherman, Sep. 12, 1812, Roger Minott Sherman Papers, FMHC, in which Fairchild wrote that he was willing to lower his expectations for the amount that Sherman could recover for him; Richard Bayan to Roger Minott Sherman, April 20, 1832, Roger Minott Sherman Papers, FMHC, requesting settlement; Lyman Law to Roger Minott Sherman, Nov. 2, 1825, Roger Minott Sherman Papers, FMHC, writing to Sherman that he was willing to accept "depreciation of bills;" Benjamin Strong to Roger Minott Sherman, June 25, 1803, Roger Minott Sherman Papers, FMHC; E. Comstock to Roger Minott Sherman, Feb. 15, 1806, Roger Minott Sherman Papers, FMHC.

often lived beyond the boundaries of Fairfield County and even across state lines.¹⁰⁷ Because Sherman's clients lived hours away from the people who owed them money, they recounted difficulty in tracking down and settling with debtors. Sherman, however, usually lived near the debtors he pursued. It was easier to avoid a letter from an out-of-state creditor than it was to hide from a local lawyer's visit. Even large concerns such as Franklin, Robinson & Co., a well-established trading firm headquartered in New York City, relied on Sherman to collect their debts. Sherman helped Franklin, Robinson, & Co. redeem unpaid debts owed by a local flourmill, obtain evidence in other suits, and settle cases. Although their ships traveled thousands of miles to trade with East Asia, China, and Europe to sell products including pepper, almonds, wine, and gunpowder, Franklin, Robinson, & Co. needed Sherman's expertise and legal network to bridge the sixty miles to Fairfield, Connecticut. If the collection process was straightforward, Sherman's intervention still prevented his clients from being forced to make time-consuming trips to collect debts.¹⁰⁸

Sherman's proximity amplified the power of his social connections. He worked for and with the most successful businessmen in Fairfield, and he knew them as a leader of his church, as an active member of a local temperance society, and through his

¹⁰⁷ Sherman's business originated across the state, from Litchfield in the northwest to New London in the southeast. James Gould to Roger Minott Sherman, Nov. 9, 1805, Roger Minott Sherman Papers, FMHC; William Cleaveland to Roger Minott Sherman, Aug. 18 1806; Roger Minott Sherman Papers, FMHC. Even as a young lawyer much of Sherman's business originated in New York City. Clients from New York asked him to compile evidence, to make settlement arrangements, to collect debt, and to foreclose on property. See, e.g., Franklin Robinson to Roger Minott Sherman, July 22 1802, Roger Minott Sherman Papers, FMHC; Franklin Robinson to Roger Minott Sherman, Feb. 7 1806, Roger Minott Sherman Papers, FMHC; Thomas Franklin to Roger Minott Sherman, March 8, 1808, Roger Minott Sherman Papers, FMHC.

¹⁰⁸ See Franklin and Robinson to Roger Minott Sherman, July 22 1802, Roger Minott Sherman Papers, FMHC; Walter Barrett, *Old Merchants of New York*, vol. 2 (New York, 1863), 247-48.

involvement in local government, in addition to in his professional capacity.¹⁰⁹ Similarly, the connections Sherman developed through Litchfield Law School and in his legal practice placed him within a broad social and professional network. At Litchfield Sherman learned alongside ten other students, nine of whom went on to become lawyers.¹¹⁰ In addition to his classmates, Sherman developed connections to other Litchfield alumni, including James Gould, who would later become a judge. Connections established at Litchfield were strengthened through Sherman's apprenticeships with prominent lawyers Simeon Baldwin and Oliver Ellsworth. They were also bolstered in practice. Sherman and other lawyers exchanged business letters, referred business, met at court, and visited each other regularly.¹¹¹ Anonymous market transaction made social pressure difficult to exert from a distance; by relying on his network, Sherman could exert it more directly.

Sometimes, however, social pressure was not enough. In the case of Belknap & Son, Sherman turned at his clients request to the more formal remedies that always served as the backdrop to collection cases. Here, the procedures he learned at Litchfield proved crucial. Sherman's records illustrate a familiar procession of official protests of notes and the drafting of writs. On behalf of Cannon & Jarvis, Sherman recorded charges for the preparation of court documents for "drawing attachment," "cash advanced for

¹⁰⁹ See Beers, *A Biographical Sketch*, 9-19.

¹¹⁰ The lawyers were Elijah Bates, Asa Chapman, William Pitt Cleaveland, Robert Fairchild, Timothy Burt, Jonathan Walter Edwards, Asa Bacon, Ezekiel Bacon, and Elijah Adams. For more on the importance of Litchfield networks see Mark Boonshoft, "The Litchfield Network: Education, Social Capital, and the Rise and Fall of a Political Dynasty, 1784-1833," *Journal of the Early Republic* 34 (2014): 561-95.

¹¹¹ Oliver Ellsworth, the lawyer who first apprenticed Sherman, for example, continued to correspond with Sherman throughout his career.

duties,” “cash advanced for signing,” and to “cash advanced for [a court] fee.”¹¹² By drawing a writ of attachment, Sherman sought a judicial lien on Belknap’s property to satisfy Cannon & Jarvis’s note.

Other of Sherman’s clients were lucky enough to face relatively straightforward redemption procedures at court. In many of the cases he brought before a judge, the other party defaulted; that is, the debtor either failed to appear at court or admitted the debt, and the judgment was automatically entered. In one session of the county court, for example, eight of the twenty cases Sherman handled resulted in default decisions.¹¹³ A default judgment meant that the debt had been legally acknowledge. If the debtor still did not pay, Sherman and his client had the right to confiscate property in the amount that they had specified in their filing with the court. Cannon & Jarvis’s saga ended similarly, not with ground-breaking litigation, but before Connecticut state arbitrators who had the duty to distribute the assets of insolvent firms.

Even a relatively complicated case like that Sherman undertook on behalf of Canon & Jarvis rarely involved novel doctrinal issues. Contested suits more often turned on evidentiary issues: Was the note signed by the debtor and properly protested? Did he actually owe the creditor money? Sherman’s main job was not to argue for a novel interpretation of financial law, nor to persuade a judge or jury of the importance of honoring debts or supporting economic development. Through hundreds of actions—

¹¹² See Roger Minott Sherman, Account Book, 1796-1803, Roger Minott Sherman Papers, FMHC.

¹¹³ See Roger Minott Sherman, Docket Book, 1800-1804, Roger Minott Sherman Papers, FMHC. Because Sherman did not consistently record the outcomes of his trials, it is difficult to measure the percentage of his cases that were concluded with default decisions. The existing records, however, suggest that more than twenty-five percent of his cases were concluded without an appearance by the other party.

many simple, others more complex—Sherman helped commercial clients work around the problem of liquidity. The work was technical and obscure, but also routine.

Although routine debt work played a significant role in legal practice, historians interested in the part lawyers played in economic exchange have tended to focus attention on legal doctrine, rather than on the day-to-day work of the profession. These historians track what legal doctrine said and how it evolved, rather than how it applied in practice. This approach and the findings of historians using it have exerted tremendous influence on the way historians understand the role of law and lawyers in nineteenth century America. Morton Horwitz in *The Transformation of American Law*, for example, traces the evolution of legal rules governing commerce and argues that judges used the discretion provided to them by the common law to “favor the active and powerful elements in American society.”¹¹⁴ By changing doctrine, Horwitz maintains, judges shaped the path of American commerce.

The legal rules that Horwitz and others have studied no doubt influenced economic development. These rules provided the backdrop to nearly every action that a lawyer like Sherman undertook and generated some of the content of Reeve’s lectures. Focusing on doctrine, however, gives short shrift to the routine work that dominated most lawyers’ practice, thus providing an incomplete—and sometimes misleading—picture of the role the profession played in the economy. Appellate cases only happened when the usual process of debt redemption failed, and when both litigants had the motivation and means to continue a legal fight beyond the trial court. They provide, in other words, a limited perspective on the profession that misses much of the work that lawyers did.

¹¹⁴ Horwitz, *Transformation*, 108.

Doctrinally focused studies can therefore benefit from the broader context that analysis of the day-to-day work of lawyers provides. Horwitz's treatment of the evolution of the doctrine of negotiability provides a case in point.

According to Horwitz, when Sherman began his career, American lawyers had yet to modify the "anticommercial" common law rules governing bills and notes to make them a suitable means of exchange.¹¹⁵ The central problem was that the doctrine of negotiability had yet to fully develop. According to traditional contract law principles, a party can only sue someone with whom he is in privity. That is, he can only sue people with whom he has transacted. In the case of commercial paper, this limited the remedies for a bad note or bill. Only the original recipient of a note could sue the original issuer. Bills were, Horwitz argues, poor replacements for cash because their redemption grew more difficult the farther removed the holder was from the initial transaction.

Eventually, according to Horwitz, the doctrine of negotiability solved this problem. Once notes or bills became negotiable, the holder of a note not only could bring an action against the person from whom he acquired the note but also could sue anyone who had ever held the note, including the original debtor or endorser.¹¹⁶ By allowing creditors to sue any endorser and by preventing endorsers from exercising traditional common law defenses, the doctrine of negotiability made commercial paper a safer and more convenient form of exchange for creditors. The doctrine of negotiability, however, arose slowly in America. Fear of a large money supply and a reliance on a

¹¹⁵ *Ibid.*, 212.

¹¹⁶ Further, principles of negotiability prevented the original issuer of a note from using defenses. Lawrence Friedman focuses on this aspect of negotiability in *A History of American Law*. See Friedman, *A History of American Law*, 196-97.

“precommercial conception of the requirements of ‘common justice and honesty’ among individuals,” prevented the modification of traditional common law requirements. By Horwitz’s count, just five states—New Hampshire, North and South Carolina, New York, and Georgia—had embraced negotiability by 1800. Only by 1879, after the gradual transformation and organization of the federal common law, did commercial forces achieve their goal of making negotiability the law of the land.¹¹⁷

Other scholars agree with Horwitz that negotiability played a critical role in allowing notes to alleviate the problems caused by a lack of currency in the early national period, with even his critics accepting his emphasis on the importance of negotiability. Harold Weinberg, for example, highlights the exceptions to the law of negotiability, such as those for unsophisticated actors, but he too sees the doctrine as central to the development of a viable alternative to printed currency. Historians of English law have been similarly focused on tracing the development of negotiability as key to the establishment of a workable law of commercial paper.¹¹⁸

As Sherman’s books show, however, his clients frequently relied on commercial paper in the early nineteenth century, even before the full flowering of the doctrine of negotiability. Part of the reason that Sherman and his colleagues were able to accomplish this, as suggested by the British legal historian James Steven Rogers, is that the common law provided mechanisms useful for redemption of notes much earlier than Horwitz and

¹¹⁷ Horwitz, *Transformation*, 218, 225 (citing *Withers v. Greene*), 338.

¹¹⁸ See Tony A. Freyer, “Negotiable Instruments and the Federal Courts in Antebellum American Business,” *Business History Review* 50 (1976): 435; Harold R. Weinberg, “Commercial Paper in Economic Theory and Legal History,” *Kentucky Law Journal* 70 (1981): 567, who argues that negotiability allowed commercial paper to “fill the void resulting from the shortage of gold and silver coinage and the absence of a reliable paper currency.” See also James Steven Rogers, *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law* (Cambridge: Cambridge University Press, 2004), 5-7

others have realized.¹¹⁹ Sherman, like the British lawyers Rodgers writes about, could use common law doctrine established as early as the seventeenth century to provide the basic framework for the redemption of notes. And, as the Litchfield notebooks illustrate, he could use the doctrine of negotiability in some cases involving out-of-state debtors. The common law, then, was not as anti-commercial as it seemed. It could provide a version of negotiability before the widespread adoption of “the doctrine of negotiability” in the nineteenth century.

The picture, however, is more complex than even Rodgers lets on. As we have seen, Sherman’s work included more than just applying negotiability doctrine in court. It also involved using his network and connections to exert pressure on and extract settlement from debtors. His work shows that lawyers, and not just law, contributed to making notes and bills a workable means of exchange. Moreover, although Sherman’s routine practice often relied on the doctrinal backing of the common law and legal system, he sometimes worked in opposition to both at the behest of his clients, for they, not the court system, paid his bills. By settling out of court, Sherman avoided some of the costs, procedural delays, and evasive tactics that might hinder or prevent collection. Doctrine and rules were less important when a lawyer like Sherman could work around them. Legal doctrine, then, provides an incomplete picture of the possibilities open to Sherman and his clients when they sought to redeem a debt. Looking beyond treatises and appellate cases to the day-to-day work of lawyers thus situates law in the context of lawyering, illustrating that the legal profession used a broad set of tools to make notes a viable means of exchange for their clients.

¹¹⁹ Ibid. 12.

It is difficult to place a precise economic value on the work that Sherman and others did to help promissory notes lessen the nineteenth century crisis of liquidity, just as it is difficult to measure the exact economic impact of the shifts in legal doctrine that Horwitz and others identify. The pervasiveness of routine debt redemption work in the nineteenth century United States makes a comparison case, in which lawyers were not providing counsel related to debt, difficult to find. The very prevalence of the work, however, suggests its importance. Debt cases brought by lawyers dominated trial court dockets and filled lawyers' account books, and clients kept coming back and paying lawyers because they wanted their help collecting outstanding debts. The power of lawyers appears to have been acknowledged by debtors, or at least creditors thought so. Advertisements in newspapers taken out by creditors threatened their borrowers with lawyers rather than with legal action. "A burnt child dreads the fire," proclaimed one, published in 1811 on behalf of Eliud Taylor, a New Haven Merchant, "And what fire is more destructive to any man's property than to have his accounts put into the hands of an Attorney?" "To prevent this," the advertisement continued, "the subscriber intreats all indebted to him, either by book or note, to call and settle their accounts."¹²⁰ Although the colorful language in this advertisement make it unique, advertisements with similar purposes frequently appeared in newspapers, threatening legal action and testifying to the power of lawyers.¹²¹ The shadow of the profession therefore expanded the shadow of the law. The most compelling evidence, however, for the importance of routine work is the

¹²⁰ Advertisement, *Connecticut Herald* (New Haven, CT), Mar. 12, 1811.

¹²¹ See, e.g., Advertisement, *The Vermont Journal* (Windsor, VT), Jan. 1, 1790; Advertisement, *Gazette of the United States* (Philadelphia, PA), Feb. 14, 1794; Advertisement, *Argus* (New York, NY), Oct. 29, 1796; Advertisement, *New Hampshire Sentinel* (Keene, NH), Aug. 30, 1806; Advertisement, *Albany Gazette* (Albany, NY), Aug. 31, 1815.

continued use of promissory notes as a means of exchange. Lawyers helped ensure that, even before the rise of the doctrine of negotiability, small scraps of paper with one or two signatures held enough power to back transactions.

Taking legal practice seriously not only puts the importance of doctrine in context but also highlights the role that lawyers played in mediating access to economic transaction. By helping to supply a substitute for cash, lawyers served a quintessentially public role.¹²² Although they sometimes relied on the power of state coercion exerted through the court system to threaten debtors and enforce liens, this state power was only accessible to those who could afford the legal fees necessary to access it. Fees were prohibitively expensive. In 1797 the cheapest retaining fee on the Fairfield bar's fee schedule was \$3, three times the daily wage of the average laborer. Lawyers charged 2.5 percent to secure a debt for an out-of-state creditor and 5 percent to collect a debt. A term fee—the amount a client had to pay for each court term during which the case was pending—for a case involving an amount under \$70 was \$3.50. In cases involving amounts of dispute over \$70 a retainer was \$4 and term fee \$3.50. If a case settled out of court, a lawyer was still entitled to fifty percent of the term fee. The expense of legal remedies grew if a trial was necessary. Pleas cost \$7.50, demurrers \$7, and motions just as much. Sherman also charged for travel and court attendance, and he passed on the often substantial fees imposed by the judicial system. A complicated and contested debt case, for example, could cost \$2.96 in judicial fees. If the case was postponed, fees could

¹²² Lawyers thus served a role that business historians often miss because of their focus on banks. See, e.g., Howard Bodenhorn, *A History of Banking in Antebellum America: Financial Markets and Economic Development in an Era of Nation-Building* (Cambridge: Cambridge University Press, 2000); Bodenhorn, *State Banking*; Myers, *A Financial History*, 70; Robert E. Wright, Richard Sylla, and Charles M. Royce, *Genealogy of American Finance* (New York: Columbia University Press, 2015).

accumulate quickly. Other formal proceedings such as arbitrations were \$7 a day plus expenses. Even “Advice,” the cheapest fee that appears on Sherman’s books, cost \$1.¹²³ Only those who could afford to pay a lawyer could gain access to the best debt redemption procedures both in and out of court, and therefore only wealthy Americans could depend on lawyers to make a private substitute for cash function as safely as possible.

Sherman’s clientele reflected the expense of his legal work. In the early years of his practice, he worked mostly for individuals. These individuals, however, were wealthy, repeat commercial players. Clients like “Samuel Starr of Troy,” “Andrew Beardsley of Huntington,” and “Henry Smith of Stamford” relied on Sherman for many years, frequently paying him sums for work that other Connecticut residents could not afford.¹²⁴ During the 1810s and 1820s an increasingly large number of commercial partnerships appear in his records. Later, corporations—the Hartford Life Insurance Company, the Darby Fishing Company, the Hartford & New Haven Railroad Company, the Eagle Bank—began to make up a significant percentage of Sherman’s clientele.

Such large creditors could afford access to lawyers to threaten debtors with suit and bring them to court if they refused to comply. The expense of hiring a lawyer made it easier for creditors to go after many small debtors than it did for any of these debtors to defend themselves. Thus, even if doctrine was in a debtor’s favor, he might not have been

¹²³ Roger Minott Sherman, Account Book, 1796-1803, Roger Minott Sherman Papers, FMHC. For data on historic wage rates see Donald R. Adams, “Wage Rates in the Early National Period: Philadelphia, 1785-1830,” *Journal of Economic History* 28 (1968): 404.

¹²⁴ Some of the amounts paid would have required a laborer to put aside months of his salary.

able to take advantage of it.¹²⁵ By making promissory notes easier to redeem and consequently helping to improve liquidity in nineteenth century America, lawyers provided a traditionally public good. Only the wealthiest commercial actors, however, could count on the full benefits lawyers provided, because they were the ones who could pay their fees. Thus, the routine work of lawyers like Sherman appears, like the doctrinal shifts that Horwitz studies, to have provided its greatest benefits to those active and successful in commerce.¹²⁶

Lawyers, however, neither acknowledged the instrumental role they played in improving liquidity nor the uneven benefits their services provided, at least not in the first decades of the nineteenth century. For the most part, they embraced a narrow, technically oriented view of the profession.¹²⁷ At meetings of the bar, they passed resolutions honoring members who had died, and in the Connecticut Reports, they printed obituaries praising their most successful colleagues. These documents give a firsthand view of the legal profession's process of self-definition and its distribution throughout the legal network. The obituaries and resolutions present a well-honed professional image. A good lawyer was intelligent, had a deep knowledge of the law, a strong work ethic, and treated his clients and colleagues with respect and honesty. The obituaries published in the Connecticut Reports read as if they were attempts by the bar to find as many synonyms as

¹²⁵See Roger Minott Sherman, Account Book, 1796-1803, Roger Minott Sherman Papers, FMHC; Roger Minott Sherman, Account Book, 1826-1844, Roger Minott Sherman Papers, FMHC. James E. Boller on behalf of Hartford Life Insurance Company to Roger Minott Sherman, April 17, 1846, Roger Minott Sherman Papers, FMHC.

¹²⁶ Expense also skewed the kind of claims that would be brought to court or appealed, making appellate cases even less representative of typical legal work.

¹²⁷ Even the Supreme Court bar mostly focused on technical private law. See George Lee Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall 1801-1815, The Oliver Wendell Holmes Devise History of the United States Supreme Court*, vol. 2 (Cambridge: Cambridge University Press, 1981), 379.

possible for these traits. For intelligence: “quickness of perception,” “great acumen,” “perspicacity,” “remarkable powers of analysis,” “judgment clear and sound,” “acute . . . discrimination” and “profound . . . analysis.” For knowledge of the law: “learning,” “profound knowledge of . . . *black-letter law*,” “master of learning,” and “comprehensive and thorough acquaintance with the science of his profession.” For work ethic: “methodical[ness],” “diligence,” “industry,” “studious habits,” “power of concentration,” “devoted himself with unremitting energy to the pursuit of his profession” “long thorough and conscientious labor.” For honesty and respect: “purity of character, integrity and love of justice,” “fidelity with which he discharged his duty to his clients,” “respect . . . which uniformly characterized his intercourse with the Court and the members of the bar,” “integrity and fidelity,” “honorable and high-minded in the management of his cases,” “frank and courteous,” “honorable,” “a model of the gentlemen of the old school,” “integrity,” “courteous,” and in perhaps a gesture of desperation—or a sign of an impressively good thesaurus—“τό πρεπον.”¹²⁸ The obituaries and resolutions presented a well-honed professional image. Rather than tying the profession to its role in advancing commerce, or to the personal advancement it might provide its members, they focused on qualities that could be achieved with thorough informed service to clients, whomever those clients might be.

This devotion of the profession to integrity, hard work, and honesty rather than to accumulation was not mere subterfuge. True, commercial work made lawyers wealthy.

¹²⁸ See “Francis Parsons,” *Connecticut Reports* 29 (1861): 604-06; “Samuel Johnson Hitchcock,” *Connecticut Reports* 17 (1845): 50-51; “Jonathan Walter Edwards,” *Connecticut Appellate Reports* 15 (1842): 26-28; “Sketch of the Life and Character of the Hon. David Daggett,” *Connecticut Reports* 20 (1849): 7-20; “Roger S. Baldwin,” *Connecticut Reports* (1862): 609-13. In English “τό πρεπον” roughly translates to decorum.

By the 1820s, Sherman's successful legal practice gave him the money to invest in dozens of Connecticut and New York companies, and when he died at 1844 his estate was valued at \$70,000, a significant amount when an average Massachusetts resident owned little more than \$400 worth of property.¹²⁹ Other Lawyers joined the ranks of the economic elite, or at least of the relatively prosperous, throughout the country, from Massachusetts to Georgia.¹³⁰ Lawyers, however, were rarely forced to pick sides in doctrinal battles over the direction of economic development. They spent most of their time performing routine work on behalf of their clients and consequently, lawyers exerted economic influence in aggregate, making their economic power harder, even for them, to discern.¹³¹ It was therefore possible for lawyers to hold what Horwitz calls "precommercial" views and harbor fear for the expansion of the money supply, while at the same, through their routine work, helping to improve liquidity for those active in commerce.¹³² They could encourage economic exchange, in other words, without trying to do so, and even when they would not have wanted to do so. From this perspective, lawyers look less like shock troops and more like (conscripted?) members of combat service support.

¹²⁹ See Beers, *A Biographical Sketch*, 41; "The Progress of Wealth in Massachusetts, from 1790 to 1840," *Hunt's Merchant's Magazine and Commercial Review* 16 (1847): 437.

¹³⁰ See Gerard W. Gawalt, *The Promise of Power: The Emergence of the Legal Profession in Massachusetts, 1760-1840* (Westport, CT: Greenwood Press, 1979): 110-11. See also discussions in Chapter Three, Chapter Four, and Chapter Five.

¹³¹ Sherman, for his part, was a "strict bullionist," who believed that paper currency should only be printed if it could be easily and quickly redeemed for specie, and he published several editorials under pen names discussing the dangers of printing too much money. He believed that an "expansion of the currency beyond its natural limits," brought on by bank issued notes, posed serious risk to the economy. He did not, however, understand the work of lawyers related to promissory notes in these terms. See Lyman H. Atwater, "Sketch of the Life and Character of the Late Honorable Roger Minott Sherman," extracted from *The New Englander* 4 (1846): 15.

¹³² See Horwitz, *Transformation*, 218. As I argue in Chapter Four, harboring precommercial views may have even helped lawyers better serve commercial clients.

Grappling with lawyers' day-to-day work thus suggests that the legal profession played, as Horwitz maintains, an economically significant role in American life. It also suggests, however, that its economic influence derived less from a pro-commercial ideology than from a devotion to client service, making the oft-remarked upon political engagement of lawyers appear less central to a lawyer's daily work and his view of his profession.¹³³ It is true that lawyers played a significant role in drafting the founding documents and also true that elite lawyers such as Litchfield alumni entered politics in great numbers.¹³⁴ Of the ten men Sherman studied alongside at Litchfield, half served in political office. Even Sherman, the quintessential private lawyer, represented Norwalk in the Connecticut General Assembly and State Senate.¹³⁵ Within the context of legal routine, however, Sherman's political engagement, and that of most of his colleagues, is best understood not as central to work as a lawyer, but tangential to it. Rather than

¹³³ Thus, we may need to consider the effects of legal discourse, as for example in the work of William Novak, within the broader context of legal practice. See William Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

¹³⁴ 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. In no other country could lawyers boast of such influence. See Ferguson, *Law and Letters*, 12, who argues that lawyers held a "virtual monopoly as . . . republican spokesman." Contemporary observers agreed with this assessment. According to Edmund Burke, "In no country, perhaps, in the world [was] the law so general a study." He found the profession to be "numerous and powerful" and that it "[took] the lead . . . in most provinces." Edmund Burke quoted in Milton M. Klein, "New York Lawyers and the Coming of the American Revolution," in *Courts and the Law in Early New York*, eds. Leo Hershkowitz and Milton Klein (Port Washington, NY: Kennikat, 1974), 88.

Of the Litchfield graduates, two became Vice Presidents, six served as cabinet secretaries, thirty-eight served as United States Senators, one hundred were members of the House of Representatives, fourteen became governors, ten lieutenant governors, and many more served in other capacities in state government. Samuel Herbert Fisher, *Litchfield Law School, 1774-1833: Biographical Catalogue of Students* (New Haven, CT: Yale University Press, 1946), 3-4.

¹³⁵ Sherman's classmates who served in political office were Ezekial Bacon, Asa Bacon, John Walter Edwards, Robert Fairchild, and Asa Chapman. For Sherman's political service see Connecticut General Assembly, *Roll of State Officers and Members of General Assembly of Connecticut from 1776 to 1861: With an Appendix Giving the Congressional Delegates, Judges of the Supreme and Superior Courts, and the Date of Incorporation of the Cities Boroughs, and Towns* (Hartford, CT, 1881), 109; Atwater, "Sketch of the Life," 8-9.

viewing politics as part of the legal profession, Sherman saw it as a distinct career path. In an 1833 letter to a young lawyer Sherman classed “the Diplomatist” and “the Legislator” as separate “callings” from the “the Jurist.”¹³⁶ This division was not just academic; rather, it was manifested in the career paths of Sherman and Litchfield’s other early alumni. Sherman himself “shunned” politics and turned down a nomination to run for Congress.¹³⁷ Although five of Sherman’s classmates served in political office, only one had a political career outside of Connecticut.¹³⁸ All of them spent most of their careers as lawyers, made most of their money as lawyers, and were for the most part not especially distinguished diplomatists or legislators. A focus on private law at the expense of political service was not, for Sherman, a sign of a pettifogger, but a hallmark of some of the most successful lawyers of the early national period.

The overlap between law and service in politics likely had more to do with a lawyer’s prominence in his community than a special affinity between law and politics. Elite and wealthy men were much more likely to enter politics and it is therefore easy for historians to read too much into the frequent political service of lawyers. Roger Sherman Baldwin, for example, who served as both a governor and U.S. Senator, spent just as much time in his legal career drawing agreements, preparing writs, arguing cases, managing estates, negotiating settlements, and taking depositions as other lawyers who never served in office. Moreover, he never abandoned his private practice. He returned to

¹³⁶ See Beers, *A Biographical Sketch*, 37. Sherman thus seems to challenge Ferguson’s timeline, which argues that a technically driven version of the profession did not thrive until later. See Ferguson, *Law and Letters*, 273-287; see also Robert Gordon, “The Legal Profession” in *Looking Back at Law’s Century*, eds. Austin Sarat, Bryant Garth, and Robert A. Kagan (Ithaca, NY: Cornell University Press, 2002), 287-336.

¹³⁷ Atwater, “Sketch of the Life,” 9, 14.

¹³⁸ Ezekial Bacon served in the United States House and as the Comptroller of the U.S. Treasury. The other five only made it to Connecticut House of Representatives.

the bar as a fifty-eight-year-old after his Senate career ended. Despite his stature and success both as lawyer and politician, he continued to handle private law matters. Many other Litchfield alumni and their colleagues in the early national period followed the same pattern: if they entered politics, they continued their private legal work while in office or returned to it soon after. Law was not a distraction from politics, but politics a distraction from law.¹³⁹

Thomas Jefferson and James Wilson therefore were not prototypical lawyers.¹⁴⁰ The high percentage of framers who were lawyers—though impressive—accounted for only a small percentage of the total number of lawyers in the country. For most elite lawyers, law was a private, client-centered endeavor. By the time Sherman died in 1844, this understanding of the profession was well established. Sherman’s own life was viewed through the lens he helped create. Just after his death, he was celebrated for his “intellectual and moral greatness.” Like the best lawyers “his intellect . . . was . . . of extraordinary power, invigorated by thorough discipline, sharpened by constant exercise, well stored by laborious service, and polished to a classical finish by the study of the finest models.”¹⁴¹ Make no mistake, however, this was a lawyer’s intellect above anything else. Sherman had an “an unusual power of intense and protracted application” but, as his biographer admitted, he also lacked a strong imagination.¹⁴² In fact, “His intellectual were so blended with his legal productions, that it was hardly possible to

¹³⁹ For more on the relationship between wealth and politics see Christopher Grasseo, *A Speaking Aristocracy: Transforming Public Discourse in Eighteenth-Century Connecticut* (Chapel Hill: University of North Carolina Press, 1999).

¹⁴⁰ Nor James Madison a prototypical learner of law. C.f. Mary S. Bilder, *Madison’s Hand: Revising the Constitutional Convention* (Cambridge, MA: Harvard University Press, 2015).

¹⁴¹ Atwater, “A Biographical Sketch,” 1; Atwater, “Death Disarmed of Its Sting,” 13-14.

¹⁴² As one biographer observed, “To any higher development of [imagination], the whole nature of legal practice is unpropitious.” Atwater, “A Biographical Sketch,” 12.

portray the qualities of his mind, without giving his traits as a lawyer.”¹⁴³ Sherman thus achieved acclaim as a private lawyer, not as a politician. Although he and the bar had yet to fully embrace the economic consequences of their routine commercial work for the economy or to align themselves as closely with commercial actors as their successors would, the embrace of private law and client service was sufficient to make lawyers like Sherman very useful to those active in commerce.

As other Litchfield graduates realized, the demand for debt work and other routine commercial work extended far past the borders of Connecticut. On the western edge of the United States currency was even scarcer than in the East. Ohio’s early lawyers thus found work related to promissory notes, just as Sherman and his colleagues had. They also discovered, however, that their “intellect” and “laborious service” suited them to undertake many other tasks for commercial clients. This work not only earned them riches and acclaim but also left the profession’s stamp on the future of the country.

¹⁴³ Atwater, “A Biographical Sketch,” 13.

CHAPTER 3: FRONTIER PROPERTY

In 1811, when Henry Leavitt Ellsworth left Connecticut for northeastern Ohio to inspect his father's land holdings, the journey was still a difficult one. During the twenty-four day trip from Litchfield, Ellsworth rode from ten to thirty miles a day on horseback. He endured treacherous stream crossings, "arm[ies]" of fleas and bed bugs, and the threat of robbery. Just nineteen when he left Connecticut, Ellsworth had recently completed his training at the Litchfield Law School. His schooling, however, had not prepared him for everything he encountered once he reached the Ohio frontier. On the so-called Western Reserve, he traveled on "excessively muddy" roads that nearly caused his horse to throw him from his saddle, saw "rattle snake[s]," listened to "inferior" preachers in "desolate woods," drank bad whiskey instead of the region's "poor water," and spent time among the area's "first settlers, . . . who, generally speaking, were poor and destitute." After a month on the Reserve, Ellsworth fled back to Connecticut. He left northeastern Ohio unsure whether its small and scattered settlements would ever amount to anything significant.¹⁴⁴

Many of Ellsworth's classmates endured this same trip but came to the opposite conclusion. As early as 1799, four years before Ohio became a state, Litchfield graduates

¹⁴⁴ Phillip R. Shriver, "Introduction," in Henry Leavitt Ellsworth, *A Tour to New Connecticut in 1811: The Narrative of Henry Leavitt Ellsworth*, ed. Phillip R. Shriver (Cleveland, OH: The Western Reserve Historical Society, 1985), 6, 12; See Franklin Bowditch Dexter, *Biographical Sketches of the Graduates of Yale College with Annals of the College History*, vol. 6 (New York: 1912): 309; Ellsworth, *A Tour*, 37, 54, 19, 56, 60-61, 64, 66, 70, 72, 74. Ellsworth jokingly referred to his guns, brought along to defend himself from robbery, as "instruments of death." He was not sure that the drinking of whiskey was absolutely necessary, but everyone seemed to do it anyway: "Where the country is not cleared up you will generally find poor water. To avoid this inconvenience we carri'd a bottle of water, and, I must add, a bottle of Whiskey which we were advised to drink occasionally to keep off the fever. Whether this is ever preventative I cannot say, the people drink a great deal whether from fear or love you may judge."

and other lawyers began to settle on the frontier, pulled by what they saw as an opportunity to make money and advance themselves. The conditions that Ellsworth bemoaned—the frontier’s isolation and wilderness—created opportunity for ambitious men. Because living on the frontier was difficult and often unpleasant, the land speculators who owned most of northeastern Ohio expressed little interest in settling there. Instead, they planned to divide that land and then sell it at great profit to migrants.

Given their absence, speculators needed proxies on the Reserve to conduct their business. For lawyers on the frontier, this meant an abundance of work, and for the frontier, this meant an abundance of lawyers. Not only as attorneys-at-law but also in a host of other roles that relied on business acumen as much as legal expertise, they helped create the market for land in Ohio, expanding the boundaries of American capitalism west in the process. Ellsworth and other visitors to the Western Reserve noted as much, recounting meetings with the attorneys who were early and prominent frontier residents.¹⁴⁵ Others observed the fruit of frontier lawyers’ labors. There were more courthouses than churches—even towns with only one hundred houses had their own.¹⁴⁶ Lawyers were not always welcome, but they managed to shape the Western Reserve to the benefit of their profession.¹⁴⁷

¹⁴⁵ Ellsworth, for example, encountered Turhand Kirtland, his father’s land agent, who had founded Poland, Ohio, Ephraim Root, the founder of Rootstown, and Ebenezer Sheldon, the founder of Aurora. See Ellsworth, *A Tour*, 57; Leonard Case, “Early Settlement of Trumbull County, Ohio,” *Tracts* 1 (March, 1876); see also Fortescue Cummings, *Sketches of a Tour to the Western Country: Through the States of Ohio and Kentucky, a Voyage down the Ohio and Mississippi Rivers, and a Trip through the Mississippi Territory, and Part of West Florida, Commenced at Philadelphia in the winter of 1807, and Concluded in 1809* (Pittsburgh, 1810).

¹⁴⁶ See Cummings, *Sketches of a Tour* at 41, 68, 73. Cummings was talking about western Pennsylvania.

¹⁴⁷ See Richard Wade, *The Urban Frontier: The Rise of Western Cities, 1790-1830* (Cambridge, MA: Harvard University Press, 1959), 116, writing that lawyers were “never in short supply, and their prominence often bred hostility.”

The transfer of land from speculators to settlers—made possible by the work of lawyers—laid the groundwork for the massive population growth that transformed Ohio from an isolated territory of 51,000 in 1800 to a fast-growing state of 937,903 in 1830. By 1820, lawyers had prepared Ohio to be integrated into a national capitalist order. Although many lawyers who migrated to Ohio also held political office, their most important work, like their colleagues in Connecticut, took place in day-to-day legal practice. By organizing, officiating, and overseeing the sale of land, lawyers helped provide the structure that capitalism needed to function in Ohio.¹⁴⁸

Even lawyers could not always envision a thriving future for the Reserve. For men like Ellsworth, who doubted the developmental potential of the frontier, migrating seemed a risk that might well not pay off. Building a capitalist order on the frontier, however, proved lucrative for lawyers. As a class, members of the bar did much better than other settlers. They were the ones with well-built houses, decent food, and clean sheets.¹⁴⁹ These frontier luxuries testified to the advantageous position of lawyers who, without risking their own capital, made money even when their clients lost it. Moreover, lawyers ensured that they would continue to benefit as the frontier matured. During the first half of the nineteenth century, Ohio was critical to the development of American

¹⁴⁸ Gordon Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (Oxford: Oxford University Press, 2011), 316. For the importance of the division and sale of land to economic development see R. Douglas Hurt, *The Ohio Frontier: Crucible of the Old Northwest, 1720-1830* (Bloomington: Indiana University Press, 1996), 168-78; 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*, eds. Andrew R.L. Cayton and Stuart D. Hobbs (Athens, GA: Georgia University Press, 2005), 146. See also Walter Licht, “Envelopment,” (unpublished manuscript, May 7, 2014), 103, who argues that “[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.”

¹⁴⁹ See, e.g., 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* (New Haven, CT, 1822), 53, describing lawyer's style of living as better than the conditions of others living on the frontier.

industry, agriculture, and commerce in the United States, and it became the “center of a great empire.”¹⁵⁰ Lawyers were at the center of that center and reaped a disproportionate share of its financial rewards.

In contrast, speculators and settlers experienced mixed results. Land sales—often at lower than expected prices—generated little money for most speculators. Some did well, but others went bust. Settlers, too, often got less than they expected. Lured by promises of better land and riches, they migrated west with the hope of improving their lot. Many built successful farms, but many others found they struggled in Ohio, just as they did in the East. Still others had their land repossessed by lawyers. In the end, the economic system that lawyers brought with them from the East did, as Willard Hurst has written, “protect and promote the release of individual creative energy” that economic activity.¹⁵¹ It protected and promoted that energy within and through a capitalist system, however, one that benefited lawyers and merchants more than it did speculators and settlers. In the first two decades of the nineteenth century, a single generation of lawyers on the Reserve helped built a society of which even Ellsworth would approve.

In 1800, when the first Litchfield alumni arrived in the Western Reserve, they encountered a series of tiny hamlets. Vienna was home to only one family, Hartford to three, Vernon to five, Mesopotamia to seven, Howland to one, and eleven each in Warren and Canfield.¹⁵² When Ellsworth visited eleven years later he noted that there were

¹⁵⁰ Cayton, “Introduction,” in *The Center of a Great Empire: The Ohio Country in the Early American Republic*, eds. Andrew R.L. Cayton and Stuart D. Hobbs (Athens, GA: Georgia University Press, 2005), 2-3.

¹⁵¹ J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison, University of Wisconsin Press, 1956), 6.

¹⁵² Joseph Badger, *A Memoir of Rev. Joseph Badger, Containing an Autobiography, and Selections from His Private Journal and Correspondence* (Hudson, OH, 1851), 25.

“many townships without a single inhabitant.”¹⁵³ The Western Reserve was especially isolated because of its unique history. The Reserve grew from Connecticut’s claim to land in the Ohio River Valley, which had been granted by King Charles I.¹⁵⁴ The new state 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. Of this 120-mile-wide parcel, Connecticut reserved the westernmost five hundred thousand acres for citizens whose property had been damaged in the Revolutionary War. The rest, more than three million acres, became the Western Reserve. Connecticut sold the Reserve for \$1.2 million in 1795 to the Connecticut Land Company, a group of land speculators. Land Company investors arranged for the land to be surveyed by an expedition led by the lawyer Moses Cleaveland, and after the surveyors completed their task, the company divided the land into parcels. The company’s division of land gave members control over individual townships. Because each member’s land was scattered throughout the Reserve, the company’s landholders became competitors: each fought to attract settlers to his area of the Reserve.¹⁵⁵ They therefore had little reason to cooperate in building roads or bridges that might redound to the benefit of other sections because such improvements could siphon potential land buyers away from their own section. Settlement on the Reserve was thus even more scattered than in other parts of Ohio, where developments

¹⁵³ Ellsworth, *A Tour*, 74.

¹⁵⁴ See Andrew R.L. Cayton, *Ohio: The History of a People* (Columbus, OH: Ohio University Press, 2002), 29-30.

¹⁵⁵ See Phillip R. Shriver & Clarence E. Wunderlin, Jr., *The Documentary Heritage of Ohio* (Columbus, OH: Ohio University Press, 2001), 50.

generally arose near trails or rivers.¹⁵⁶ In contrast, settlers on the Reserve, inhabited land in isolated townships, miles away from their neighbors.¹⁵⁷

The difficulty of traveling to (and on) the Reserve heightened its isolation. In the early nineteenth century, the six hundred mile trek from Connecticut could take more than thirty days, even for an experienced traveler on horseback.¹⁵⁸ Such journeys required both persistence and improvisation.¹⁵⁹ Travelers slept in the woods, braved bridgeless river crossings, and carried their own provisions.¹⁶⁰ In the 1810s, migrants still took roads “bad past description [with] [l]arge stones & deep mud holes every step of the way.”¹⁶¹ Connecticut residents like Ellsworth complained of the filth as well as the many nasty people they encountered on the way.¹⁶² They also chafed at the frontier custom of everyone—men, women, children, and visitors—sleeping together in a single room.¹⁶³ Even in the 1820s, the Reserve was separated from eastern society by a desolate wilderness.¹⁶⁴ Traveling within the Western Reserve was also dangerous. One 1799 Litchfield graduate fell in a river in 1813 and died before he could be brought to a

¹⁵⁶ See *Ibid.*

¹⁵⁷ Reserve residents might be “fifteen or twenty miles from [their] nearest neighbor.” See Harlan Hatcher, *The Western Reserve: The Story of New Connecticut in Ohio* (Kent, OH: Kent State University Press, 1991), 62.

¹⁵⁸ See, e.g., Badger, *A Memoir*, 22-24.

¹⁵⁹ See *ibid.*

¹⁶⁰ See *ibid.*, 22-23; Harriet Taylor Upton, *A Twentieth Century History of Trumbull County, Ohio: A Narrative Account of Its Historical Progress, Its People, and Its Principal Interests* (Chicago: Lewis Publishing Co., 1909), 154, noting that “As there were no bridges, as the streams were much fuller in those days than now, all early ministers and lawyers, in buying horses, had to be assured that the animals were good swimmers;” Badger, *A Memoir*, 32-33.

¹⁶¹ Margaret Van Horn Dwight, *A Journey to Ohio in 1810*, ed. Max Farrand (Lincoln: University of Nebraska Press, 1991), 47.

¹⁶² Margaret Van Horn Dwight provided a particularly vivid description of the conditions. According to her, at one stop on her journey the “sheets . . . so dirty [she] felt afraid to sleep in them,” and the “landlady” was a “fat, dirty, ugly looking creature.” Dwight, *A Journey to Ohio*, 5-6.

¹⁶³ See, e.g., Ellsworth, *A Tour*, 69.

¹⁶⁴ See Hawley, *A Journal of a Tour*, 9.

doctor.¹⁶⁵ Another lawyer was attacked by wolves on his way back to his house in 1802, escaping only because of his fast horse and his ability to fight the wolves off with his umbrella.¹⁶⁶

The Reserve's irregular and insecure mail service further separated western lawyers from colleagues and clients in the East.¹⁶⁷ Warren, one of the largest and most important cities in the early Reserve, had no regular post until 1802.¹⁶⁸ In 1803, Warren's mail route was extended to Pittsburgh, but the 150 mile journey took ten days for carriers on foot.¹⁶⁹ Mail service in Cleveland developed more slowly—new routes were still being established in the late 1810s.¹⁷⁰ Rather than trusting the postal service, lawyers on the Reserve sometimes sent letters with visitors to “save the risk of transportation.”¹⁷¹ Even that did not always work.¹⁷² In the second decade of the nineteenth century, they cut bills in half and sent the pieces in separate envelopes to prevent theft.¹⁷³

¹⁶⁵ Edwards became ill in January 29, 1813 after falling in a river and then experiencing pain in his stomach. See Louisa Maria Edwards, *A Pioneer Homemaker, 1787-1866: A Sketch of the Life of Louisa Maria Montgomery* (L.M. Edwards, 1903), 36-37.

¹⁶⁶ See Upton, *A Twentieth Century History*, 154. Other frontier travelers described interactions with wildlife as well. The missionary Joseph Badger encountered a bear, whom he had to climb a tree to escape and was followed by a “large wolf.” See Badger, *A Memoir*, 25, 64.

¹⁶⁷ Lawyers and clients frequently complained of, and attempted to circumvent, the mail. See, e.g., Letter of Elisha Whittlesey, May 18, 1809, Elisha Whittlesey Papers, Western Reserve Historical Society, Cleveland, OH (Hereinafter “WRHS”), noting that mail from “Pittsburgh to Warren has not been very regular;” E.D. Whittlesey to Elisha Whittlesey, June 1, 1816, Elisha Whittlesey Papers, WRHS, complaining of lateness of letter.

¹⁶⁸ Leonard Case, “Early Settlement,” 8.

¹⁶⁹ See William Ganson Rose, *Cleveland: The Making of a City* (Kent, OH: Kent State University Press, 1950), 50, 57.

¹⁷⁰ See Edmund H. Chapman, *Cleveland: Village to Metropolis, A Case Study of Problems of Urban Development in Nineteenth Century America* (Cleveland: Press of Western Reserve University, 1964), 17.

¹⁷¹ Elisha Whittlesey to Elisha Sterling, Sep. 3 1810, Elisha Whittlesey Papers, WRHS; see also Elisha Sterling to Elisha Whittlesey, Aug. 31, 1819, Elisha Whittlesey Papers, WRHS; Elisha Sterling to Elisha Whittlesey, May 29, 1820, Elisha Whittlesey Papers, WRHS.

¹⁷² E.D. Whittlesey to Elisha Whittlesey, June 1, 1816, Elisha Whittlesey Papers, WRHS.

¹⁷³ See, e.g., E.D. Whittlesey to Elisha Whittlesey, March 24, 1817, Elisha Whittlesey Papers, WRHS.

The Reserve also lacked many of the institutions to which cultivated Connecticut residents were accustomed. Churches, libraries, and schools appeared slowly. Warren did not have a regular preacher for many years. Baptists made do with a minister who came every other week and Presbyterians had only “occasional” preachers until 1808.¹⁷⁴ In 1810, only three small libraries existed in the entire Reserve.¹⁷⁵ Schools also developed slowly; a smattering of one-room schoolhouses in the first decade of the nineteenth century meant literacy was cultivated at home.¹⁷⁶ Even as the Reserve’s institutions developed, they remained inaccessible to many residents, who often lived ten or twenty miles from their neighbors. At home, Reserve residents also lacked standard comforts. Settlers lived in “imperfectly finished” log cabins “exposed to the damps of a new country.”¹⁷⁷ Their children caught “[wh]oooping cough,” they drank gallons of liquor, and entire families slept in beds “completely covered with fleas.”¹⁷⁸

Despite the many difficulties that Reserve life entailed, Litchfield alumni were among the region’s earliest residents. In 1799, 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.¹⁷⁹ George Tod, who attended Litchfield in 1796, was one of Youngstown’s first residents when he arrived in

¹⁷⁴ See Leonard Case, “Early Settlement,” 4.

¹⁷⁵ Stuart Stiffler, “Books and Reading in the Western Reserve: The Small-Settlement Library, 1800-1860,” *Libraries and Cultural Record* 4 (2011), 391.

¹⁷⁶ See Upton, *A Twentieth Century History*, 284-85. Joseph Green Butler, *History of Youngstown and the Mahoning Valley*, vol. 1 (Chicago: American Historical Society, 1921), 114.

¹⁷⁷ Ellsworth, *A Tour*, 64; see also Chapman, *Cleveland*, 12-13.

¹⁷⁸ Ellsworth, *A Tour*, 70-71.

¹⁷⁹ Edwards, *A Pioneer Homemaker*, 8.

1800.¹⁸⁰ Elijah Bottom Merwin also arrived before Ohio statehood. He moved to Marietta in 1801, immediately after he completed his training at Litchfield. The township reported only 173 residents in the 1800 census.¹⁸¹ William Woodbridge, a 1796 Litchfield alumnus, arrived in Marietta just five years later. Homer Hine moved to Ohio soon after he finished studying with Reeve in 1800, settling first in Canfield and then Youngstown. In total, 39 of the 711 lawyers educated at Litchfield before 1820 migrated to Ohio. Of four hundred lawyers taught by Reeve who left Connecticut, almost 10 percent worked in Ohio, and there were more Litchfield lawyers in Ohio than in any other state save Connecticut.

Non-Litchfield lawyers also arrived early and in significant numbers.¹⁸² Early accounts of the Reserve describe frequent encounters with lawyers using the label “esquire” that was the conceit of members of the bar in Ohio and elsewhere. One traveler recounted meeting “Esquire Smith,” the founder of Smithfield, “Esquire Hudson,” the founder of Hudson, and “Esquire Sheldon,” the founder of Aurora.¹⁸³ Other lawyers, even if they had not founded a town, were among its first residents. Samuel H. Huntington, who studied law with his stepfather, moved to a “nearly depopulated”

¹⁸⁰ See Jeffrey P. Brown, “Samuel Huntington: A Connecticut Aristocrat on the Ohio Frontier,” in *Ohio’s Western Reserve: A Regional Reader*, eds. Harry F. Lupold and Gladys Haddad (Kent, OH: Kent State University Press, 1988), 47.

¹⁸¹ U.S. Census Bureau, *1800 United States Federal Census*. The census of Marietta, Ohio recorded 173 “free white male inhabitants.”

¹⁸² See *History of the Bench and Bar of Northern Ohio*, ed. William B. Neff (Cleveland: Historical Publishing Company, 1921); *Bench and Bar of Ohio: A Compendium of History and Biography*, ed. George I. Reed (Chicago, 1897); see also Wade, *Urban Frontier*, 115-16, describing proliferation of lawyers on the frontier more generally.

¹⁸³ Badger, *A Memoir*, 64, 27, 26.

Cleveland in 1801 after seven years of legal practice in Connecticut.¹⁸⁴ Job Doane, born to the founder of East Cleveland Township, stayed on the frontier and became a lawyer.¹⁸⁵ Elisha Whittlesey moved from Danbury, Connecticut to Canfield, Ohio in 1806 after studying law with his brother and briefly practicing in Connecticut.¹⁸⁶

The western migration of lawyers was so substantial that the Reserve almost certainly had more lawyers per capita than the East did. In 1800, there was roughly one lawyer for every 2,100 people in Connecticut and one for every 2,900 in Massachusetts. County-level census records are not available for Ohio in 1800, but even ten years later, less than 20,000 people lived on the Reserve. Considering that Ohio's population grew fivefold during that period, it is safe to assume that approximately 4,000 people lived on the Reserve in 1800. At eastern ratios that would have entailed one or two lawyers. Yet by 1801, at least five Litchfield graduates had already moved to the Reserve. Accounting for the presence of lawyers who received training elsewhere, the ratio of lawyers to population was probably at least five or ten times what it was in Connecticut in Massachusetts. Even these estimates possibly understate the pervasiveness of lawyers. In

¹⁸⁴ Charles Whittlesey, *Early History of Cleveland* (Cleveland, 1867), 384; see also Brown, "Samuel Huntington," 47.

¹⁸⁵ Badger, *A Memoir*, 95; Andrew Cozad, "History of East Cleveland Town," (unpublished manuscript), WRHS, available at <http://digital.case.edu/concern/texts/ksl:wrhsms06160>.

¹⁸⁶ See Whittlesey, *Early History*, 125. According to family lore, when Whittlesey and his wife, Polly, left for Ohio "in a Jersey wagon with a good team of horses" Polly "asked for \$50 with which to purchase, as they passed through New York, a new bonnet, some silverware, linen etc. [Her father] replied by saying, that she could have no use for such articles in the place where she was going, and as for table ware, all she would need would be two tin cups and as many pewter spoons with which to eat their mush and milk." Ibid.

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.¹⁸⁷

This significant migration of lawyers was led by young men. East Coast lawyers with extensive practices had little reason to uproot their families and abandon their clients; thus, the lawyers who left for the frontier tended to be relatively inexperienced. Indeed, none of the Litchfield alumni who moved to Ohio before 1820 had practiced for more than five years. Other lawyers in the Western Reserve tended to have similar levels of experience. Connecticut residents were aware of this outmigration of young lawyers and were worried about it.¹⁸⁸ In an address to the Connecticut legislature in 1817, Governor Oliver Wolcott called for an investigation into the “emigrations of our industrious and enterprising young men,” labeling the issue “by far the most important subject which can engage our attention.”¹⁸⁹ As one of Reeve's former students and a

¹⁸⁷ According to Simeon Baldwin's calculations, there were approximately 120 lawyers actively practicing in Connecticut in 1798. The 1800 U.S. Census placed the Connecticut population at 250,002. This gives a ratio of 1 lawyer for every 2,090 people. In Massachusetts, Gerard Gawalt found 200 lawyers in 1800, and calculated the ratio of lawyers to population at 1:2,872. Simeon E. Baldwin, “James Gould 1770-1838,” in *Great American Lawyers*, vol. 2, ed. William Draper Lewis (Philadelphia: The J.C. Winston Co., 1907), 459-60; Gerard Gawalt, *The Promise of Power: The Emergence of the Legal Profession in Massachusetts, 1760-1840* (Westport, CT: Greenwood, Press, 1979). I calculated the population of the Western Reserve in 1810 by using county-level data available from the 1810 U.S. Census.

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 one lawyer for every three hundred residents. See Deborah Lee Haines, “City Doctor City Lawyer: The Learned Professions in Frontier Chicago, 1833-1860,” (Ph.D. thesis, University of Chicago, 1986), 62.

¹⁸⁸ They were not alone. Many eastern politicians were concerned with the emigration of their residents. See Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861*, (Cambridge, MA: Harvard University Press, 1969), 186-91; Richard H. Steckel, “The Economic Foundations of East-West Migration During the 19th Century,” *Explorations in Economic History* 20 (1983), 14-19.

¹⁸⁹ Oliver Wolcott, Jr., “Address to the Connecticut State Legislature,” in *The Peopling of New Connecticut: From the Land of Steady Habits to the Western Reserve*, ed. Richard Buel (Hawthorne, CT: Acorn Club, 2011), 102.

native of Litchfield, Wolcott knew that many younger colleagues left the state. Wolcott feared that the young men leaving for the frontier underestimated the value of the “schools, churches, roads, and many other establishments necessary to the comfort, preservation and dignity of society” that they left behind in Connecticut.¹⁹⁰ In Ohio, by contrast, the first generation of lawyers and their successors celebrated the new arrivals from Connecticut. These “prominent and successful” men brought a “favorable influence” to the frontier, argued local residents.¹⁹¹ By coming to Ohio they “transplanted . . . a New England court jurisdiction almost bodily.”¹⁹²

Why did so many men move to a disorganized and hazardous frontier where they had to compete with other lawyers for business? The influx of lawyers to the Reserve was not a simple response to demand from other settlers. When the first lawyers arrived, Ohio had few inhabitants. Those who lived in its scattered settlements expressed little interest in professional legal representation; many of them had moved west to get away from lawyers and their ilk.¹⁹³ An examination of the letters and legal papers of Litchfield lawyers demonstrates that young attorneys were driven from the East Coast by the difficulties of competing in a crowded legal market. They also show that lawyers were pulled by opportunities that they hoped outweighed the hazards: work on behalf of

¹⁹⁰ Ibid.

¹⁹¹ Whittlesey, *Early History*, 384.

¹⁹² James Harrison Kennedy, “Introductory,” in *The Bench and Bar of Cleveland*, eds. James Harrison Kennedy and Wilson Miles Day (Cleveland, 1889), 10-11.

¹⁹³ Henry Clay, “The Early Bench and Bar of the Western Reserve,” in *Bench and Bar of Ohio: A Compendium of History and Biography*, vol. 1, eds. George I. Reed, Emilius Oviatt Randall, and Charles Theodore Greve (Chicago, 1897); see also Andrew Cayton’s discussion of the conflicts between Ohio’s initial white settlers and Federalist politicians and Stephen Aron’s discussion of how law helped to transform Kentucky against the wishes of many of its residents. Andrew R. L. Cayton, *The Frontier Republic: Ideology and Politics in the Ohio Country, 1780-1825* (Kent, OH: Kent State University Press, 1986); Stephen Aron, *How the West Was Lost: The Transformation of Kentucky from Daniel Boone to Henry Clay* (Baltimore: John Hopkins University Press, 1996), 122.

eastern speculators combined with the opportunity to wield influence in a fledgling frontier society that shared important connections with Connecticut.

By 1800, the earlier demand for lawyers on the East Coast, generated by an exodus of established attorneys into judgeships and politics after the Revolutionary War, had dissipated.¹⁹⁴ Would-be lawyers now faced significant competition for clients. This competition was heightened by loose standards for legal education and admission to the bar in the early national period. One Virginia lawyer summed up the feelings of many of his fellow attorneys: law was a “noble profession, for which every jackass in the country conceives himself more than equal.”¹⁹⁵ Although he was exaggerating, many in the profession, including those with Litchfield educations, shared his exasperation with the large supply of lawyers.

Fee schedules, set by local bar associations, were equally troublesome. The schedules required beginning lawyers to charge the same amount as those with years of experience, making it difficult to pry work away from their seniors.¹⁹⁶ Moreover, because most lawyers practiced alone, they had to generate the work themselves.¹⁹⁷ As a result, young lawyers struggled to find work.¹⁹⁸ Elisha Whittlesey, who conceded that he had a “limited education,” captured the widespread feeling of hopelessness: “There were then, great men in Connecticut in the practice of the law, and particularly in the counties of

¹⁹⁴ E. Lee Shepard, “Lawyers Look at Themselves: Professional Consciousness and the Virginia Bar,” *American Journal of Legal History* 25 (1981): 3-4.

¹⁹⁵ Quoted in Shepard, “Lawyers Look at Themselves,” 16.

¹⁹⁶ See Gerard W. Gawalt, “Sources of Anti-Lawyer Sentiment in Massachusetts, 1740-1840,” *American Journal of Legal History*. 14 (1970): 304-05; Roger Minott Sherman, *Account Book, 1796-1803*, Fairfield Historical Society, Fairfield, CT.

¹⁹⁷ See Wayne K. Hobson, “Symbol of the New Profession,” in *The New High Priests: Lawyers in Post-Civil War America*, ed. Gerard W. Gawalt (Westport, CT: Greenwood Press, 1984), 8.

¹⁹⁸ See Shepard, “Lawyers Look at Themselves,” 4.

Litchfield and Fairfield. In sober earnest, I could not hope to attain their height nor resist their strength.”¹⁹⁹ Even well-connected lawyers complained. William W. Ellsworth, son of Governor Oliver Ellsworth, lamented in 1823 that twelve years after being admitted to the bar he struggled to make a living as an attorney. There were, Ellsworth wrote, “a redundance of numbers and talents” in the Connecticut bar. Many lawyers, he explained, failed because of a “want of opportunity and cultivation.”²⁰⁰ Conditions were bad enough that Ellsworth considered leaving the profession. The problem of competition extended beyond Connecticut. John Lloyd Stephens, who attended Litchfield in 1822 and began his legal career in New York City, described the “hundreds of poor complaining, fortune-seeking lawyers” with whom he would soon be competing.²⁰¹ Lawyers in Virginia had similar complaints.²⁰² The difficulty of finding work as a young lawyer was pervasive enough that it became a trope in legal biographies throughout the country.²⁰³ Lawyers, if we are to believe their colleagues, often faced years of struggle before they were able to earn “a decent living.”²⁰⁴ A move west promised respite from intense competition with senior members of the profession.

The Western Reserve appealed to lawyers fleeing the competitive legal markets of the East Coast because, although it promised western opportunity, it was linked to

¹⁹⁹ Elisha Whittlesey, quoted in Kenneth Edwin Davison, “Forgotten Ohioan: Elisha Whittlesey, 1783-1863” (Ph.D. diss., Western Reserve University, 1983), 14.

²⁰⁰ William W. Ellsworth to Roger M. Sherman, Nov. 10 1823, quoted in William A. Beers, *A Biographical Sketch of Roger Minott Sherman, The Eminent Connecticut Jurist, 1773-1845* (Fairfield, CT, 1882), 32.

²⁰¹ See John Lloyd Stephens to Benjamin Stephens, Nov. 28, 1823, quoted in Victor W. von Hagen, “Introduction,” in John Lloyd Stephens, *Incidents of Travel in Egypt, Arabia Petraea, and the Holy Land*, ed. Victor W. von Hagen (New York: Dover, 1996), xiv.

²⁰² See Lee Shepard, “Lawyers Look at Themselves,” 4. .

²⁰³ See M.H. Hoeflich, “John Livingston and the Business of Law in Nineteenth-Century America,” *American Journal of Legal History* 44 (2000): 359.

²⁰⁴ See *ibid.*; see also Beers, *A Biographical Sketch*, 9; *Memorial of Daniel Lord* (New York, 1869), 10.

Connecticut through (relative) proximity, ownership, and culture. The Reserve was Connecticut's closest frontier, and the majority of the investors in the Connecticut Land Company lived in Connecticut, many holding direct ties to Litchfield. Of the thirty-six investor groups in the company, one included a former Reeve student (Uriel Holmes) and six others included members whose sons had attended the law school.²⁰⁵ Four more groups included men whose daughters or wives had attended the Litchfield Female Academy.²⁰⁶ These connections meant that a family member, classmate, or potential client likely held land on the Reserve. The Litchfield connection made the school's students aware of the Reserve and exposed them to investors looking for representatives there.²⁰⁷

Other Connecticut lawyers who had more traditional legal training also established similar connections through family, college, work, and apprenticeship.²⁰⁸ Although the young lawyer Elisha Whittlesey's father was a farmer, he had also served as a justice of the peace and as a member of the Connecticut legislature.²⁰⁹ Moreover, Whittlesey's older brother Matthew, from whom he learned the law, was a well-

²⁰⁵ See Whittlesey, *Early History*, 170. Uriel Holmes was one of Tapping Reeve's first students in 1785 and after finishing his studies he stayed to practice in Litchfield. "Holmes, Uriel, 1764-1827," *Biographical Directory of the United States Congress*, available at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000743>.

Oliver Phelps, the largest subscriber and the directory of the company sent his son to Litchfield. So did Robert C. Johnson, David King, Jonathan Brace, and Ephraim Starr. Pierpont Edwards sent three of his sons to study with Reeve and Elijah Boardman, who owned a share with Uriel Holmes, sent two sons to the Law School.

²⁰⁶ Uriah Tracy and John Caldwell's had daughters who had attended the school, Henry Champion was married to an LFA graduate, and Caleb Atwater was married to a graduate and also sent his daughter there.

²⁰⁷ John S. Edwards for example, moved to the land held by his father, who was a Land Company investor, in 1796. George Tod, who arrived on the Reserve in 1800, also came to the frontier to represent Land Company shareholders; See Brown, "Samuel Huntington," 47.

²⁰⁸ See *ibid.*, 55.

²⁰⁹ Davison, "Forgotten Ohioan," 6.

connected lawyer, and his wife was the daughter of a successful merchant.²¹⁰ These family connections helped Whittlesey find work. Being from Connecticut also proved useful. Before heading west, Whittlesey met with Herman Canfield, the founder of Canfield, and Zalmon Fitch, another early settler, when they were visiting Connecticut. It was probably no coincidence that he worked for members of the Canfield family once he arrived on the Reserve.²¹¹ Other lawyers such as Samuel H. Huntington, who established ties in Connecticut practice, and Turhand Kirtland, who used his “prominent and influential” family’s connections to help him find work, took advantage of the region’s western ties.²¹² By living in Connecticut, the gateway to the Western Reserve, young lawyers already belonged to a professional network that would prove useful upon moving west.

Lawyers were also joined by many other Connecticut residents who headed west seeking advancement.²¹³ Thanks to their influence, the Reserve became known for its New England character, which distinguished it from other parts of the Ohio frontier.²¹⁴ Later residents understood that their region functioned “as a means for the overflow of the New England populations,” including an overflow of lawyers.²¹⁵ On the Reserve,

²¹⁰ Ibid., 10.

²¹¹ See, e.g., Elisha Whittlesey, Ledger, 1807-1817, Elisha Whittlesey Papers, WRHS.

²¹² See Brown, “Samuel Huntington;” Mary L.W. Morse, “Introduction” in *Turhand Kirtland, Diary of Turhand Kirtland from 1798-1800, while Surveying Land and Laying Out the Western Reserve for the Connecticut Land Company*, vol. 1, ed. Mary L.W. Morse (Poland OH, 1903).

²¹³ See David S. Boardman, *Sketches of the Early Lights of the Litchfield Bar* (Litchfield, CT, 1860), 22.

²¹⁴ Kenneth B. Lottich, *New England Transplanted: A Study of the Development of Educational and other Cultural Agencies in the Connecticut Western Reserve in their National and Philosophical Setting* (Dallas: Royal, 1964), 44; see also John Stillman Wright, *Letters from the West: Or A Caution to Emigrants* (Salem, NY, 1819), 67.

²¹⁵ See “Speech of Judge Ranney at Cleveland Law Banquet,” in *The Bench and Bar of Cleveland*, eds. James Harrison Kennedy and Wilson Miles Day (Cleveland, 1889), 200; see also F.T. Wallace, “The Legal and Judicial History,” in *ibid.*, 35, arguing that many lawyers moved to Ohio to avoid a “sore legal famine in the effete cities and rural villages.”

lawyers built on their eastern connections, establishing social networks that strengthened their power on the frontier.²¹⁶ Whittlesey, for example, held a central place in “the olden Canfield,” a social group made up of prominent families in northern Ohio, who shared Connecticut roots.²¹⁷ Edwards and Tod, who had first traveled to the Reserve with other well-connected men from western Connecticut, took places in the social and political circle of Greenwich native Simon Perkins, the founder of Akron.²¹⁸ Networks linking the Reserve’s lawyers to one another and to eastern elites enabled referrals that amplified lawyers’ influence. Although lawyers might compete with one another for business, their “comradeship,” helped them to find work.²¹⁹

Most of the work generated through these connections, along with most of the demand for legal expertise on the frontier, came from eastern buyers and sellers. Both settlers and land speculators wanted certainty that title to land was secure.²²⁰ Absentee speculators also needed expert assistance inspecting and managing their land, drafting transactions, ensuring that buyers paid their mortgages, collecting when they did not, keeping records of for transactions, verifying the accuracy of deeds, examining titles,

²¹⁶ For more, see Marc Harris, “Social Entrepreneurs” (Ph.D. diss., John Hopkins University, 1983), 329-30.

²¹⁷ See *ibid.*, 97-98, noting that the network included the “Whittlesey, Wadsworth, Church, and Canfield families.”

²¹⁸ *Ibid.*, 100; see also Edwards, *A Pioneer Homemaker*, 25, describing friendship between Litchfield lawyers John Stark Edwards and George Tod. John Edwards was accompanied on that journey by John Kinsman, a large landowner, Calvin Pease, a lawyer, Simon Perkins, George Tod, Ebenezer Reeve, Josiah Pelton, Turhand and Jared P. Kirtland and others. *Ibid.*

²¹⁹ See Harris, “Social Entrepreneurs,” 105.

²²⁰ 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*.” See “Advertisement for Farms and New Lands,” *Litchfield Gazette* (Litchfield, CT), Apr. 13, 1808. Later Ohio residents spoke effusively on the subject. See Whittlesey, *Early History of Cleveland*, 145: “To those outside of the legal profession, nothing is more uninteresting than discussions upon titles. But the subject is too important to be omitted. In regard to the permanent prosperity of a country, a good system of land titles, is of no less consequence than a good government.”

paying taxes, suing and defending suits, and more.²²¹ No individual landholder earned enough money with speculation to justify paying a full-time employee in Ohio to perform these tasks, so they needed to hire part-time help. 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 1830.²²² As late as 1870, white-collar workers made up less than 3 percent of the American workforce.²²³ Accountancy became an established professional category only in the twentieth century.²²⁴

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.²²⁵ Along with an understanding of the basics of ledger keeping, most lawyers were capable of acting as financial agents.²²⁶ They were also willing to undertake

²²¹ See Harris, “Social Entrepreneurs,” 60; Timothy J. Shannon, ““This Unpleasant Business:” The transformation of Land Speculation in the Ohio Country, 1787-1820,” in *Pursuit of Public Power: Political Culture in Ohio, 1787-1861*, eds. Andrew R.L. Cayton and Jeffrey P. Brown (Kent, OH: Kent State University Press, 1994), 22.

²²² See Michael Zakim, “Producing Capitalism: The Clerk at Work,” in *Capitalism Takes Command: The Social Transformation of Nineteenth Century America*, ed. Michael Zakim and Gary J. Kornblith (Chicago: University of Chicago Press, 2011), 223.

²²³ See Alba M. Edwards, “The ‘White-Collar Workers,’” *Monthly Labor Review* 38 (1934): 501, 504. By 1930, the percentage had climbed to 16.3 percent. *Ibid.*

²²⁴ See

https://books.google.com/ngrams/graph?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).

²²⁵ For more on this, see Chapter Two.

²²⁶ See William T. Baxter, “Observations on Money, Barter and Bookkeeping,” *Accounting Historians Journal* 31 (2004): 133.

many other tasks for their clients. At a time when working as an employee may have threatened a man's masculinity, the lawyers avoided the aura of dependence by working for multiple clients, taking leading roles in their communities, and emphasizing their professional affiliation.²²⁷ They executed the technical tasks normally associated with lawyering, and the broader set of functions on which land sales depended. As some of the only educated men on the frontier, their skills proved immensely useful.

Those lawyers who moved to the Reserve expected more than a quick buck and a temporary respite from the competitive eastern legal market, however. They believed that the Reserve could become integrated legally, economically, and politically with the rest of the United States. As the Litchfield graduate John S. Edwards put it in an 1802 letter to his father,

I often experience much real pleasure in contemplating the future greatness of this flourishing and rising country. I can behold cities rising which shall equal in populousness and splendor of those of the Atlantic States, a rich, well improved and highly cultivated country and as great a share of luxuries and enjoyments of life as are necessary for our happiness.²²⁸

The belief that the frontier offered opportunity for advancement depended on a particular vision of its future, one that relied on its connections to the east. The land was not special

²²⁷ For information about the problems employment posed see Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture* (Chapel Hill: University of North Carolina Press, 1991), 125-31; Naomi R. Lamoreaux, "The Partnership Form of Organization: Its Popularity in Early-Nineteenth-Century Boston," in *Entrepreneurs: The Boston Business Community 1700-1850*, eds. Conrad Edick Wright and Katheryn P. Viens (Boston: Northeastern University Press, 1997), 290-95.

If anything, lawyers tended to be accused of taking advantage of their clients rather than vice versa. See, e.g., Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776-1876* (Cambridge, MA: Harvard University Press, 1976), 40-58; for more on lawyers embracing servitude, see Sarah Winsberg, "Sorting Labor Cases 'Under Heads Where They Seemed Most Applicable': American Legal Understandings of Work before Employment Law" (unpublished manuscript).

²²⁸ John S. Edwards to Samuel Wm. Johnson, July 28, 1802, in Edwards, *A Pioneer Homemaker*, 8-9.

because it would serve as a new model for American society but because it would soon be integrated into the rapidly expanding eastern economy. Edwards did not come to the frontier planning to adopt frontier values or ways of doing business. He did not want to capitalize on informal frontier norms to earn a living and then leave. He believed instead that the same professional approach and tools that had helped lawyers in the East gain economic and political influence were appropriate in a place as isolated as the Western Reserve. In this context, law was an organizing force. It provided the foundation for the development of the state and community and its integration into the legal and commercial culture in the East. Other lawyers felt the same way as Edwards. They too planned to permanently establish themselves on the frontier, and they too brought eastern approaches to law and business with them.²²⁹

If, like Edwards, one believed that the Reserve would become an important part of the United States, the transformation of the Reserve would also distinguish its leading residents. As Edward's father put it:

I do not believe that you could have done any act which would at a stroke have made you so important in the Eyes of the world as your going to the Reserve. All ascribe to you that firmness, enterprize, ambition and perseverance, which must in a few years make you to be considered the father of that Country, indeed predictions of your future greatness are already uttered by all our oracular people.²³⁰

²²⁹ See, e.g., Davison, "Forgotten Ohioan," 85.

²³⁰ Pierpont Edwards to John S. Edwards, June 9, 1799, in Edwards, *Pioneer Homemaker*, 7.

By moving west, Edwards and other lawyers believed that they would command respect on a national scale for using their skills to build up western settlements. For Edwards, moving to the Reserve was a “sacrifice made to pride and ambition.”²³¹

The dozens of practitioners, who inhabited the well-framed houses and owned the better clothes that distinguished them from their neighbors on the frontier, transformed the frontier through private legal work. Later Ohioans bragged incessantly about the importance of these lawyers. They were “[t]he products of the best families; the sons of Revolutionary statesmen and 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.”²³² Much of their important work, however, is difficult to see; unlike legislation or appellate opinions, details of their private practice remain unpublished. Although frontier lawyers evidently kept records of their practice, most of these have not survived. Of those that have, the majority are incomplete. Reconstructing the practices of frontier lawyers from a smattering of letters, a few pages of account books, and vignettes by later members of the bar is difficult.

Elisha Whittlesey’s papers, however, provide a rare window into day-to-day practice of a lawyer on the frontier. Whittlesey moved to the Reserve in 1806 with his wife Polly and practiced in Ohio for most of his life. Like Edwards, ambition motivated Whittlesey to settle on the Reserve. He believed “that [a] young man, with good habits . . . and industry, with good practical common sense . . . might make a living in a new

²³¹ John S. Edwards to his sister, 1801, in Edwards, *A Pioneer Homemaker*, 6.

²³² See F.T. Wallace, “Legal and Judiciary History,” 10-11.

country and be respected.”²³³ On the Reserve he and his wife were soon joined in Canfield by his wife’s family, including her father who opened one of the town’s first stores.²³⁴ By the time Whittlesey died in 1863 at the age of seventy-nine, he had fulfilled his prediction of financial success and social renown, earning him the right to be called “the dean of the Reserve bar.”²³⁵ In his career, Whittlesey served as the prosecuting attorney in Mahoning County, worked as a private lawyer for hundreds of clients, spent six years in the House of Representatives, and become the first Comptroller of the United States Treasury.²³⁶

Although Whittlesey neither attended Litchfield (nor college), his legal career shared much in common with other elite lawyers on the Reserve.²³⁷ Despite his modest background, Whittlesey found work quickly.²³⁸ His account books, correspondence, and other papers offer a clear picture of Whittlesey’s extensive transactional work. Account book entries for clients offer brief statements of Whittlesey’s work and the amount his clients paid him. They show him charging \$0.25 for “drawing an article,” receiving a \$10.50 “Commission for selling \$350 worth of land to C. Fitch,” and earning \$0.50 “commission on collecting \$10,” but do not explain the purposes of the article, the

²³³ Elisha Whittlesey, quoted in Davison, “Forgotten Ohioan,” 14.

²³⁴ For information on Polly’s father, Comfort S. Mygatt, see George Mygatt to John M. Edwards, in *Mahoning Valley Historical Society, Historical Collections of the Mahoning Valley: Containing an Account of the Two Pioneer Reunions: Together with a Selection of Interesting Facts, Traditions, Biographical Sketches, Anecdotes, etc., Relating to the Sale and Settlement of the Lands Belonging to the Connecticut Land Company, and History and Reminiscences, Both General and Local*, vol. 1 (Youngstown, OH, 1876), 68-69.

²³⁵ Harris, “Social Entrepreneurs,” 61.

²³⁶ For a full biography of Whittlesey see Davison, “Forgotten Ohioan.”

²³⁷ Harris, “Social Entrepreneurs,” 61. Most frontier lawyers whom I have discovered, however, did have a more comprehensive education than Whittlesey.

²³⁸ Whittlesey was named prosecuting attorney soon after he arrived but because the position paid meagerly, he spent the bulk of his time on private legal work. Davison, “Forgotten Ohioan,” 23.

circumstances of the land sale, or the reasons for the default.²³⁹ Letters exchanged with clients document Whittlesey partitioning land into segments of unverifiable size, repossessing land for unspecified prior debts, and transferring deeds to be given to anonymous purchasers.²⁴⁰ Although these sources lack human detail, they provide a comprehensive picture of Whittlesey's work for his clients, illustrating the wide variety of tasks work on the frontier necessitated.

Whittlesey developed longstanding relationships with many clients. One of his longest and most lucrative was with Elisha Sterling, for whom he started working as soon as he moved to Canfield. Their collaboration lasted for nearly thirty years.²⁴¹ Sterling had graduated from Yale in 1787 and then studied law, first with his father-in-law John Canfield of Sharon, Connecticut and finally with Tapping Reeve at Litchfield in 1789.²⁴² Unlike Roger Minott Sherman and other Litchfield educated lawyers, however, Sterling did not relish the practice of law.²⁴³ He sought wealth that "enabled him to indulge" his "aristocratical tendencies" and his "strong taste . . . for a handsome style of living and equipage."²⁴⁴ His legal practice was distinguished by volume and profit, not by prestige. Much of his time was spent on business ventures, especially land speculation, such as that

²³⁹ See, e.g., Elisha Whittlesey, Ledger, 1807-1817, Elisha Whittlesey Papers, WRHS; Elisha Whittlesey, Ledger, 1811-1814, Elisha Whittlesey Papers, WRHS.

²⁴⁰ See E.D. Whittlesey to Elisha Whittlesey, June 1, 1816, Elisha Whittlesey Papers, WRHS; Tucker & Carter to Elisha Whittlesey, June 5, 1818, Elisha Whittlesey Papers, WRHS; Elisha Whittlesey to Elisha Sterling, Oct 2, 1804, Elisha Whittlesey Papers, WRHS.

²⁴¹ Correspondence exists in Elisha Whittlesey's papers from 1806 to 1833. See Elisha Whittlesey Papers, WRHS.

²⁴² See Albert Mack Sterling, *The Sterling Genealogy* (New York: Grafton Press, 1909), 393-95.

²⁴³ *Ibid.*, 395.

²⁴⁴ *Ibid.*; Dwight C. Kilbourn, *The Bench and Bar of Litchfield County, Connecticut, 1709-1909: Biographical Sketches of Members, History and Catalogue of the Litchfield Law School, Historical Notes* (Litchfield, CT: Dwight C. Kilbourn, 1909), 88. The disdainful tone adopted by Sterling's biographers illustrates the extent to which lawyers judged their colleagues harshly for engaging in fortune-seeking behavior.

he undertook on the Reserve.²⁴⁵ 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 fell. Wary speculators or heirs of initial investors were willing to sell at sharply reduced rates.²⁴⁶ Sterling entered the fray in this depressed era with Whittlesey's counsel by his side.

Land speculation was a relatively hands-off enterprise for Sterling and other speculators. The most active role these large landholders took was in placing advertisements in eastern newspapers to attract buyers.²⁴⁷ Ads trumpeted the benefits of "acres of new land in the Western Reserve" for sale within "the increasing & flourishing state of Ohio." 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." 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."²⁴⁸ Aside from promotion, Sterling, like most speculators, delegated almost all of the work of managing, dividing, and selling land to his lawyer.

²⁴⁵ See Boardman, *Early Lights*, 64; Charles F. Sedgwick, "Fifty Years at the Litchfield County Bar: A Lecture Delivered before the Litchfield County Bar," in Kilbourn, *Bench and Bar*, 86.

²⁴⁶ See Shannon, "'This Unpleasant Business,'" 23-25; Jon T. Coleman, *Vicious: Wolves and Men in America* (New Haven: Yale University Press, 2004), 127.

²⁴⁷ See *Visions of the Western Reserve: Public and Private Documents of Northeastern Ohio, 1750-1860*, ed. Robert A. Wheeler (Columbus: Ohio State University Press, 2000) 102-03; see also Harlan Hatcher, *The Western Reserve: The Story of New Connecticut in Ohio* (Kent, OH: Kent State University Press, 1991), 71.

²⁴⁸ See "Advertisement for Farms and New Lands," *Litchfield Gazette* (Litchfield, CT), Apr. 13, 1808.

Selling land seemed like a straightforward process. The seller drafted contracts 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. On the Western Reserve, speculators required even more extensive work from their lawyers. Because many of them had never seen the property that they wanted to sell nor met (or vetted) the buyers who wanted to purchase it, speculators like Sterling needed property managers.²⁴⁹

For Sterling, Whittlesey managed workers, hiring them to clear and survey Sterling's land, and perform other unspecified tasks.²⁵⁰ Whittlesey also paid Sterling's taxes, often a complex undertaking with high stakes.²⁵¹ In 1808, Whittlesey noted that Sterling would "probably be surprised that the amount of [his] last tax was so high."²⁵² Complications encountered with the transfer of ownership required a higher tax payment this year. But if Whittlesey had not paid it, the property "would have been exposed for sale."²⁵³ Whittlesey also provided practical help with tax payments, traveling the fifteen or so miles to Warren, Ohio to securely pay the taxes in person.²⁵⁴

²⁴⁹ Similar limitations prompted absentee planters in the West Indies to rely on agents, prompting the development of accounting techniques. See Caitlin Rosenthal, "A Calculating Atlantic: Distance, Management, and Moral Reckoning," Penn Economic History Forum (unpublished manuscript, March 21, 2014).

²⁵⁰ See Elisha Whittlesey, Account Book, 1806-1817, Elisha Whittlesey Papers, WRHS.

²⁵¹ See Elisha Whittlesey to Elisha Sterling May 2, 1808, Elisha Whittlesey Papers, WRHS.

²⁵² See Elisha Whittlesey to Elisha Sterling May 2, 1808, Elisha Whittlesey Papers, WRHS.

²⁵³ Ibid. Official transfer of ownership of land was only available at the sale of the property or through the land auditor's office in Chillicothe, Ohio. Because a seller from whom Sterling purchased land had failed to register the transaction Whittlesey had to register it instead. This also meant paying for back taxes. Ibid.

²⁵⁴ See Elisha Whittlesey to Elisha Sterling May 2, 1808, Elisha Whittlesey Papers, WRHS.

Whittlesey routinely inspected land, examining its boundaries and features, researched titles, vetted sellers, drafted conveyances, transferred deeds, and registered sales with the state.²⁵⁵ If a plot “possesse[d] no particular advantages over the land adjoining,” it would be sold for the standard price per acre.²⁵⁶ On the other hand, if Whittlesey found coal, limestone, or another especially valuable feature, the price would be adjusted upward.²⁵⁷ In the next step, Whittlesey would ensure that Sterling held clear title, checking that the lot had not already been sold by Sterling or a business partner, for example, and verifying that there were no liens on the property.²⁵⁸ Whittlesey then prepared sales contracts that might include payment plans or liquidated damage clauses.²⁵⁹ Sterling delegated this work to Whittlesey, who made decisions he assumed would be “agreeable” to his client.²⁶⁰

Like their eastern counterparts, lawyers on the Western Reserve helped clients navigate an economy dependent on debt. In the words of one seller, there was simply “no money” in Ohio.²⁶¹ Moreover, most of Sterling’s buyers did not have the means to pay without a mortgage, and because banks were not common in the Western Reserve until

²⁵⁵ See, e.g., Elisha Sterling to Elisha Whittlesey, May 29, 1820, Elisha Whittlesey Papers, WRHS; Elisha Sterling to Elisha Whittlesey, May 29, 1820, Elisha Whittlesey Papers, WRHS; Elisha Sterling to Elisha Whittlesey, Oct 2, 1804, Elisha Whittlesey Papers, WRHS; Elisha Sterling to Elisha Whittlesey, Oct 2, 1804, Elisha Whittlesey Papers, WRHS; Elisha Whittlesey to Elisha Sterling, May 2, 1808, Elisha Whittlesey Papers, WRHS.

²⁵⁶ Elisha Whittlesey to Elisha Sterling, May 15, 1810, Elisha Whittlesey Papers, WRHS.

²⁵⁷ Elisha Whittlesey to Elisha Sterling, Oct. 10, 1810, Elisha Whittlesey Papers, WRHS.

²⁵⁸ See Elisha Sterling to Elisha Whittlesey, Oct 2, 1804, Elisha Whittlesey Papers, WRHS.

²⁵⁹ See, e.g., Elisha Sterling to Elisha Whittlesey, Oct 2, 1804, Elisha Whittlesey Papers, WRHS, detailing contract providing for payment of 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; Elisha Sterling to Elisha Whittlesey, Oct 2, 1804, Elisha Whittlesey Papers, Elisha Whittlesey Papers, WRHS.

²⁶⁰ See Elisha Whittlesey to Elisha Sterling, May 2, 1808, Elisha Whittlesey Papers, WRHS.

²⁶¹ Shannon, “This Unpleasant Business,” 22, quoting John May, an Ohio Company agent. Although May was exaggerating, a lack of a reliable means of exchange was a problem endemic to the whole territory. See *ibid.* For more on the importance of credit, see Chapter Two.

mid-century, buyers relied on Sterling to provide financing.²⁶² Thus, as in the rest of the country, in Ohio land sales usually depended on credit. In addition to drafting mortgage contracts, Whittlesey also ensured that mortgagees kept up their payments.²⁶³ This process brought Sterling and other speculators into a web of financial obligation, in which all parties involved had to carefully balance income and outlays to ensure they had the means to pay one another when a note came due. Whittlesey collected and accounted for payments, receiving money in person and by the mail.²⁶⁴ Because he dealt with the lenders, borrowers, purchasers, and sellers in the Western Reserve, he advised Sterling which loans were likely to be paid on time, which were likely to be late, and which were worthless.²⁶⁵ When possible, Whittlesey secured suspect notes with a debtor's property. In one case he 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."²⁶⁶ Detailed accounting by Whittlesey helped Sterling avoid defaulting on his obligations: Whittlesey ensured that when Sterling had to pay one of his creditors that he had sufficient means. Whittlesey also sent profits back East, either through the mail or with a friend.²⁶⁷

When disputes arose over title, payment, or collection, Whittlesey handled the negotiations and, if necessary, went to court.²⁶⁸ He importuned buyers in default, took

²⁶² See *ibid.* (Noting that in the "cash-strapped economy [of Ohio] any land sales were usually on credit over an extended time"); Harris, "Social Entrepreneurs," 59; Elisha Whittlesey to Elisha Sterling, May 15, 1810, Elisha Whittlesey Papers, WRHS.

²⁶³ See, e.g., Elisha Whittlesey to Elisha Sterling, July 3, 1809, Elisha Whittlesey Papers, WRHS.

²⁶⁴ See Elisha Whittlesey, Ledger, 1811-1814, Elisha Whittlesey Papers, WRHS.

²⁶⁵ See Elisha Sterling to Elisha Whittlesey, Oct. 7, 1816, Elisha Whittlesey Papers, WRHS; see also Elisha Whittlesey to Elisha Sterling, November 17, 1807, Elisha Whittlesey Papers, WRHS.

²⁶⁶ Elisha Whittlesey to Elisha Sterling, May 27, 1811, Elisha Whittlesey Papers, WRHS.

²⁶⁷ Elisha Sterling to Elisha Whittlesey, Oct. 2, 1804, Elisha Whittlesey Papers, WRHS; Elisha Sterling to Elisha Whittlesey, Aug. 31, 1819, Elisha Whittlesey Papers, WRHS.

²⁶⁸ See, e.g., Elisha Sterling to Elisha Whittlesey, Sep. 12, 1831, Elisha Whittlesey Papers, WRHS.

depositions, and repossessed property.²⁶⁹ Repossession could demand both persistence and legal expertise, as a dispute between Sterling and a buyer recorded only as “Bradley” attested. When a buyer defaulted, Whittlesey generally attempted first to negotiate.²⁷⁰ Bradley stopped making payments in 1807, and Whittlesey used “every endeavor to obtain [Sterling’s] money in [his] power.” But his “hopes of receiving [the money] without a suit” were dashed. After giving Bradley the time he requested for his crops to grow, the crops “were unexpectedly destroyed,” likely by inclement weather. Bradley then tried to sell his farm, but, like the eastern speculators who encountered difficulty selling their Reserve land in a saturated market, he found no interested buyers.²⁷¹

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. 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 believed that Bradley’s attorney “neglected attending court to have [the] cause put over,” the judge postponed the case.²⁷² The delay hindered Sterling’s repossession of Bradley’s, but only temporarily.²⁷³ After a trial in the summer of 1809, a judge issued an execution for Sterling to repossess Bradley’s land.²⁷⁴ Whittlesey made a first attempt to sell Bradley’s farm that fall, but no

²⁶⁹ See, e.g., Elisha Whittlesey to Ansel Sterling Mar. 22, 1808, Elisha Whittlesey Papers, WRHS; Elisha Sterling to Elisha Whittlesey, Aug. 5, 1813, Elisha Whittlesey Papers, WRHS; Elisha Whittlesey to Elisha Sterling, Oct 1, 1809, Elisha Whittlesey Papers, WRHS.

²⁷⁰ See letter from Elisha Whittlesey to Ansel Sterling, July 6, 1807, Elisha Whittlesey Papers, WRHS.

²⁷¹ Elisha Whittlesey to Elisha Sterling Mar, 22, 1808, Elisha Whittlesey Papers, WRHS.

²⁷² Elisha Whittlesey to Elisha Sterling, Nov. 22, 1808, Elisha Whittlesey Papers, WRHS.

²⁷³ 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, Elisha Whittlesey Papers, WRHS.

²⁷⁴ Elisha Whittlesey to Elisha Sterling, July 3, 1809, Elisha Whittlesey Papers, WRHS.

bidders for the land could be found.²⁷⁵ Nonetheless, Whittlesey assured Sterling that once the land sold, he would “recover [his] money with usury.”²⁷⁶ It appears that Bradley’s lot was divided and sold in pieces over the next few years.²⁷⁷ In cases like these, Whittlesey, like his classmate Roger Minott Sherman, used his status as a member of the bar to make convincing threats, and, also like Sherman, made good on these threats by bringing suit when settling outside of court did not work.

The distance between Whittlesey and Sterling necessitated constant communication. Between 1806, when their correspondence began, and 1836 when Sterling died, the two exchanged many letters, eighty-four of which have survived. 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,” lengthy and frequent correspondence was highly unusual for most, but not for lawyers.²⁷⁸ Such constant and detailed correspondence was one reason why lawyers like Whittlesey were able to overcome the problems that working from a distance posed.

Whittlesey’s reports give a sense of the scope and diversity of his work and of the detailed information he passed on to Sterling:

²⁷⁵ Elisha Whittlesey to Elisha Sterling, Oct 1, 1809, Elisha Whittlesey Papers, WRHS.

²⁷⁶ *Ibid.*

²⁷⁷ See Elisha Whittlesey, Ledger, 1811-1817, Elisha Whittlesey Papers, WRHS, listing charge for surveying “Bradley lot so much as is sold to Phil Beardsley.”

²⁷⁸ See David M. Henkin, *The Postal Age: The Emergence of Modern Communications in Nineteenth Century America* (Chicago: University of Chicago Press, 2006), 17. Even in the 1850s, the average American sent only five letters per year, and most of this mail was concentrated in urban centers. *Ibid.*, 26. 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 *Ibid.*, 18-19; Elisha Whittlesey, Ledger, 1811-1817, Elisha Whittlesey Papers, WRHS.

following and made		for Elisha Sterling		March 31 by money of P & G arms		
1807	Jan 31	to highway tax	22.50	March 15	by P & G arms	52.50
	March 9	to bounty tax	2.50	May 14	by P & G arms	5.50
	April 16	to money sent you by J. M. Lewis	105.30	June 14	by do do	20
	June 27	to paying that this on the note given by W. Campbell for money he borrowed to pay Ches. B. Dutch	75.00	July 15	by J. Sackett	30
	July 15	to Ches. B. Dutch	20	Aug 10	by P. Linn	27
	Aug 8	to Ches. B. Dutch	55	31	by J. Gifford	18.15
	10	to Ches. B. Dutch	50	Sept 12	by E. Hunt	20
	14	to order to take deposition of the woman wife of the man who killed	75	July 8	by do	5
	31	to paying on Ches. B. Dutch order	30	12	by J. Hunt	22.50
	24	to expenses at Warran to examine records, respecting your title from G. Waterman	1	March 7	by J. Gifford	42.50
		to paying for recording said	37 1/2	12	by P & G arms	100
	June	to paying your taxes	20	April 4	by P & G arms	537.45
		to expenses making transcripts	2			
	July 8	to paid Mr. Dutch on Ches. B. Dutch order	30			
	March 12	to paid Ches. B. Dutch on do	45			
	15	to paid Mr. Dutch on do	70			
	April 4	to paid Post for carrying back	50			
	" 23	to paid Ches. B. Dutch on do	40			
		money expended amt. to	542.92 1/2			

Letter of Elisha Whittlesey to Elisha Sterling, May 2, 1808²⁷⁹

²⁷⁹ Letter of Elisha Whittlesey to Elisha Sterling, May 2, 1808, Elisha Whittlesey Papers, WRHS.

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 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 1/2 and \$537.46 respectively.

When Dated	Against Whom	Amount	Remarks
Nov 9. 1804	Esq George Linn	132 45	due 1 st of April 1806
April 1. 1800	James Bradley	6 49	
Dec 6 th 1804	Walter Lamborn	35 0	
June 9 1806	Elisha Chapman	256 33	
Dec 4 1804	Am Chapman	176 15	
April 24. 1807	Joseph Sangham	25 40	
July 12. 1803	Joshua Hollister	31 11	On this note there is an endorsement of \$2.00 dated 6 May 1805, which was before a justice assigned by W. Langford.
June 14 th 1802	Thomas Bishop	30	
April 7. 1806	Dr Hunt	20	Do Do
April 1. 1801	A. S. L. man	28 30	is now due on this note if I have not the interest correct, I have received on it \$72.50. in cash which I advanced on Ruth Fitch's Account Debt
	James Gifford	53 52	
	Ezra Hunt	34 20	judgment was given April 6 th 1807. Stay of Execution 9 months Matthias Ringle Bondsmen
	Emerson		was given judgment April 26 th 1807. Stay of Execution 9 months John Lewis Bondsmen

Letter from Elisha Whittlesey to Elisha Sterling, November 17, 1807²⁸⁰

²⁸⁰ Elisha Whittlesey to Elisha Sterling, Nov. 17, 1807, Elisha Whittlesey Papers, WRHS.

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 explaining that the remaining amount due on one note is \$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; used his power of attorney to "partition" and "convey" E.D. Whittlesey's land; drafted power of attorney forms for "Hermon of Canfield;" "took depositions for lawsuits" and traveled to "negotiate purchase . . . of land" for Elijah Wadsworth; paid taxes on land "west of Cuyahoga," and "explor[ed] R.R. Township" for John Calhoon and Nathaniel Rollin; paid Matthew Whittlesey's "high way" "county" and "state tax;" sold land on behalf of the New York merchants August Hammett and William Lane; brought a "petition for partitioning lands of Joseph Storey & Others" at the request of Turhand Kirtland; sold a massive lot worth \$2410 for Samuel B. Flores of Philadelphia; received and sent money, collected interest on loans, and paid judgments on behalf of Judson Canfield; and traveled to Cleveland for William Winthrop "to take the

Depositions of John Williams” in relation to a suit.²⁸¹ It is tempting to divide his practice into modern professional categories, to separate his work as an agent, accountant, or businessman from his work as a lawyer. As his papers show, however, these categories were intertwined.

Whittlesey’s wide-ranging work earned him a reputation as one of the best lawyers in northern Ohio.²⁸² Although he was especially successful, representation of eastern land speculators dominated most lawyers’ practices.²⁸³ Litchfield graduate George Tod’s earliest work in Ohio, for example, involved drafting deeds for land sales by John Young, the founder of Youngstown, Ohio.²⁸⁴ Tod also drafted agreements for clearing lumber, securing debts with land, and selling land.²⁸⁵ A study of Cleveland lawyers in the 1810s found that when that city’s lawyers came to court, they spent most of their time partitioning land on behalf of Connecticut residents.²⁸⁶ Legal work in Trumbull County, the home of Warren and Youngstown, was also dominated by land transactions. In one 1815 session of the Trumbull County Court of Common Pleas, the only non-land cases on the docket were the still familiar debt cases. Because notes and land sales were so intertwined, however, these cases likely involved land, either as the

²⁸¹ Elisha Whittlesey to Samuel Smedley, April 21, 1812, Elisha Whittlesey Papers, WRHS; E.D. Whittlesey to Elisha Whittlesey, June 1, 1816, Elisha Whittlesey Papers, WRHS; Elisha Whittlesey, Ledger, 1807-1817, 20, 33, 30, 42, 39, 188, 71, 143, 159, 112, Elisha Whittlesey Papers, WRHS.

²⁸² See Harris, “Social Entrepreneurs,” 97-98, noting that Whittlesey “already ranked among the three or four great lawyers of northern Ohio” in 1822.

²⁸³ See Harris, “Social Entrepreneurs,” 95.

²⁸⁴ See Deed of John Young, May 13, 1801, George Tod Papers, WRHS.

²⁸⁵ See Copy of Agreement to Chop Lumber, June 12, 1802, George Tod Papers, WRHS; Agreement to Settle Debt of \$15.23, June 8, 1810, George Tod Papers, WRHS; Agreement to Sell \$150 of Land, Dec. 9, 1803, George Tod Papers, WRHS. Turhand Kirtland and John S. Edwards also established extensive out-of-court land practices. Upton, *A Twentieth Century History*, 149. They continued to conduct plenty of out-of-court work even after the courts opened.

²⁸⁶ See F.T. Wallace, “Legal and Judicial History,” 24, reporting on the study: “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.”

object of the loan or as collateral.²⁸⁷ 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, likely performed the same kind of diverse but related work found in Whittlesey's account books.

By helping to create a reliable market for land, lawyers helped build a market and capitalist order that cemented their continued importance in Ohio life. They brought their legal training with them, and addressed frontier problems by using those tools. The documents they drafted looked as sophisticated as any in the east. In 1802, for example, George Tod drafted an agreement for clearing "all timber and bushes" from the land owned by one of his clients. The contract was lengthy and precise. It contained a liquidated damages clause, specifying that the brush clearer pay double his fee if he failed to perform his end of the contract.²⁸⁸ This agreement demonstrated none of the informality that might be expected in a small settlement on the periphery of the country.²⁸⁹ Instead, it treated the development of the frontier—the clearing and settling of land—as a legal process dependent on lawyers.

²⁸⁷ See George Tod, Notes on Court Cases, July 1815, George Tod Papers, WRHS.

²⁸⁸ Contract, June 12, 1802, George Tod Papers, WRHS. It was detailed enough to exclude "three trees from clearing."

²⁸⁹ Other lawyers in the Western Reserve expanded the reach of legal norms and forms. Canfield, founded in 1798, only contained seventeen homes and a single store in 1805. Richard Ulrich, *An Early History of Canfield (1776 to 1876)* (Canfield: Canfield Historical Society, 1980). 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):

the 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

The work of lawyers made land transactions possible, but they could not guarantee returns for their clients. The Land Company dissolved in 1809, leaving all of its land to individual investors and further curtailing the possibility of cooperative development.²⁹⁰ Speculators in Reserve land also faced the difficulty of convincing settlers to move to an isolated part of the Ohio valley, especially after competition from land sales in other parts of the state, including those directly from the government, suppressed prices.²⁹¹

Faced with significant obstacles, land speculators rarely profited from their investment. Whittlesey's partnership with Sterling appeared to have been one of the successful ones; profits from speculation allowed Sterling to retire from active legal practice.²⁹² On the whole, however, speculators complained that they made less money than they expected and many speculators ended up passing their unsold land to their

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).

Elisha Whittlesey to Elisha Sterling, July 3, 1809, Elisha Whittlesey Papers, WRHS.

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. 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. There were enough lawyers scattered across Ohio to guarantee that documents like these were read and understood even in the most isolated places. Other documents were similarly technical. See, e.g., Deed from John Young of Youngstown, May 13, 1801, George Tod Papers, WRHS; Agreement to Chop Lumber, June 12, 1802, George Tod Papers, WRHS; Indenture for Land Use, Feb. 14, 1803, George Tod Papers, WRHS.

²⁹⁰ See Shannon, "This Unpleasant Business," 28.

²⁹¹ Shannon, "This Unpleasant Business," 20, 27.

²⁹² By 1820, his land speculation and other business ventures allowed him to retire from practice. See Sterling, *Sterling Genealogy*, 395.

children. According to one historian's accounting, land sales benefited settlers more than speculators.²⁹³ Returns for settlers were also mixed, however. New residents of Ohio sometimes found that the "high sounding recommendations" of newspaper advertisements were "totally unfounded in fact."²⁹⁴ After living on the Western Reserve for a year, one author wrote that settlers lived miserably, and that the stories of the Reserve's potential were myths, spread by unscrupulous speculators desperate to sell land.²⁹⁵

In reality, the Reserve was neither as good as its boosters made it out to be nor as bad as its critics claimed. For farmers who repaid their mortgages, Ohio's soil proved fertile and productive. For those who did not, the Reserve was much less welcoming. On the whole, however, early farmer-settlers on the Reserve played important roles in shaping the future of their communities, building towns that one critic of the frontier described as more "pleasant" and inhabited by a "different order of beings" than those in the rest of Ohio.²⁹⁶ After 1815, thanks to an economic downturn in the east, immigration to the Reserve increased.²⁹⁷ By the 1820s, Ohio was thriving.

Lawyers benefited from this boom, especially because their economic position was less risky than that of speculators or farmers. Unlike speculators, they did not need to risk capital to earn money. Instead, they profited on land transactions even when these

²⁹³ See Buel, *The Peopling of New Connecticut*, 46.

²⁹⁴ Hawley, *A Journal of a Tour*, 40-51, 56.

²⁹⁵ His litany of complaints was familiar. According to him, "[t]he weather was bad, housing inadequate, clothing "indifferent[.]" furniture pathetic, manners "very rude and uncultivated," education insufficient, religion lacking, and poverty widespread. *Ibid.*

²⁹⁶ John Stillman Wright, *Letters from the West: Or A Caution to Emigrants* (Salem, NY, 1819), 68.

²⁹⁷ Demand increased after 1815. See Jay Gitlin, "Introduction," in Dwight, *A Journey to Ohio*, x; Harris, "Social Entrepreneurs," 52.

transactions occurred at cut rates.²⁹⁸ Unlike farmers, lawyers did not depend on crop yields to maintain a standard of living—they could rely on their connections to find clients who wanted legal work. When a speculator failed, a lawyer closed his account. When a farmer failed, a lawyer made money recovering his property. Thus, although land speculation had mixed results for buyers and sellers, it benefited lawyers nearly across the board. By 1805, only six years after arriving in Ohio, Edwards wrote to his family that his practice was “sufficient to support [him] handsomely”²⁹⁹ Five years later, Edwards felt that he had achieved “every success in my profession which I have any right to expect” and that his “style of . . . living” was as good as anyone else on the frontier.³⁰⁰ Whittlesey also made rapid progress. When he and his wife first moved to Canfield in 1806, they rented rooms before moving to a modest log cabin.³⁰¹ By 1808, however, his home was majestic enough to become a Canfield landmark.³⁰² Soon after the young lawyer Samuel Huntington arrived in Cleveland, he could afford to move from his “log house” to a “well built block house, of considerable pretensions.”³⁰³ Lawyers on the Reserve consistently achieved respectable standards of living.³⁰⁴

In addition to finding work as agents, frontier lawyers could also hope for government appointment or election to political office. On the frontier, the “mere

²⁹⁸ Whittlesey generally received 3 percent of the transaction cost. C.f. Ledger of Elisha Whittlesey, 1811-1817, Elisha Whittlesey Papers, WRHS, explaining miscalculation of rate.

²⁹⁹ John S. Edwards to Pierpont Edwards, June 15th, 1805, in Edwards, *A Pioneer Homemaker*, 9-10.

³⁰⁰ John S. Edwards to Pierpont Edwards, Jan. 22, 1810, in Edwards, *A Pioneer Homemaker*, 28.

³⁰¹ Davison, “Forgotten Ohioan,” 19.

³⁰² *Ibid.*, 20.

³⁰³ Whittlesey, *Early History of Cleveland*, 57.

³⁰⁴ See, e.g., Hawley, *A Journal of a Tour*, 53, 79. Some succumbed to the dangers of the frontier, but those who survived seem to have become wealthy.

presence” of a “competent and well-connected easterner” qualified him for office.³⁰⁵

Litchfield graduates were triply qualified. The school’s reputation was strong enough to distinguish its graduates, even in the East. On the Reserve, such an education stood out even more. Moreover, Litchfield students could use the same connections, to their clients and to each other, that helped them find private work to earn appointment for political office.³⁰⁶ Finally, their outsized presence on the frontier made them easy to find.

Lawyers thus provided a ready supply of legally trained judges and other officials. 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 1807.³⁰⁷ 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 1814.³⁰⁸ Trained judges like Ruggles reinforced the standards that lawyers applied in private transactions out of court. The Court filings that took the same form and followed the same technical rules of law used in the East. Litigants pressed judges to require opposing parties to amend faulty documents, and persuaded them to throw out meritorious suits because they failed to meet technical pleading requirements.³⁰⁹ Exceptions were noteworthy. When a judge postponed a case because of a lawyer’s dubious claim of illness, it was surprising.³¹⁰ By applying exacting legal standards,

³⁰⁵ Brown, “Samuel Huntington,” 47.

³⁰⁶ For more see Chapter One.

³⁰⁷ Rose, *Cleveland*, 63; see also “Ruggles, Benjamin,” *Biographical Directory of the United States Congress*, available at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000500>.

³⁰⁸ See Rose, *Cleveland*, 73.

³⁰⁹ See, e.g., Elisha Whittlesey to Ansel Sterling, Nov. 22, 1808, Elisha Whittlesey Papers; Elisha Whittlesey to Ansel Sterling, Mar. 22, 1808, Elisha Whittlesey Papers, WRHS, providing detailed description of technical problem in defendant’s pleading.

³¹⁰ Elisha Whittlesey to Ansel Sterling, Nov. 22, 1808, Elisha Whittlesey Papers, WRHS.

judges thus helped secure the efforts lawyers had begun in their private work. As a result, Ohio's law and economy was firmly placed within an existing legal framework, one that demanded the participation of lawyers and that would continue to shape the state's economy for decades.

Historians who study American expansionism in the early national period focus on the developmental efforts of federal and state governments and especially the courts and law these institutions create.³¹¹ From this perspective, lawyers derived their greatest significance from the official roles they filled in government office—as judges, legislators, and governors. But before (and during) their service as government officials, these lawyers maintained practices dedicated to division and sale of property. Political battles for the future of Ohio affected the state's developmental path, to be sure, but they cannot be understood without also appreciating the organized, law-bound society that lawyers built in early Ohio.³¹² Just as the ostensibly private work of lawyers in Connecticut exerted demonstrably public effects, so did the work of lawyers on Ohio's frontier.

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 it was not necessary for them to solve the mysteries and unravel the

³¹¹ See, e.g., Wood, *Empire of Liberty*, 400-403; Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge: Cambridge University Press, 2009), 219-276; Hurst, *Law and the Conditions of Freedom*; J. Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little Brown and Company, 1950); see also Stephen J. Rockwell, *Indian Affairs and the Administrative State in the Nineteenth Century* (Cambridge: Cambridge University Press, 2010), 2.

³¹² For more on fights over Ohio's future see Cayton, *Frontier Republic*.

intricacies of modern business.”³¹³ They described the “unsubstantial” work of “debts, accounts, notes, contracts, titles, foreclosures, ejectments, and bankruptcy” that made up early frontier practice.³¹⁴ In truth, these matters were anything but simple. Both in and out of court lawyers were critical to the sale and distribution of land on the Reserve. They decided hundreds of small and large matters for clients, making transactions reliable and legally sound. The value of such work lay both in its versatility and in its replication of eastern legal standards and practices in a new jurisdiction. From these standards flowed a host of related structures and institutions. Chronologically and professionally, private law and the lawyers who brought it to Ohio predated the political and economic development that has captured most historians’ attention.

The contribution of private legal work to the spread of a capitalist order is counterintuitive, because the private work of lawyers looks like the work of intermediaries rather than of the state itself. As the political scientist Timothy Mitchell has pointed out, however, governments have “porous edges.” On these boundaries, “official practice mixes with the semiofficial and the semiofficial with the unofficial.”³¹⁵ Close attention to the boundaries of the government in early Ohio illustrates that it was never completely distinguishable from society, and that, by patrolling this middle ground, lawyers in Ohio helped govern and reinforce these boundaries.

Understanding the private work of lawyers through this framework explains the larger significance of their day-to-day practice. Lawyers not only acted as intermediaries

³¹³ Carrington T. Marshall, *A History of the Courts and Lawyers of Ohio* (New York: American Historical Society, 1934), viii.

³¹⁴ F.T. Wallace, “Legal and Judicial History,” 34.

³¹⁵ Timothy Mitchell, “The Limits of the State: Beyond Statist Approaches and Their Critics,” *American Political Science Review* 85 (1991): 77, 82.

between the government and speculators, in some sense, they were the government. Their work, in other words, was never wholly private. When migrating to the Reserve, lawyers brought tools that would expand a developing capitalist order. They established 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. As they divided land and organized the frontier according to the legal rules and practices that they had learned in Connecticut, they integrated Ohio into a developing capitalist economy.

The success of lawyers in early Ohio—though impressive—was not unique. Much of the uneven historical literature on law on the American frontier draws attention to the technical proficiency of lawyers.³¹⁶ As early as 1947, William Frances English remarked on the formalism of law in early Missouri.³¹⁷ According to his research, the Missouri bar of the early nineteenth century included a significant number of well-educated lawyers who applied their skills to property and associated issues.³¹⁸ Moreover, in a detailed study of laws, bar admissions, judicial opinions, and lawyers' briefs in Wayne County, Michigan, from 1796 to 1836, Elizabeth Gaspar Brown finds that judges carefully regulated access to the bar and “performed their duties in a meet and proper

³¹⁶ Most of this literature has been built in opposition to Lawrence Friedman's brief treatment in *A History of American Law*, in which he takes a dim view of the frontier bar and judiciary. “Polish and legal skill,” he writes “were in short supply.” Lawrence Friedman, *A History of American Law*, 4th. ed. (New York: Simon and Schuster, 2005), 108; see also Anton Chroust, who writes of a “discouragingly primitive” bar dominated by uneducated, illiterate judges. Anton Chroust, *The Rise of the Legal Profession in America*, vol. 1 (Norman: University of Oklahoma Press, 1965), 92-93.

³¹⁷ William Frances English, *The Pioneer Lawyer and Jurist in Missouri* (Columbia: University of Missouri Press, 1947), 69.

³¹⁸ *Ibid.*, 115.

manner.”³¹⁹ Lawyers too, she argues, were “craft conscious practitioners” who demonstrated “genuine reliance on legal authorities.”³²⁰ Looking to the territorial judiciary, Kermit Hall finds an accomplished, “educated elite.”³²¹ John Wunder, in his study of justices of the peace in the Pacific Northwest also argues for competency.³²² Other studies dispute the supposed amateurishness of lawyers in Kansas, Nashville, and California.³²³ The frontier “seemed to teem with legal talent.”³²⁴ But like the historians who have written about law in more settled regions, historians of the frontier bar focus on courts rather than the day-to-day work of lawyers. Applying the lessons of early lawyers on the Western Reserve, however, reveals that lawyers were key to expanding capitalist markets, especially through work involving land sales. Understanding the process by which lawyers contributed to the growth of early national America is critical to understanding how law spread west, and with law, economic and commercial development.

By the 1830s, the Ohio Valley was thoroughly integrated into the national economy, overcoming the “first and greatest hurdle” for “American national expansion.”³²⁵ Historians of Ohio who have examined the state’s development argue that Ohio’s rapid growth benefited commercial actors, creating a system where “wealth and

³¹⁹ Elizabeth Gaspar Brown, “The Bar on a Frontier: Wayne County, 1796-1836,” *American Journal of Legal History* 14 (1970): 156.

³²⁰ Elizabeth Gaspar Brown, “Frontier Justice, Wayne County 1796-1836,” *American Journal of Legal History* 16 (1972): 137.

³²¹ Kermit Hall, “Hacks and Derelicts Revisited,” *Western Historical Quarterly* 12 (1981): 280.

³²² See John Wunder, *Inferior Courts, Superior Justice: A History of the Justices of the Peace on the Northwest Frontier, 1853-1889* (Westport, CT: Greenwood Press, 1979).

³²³ C. Robert Haywood, *Cowtown Lawyers: Dodge City and Its Attorneys, 1876-1886* (Norman: University of Oklahoma Press, 1988); Anita S. Goodstein, “Leadership on the Nashville Frontier, 1780-1800,” *Tennessee Historical Quarterly* 35 (1976): 175; Maxwell Bloomfield, “Western Lawyers and Judges: Image and Reality,” in *Law in the West*, ed. David L. Langum (1985).

³²⁴ Wade, *Urban Frontier*, 116.

³²⁵ Aron, *How the West Was Lost*, 197.

power derived not from the ability to grow crops but from commercial transactions connected with buying, selling, financing, and provisioning for them.”³²⁶ Yet they have missed a key ingredient, that is, the legal profession, which grew symbiotically with the state. The organized, regulated, and integrated Ohio of the 1830s looked much like the Ohio that John Edwards, Elisha Whittlesey, and George Tod envisioned when they set out to the frontier at the beginning of the nineteenth century.³²⁷ Here were the “cities rising . . . equal in populousness and splendor of those of the Atlantic States” and the “rich, well improved and highly cultivated country” of Edwards’ dreams.³²⁸ Ohio was now a lawyer’s frontier.

Although the capitalist framework that lawyers helped to install in Ohio was powerful, it operated best with their assistance. Thus, even in bustling cities, commercial clients sought out the services of the legal profession. In the middle decades of the nineteenth century, eastern lawyers continued to provide these clients with routine debt and property work, but they also applied their legal skills to new fields. They found their work just as useful to clients in metropolitan board rooms as it had been in the Reserve’s small towns.

CHAPTER 4: COMMERCE AS CALLING

³²⁶ Clark, “The Ohio Country,” 158; see also Cayton, *Ohio*, 24, arguing that “lawyers and merchants reaped the biggest financial rewards” in Cincinnati’s growth.

³²⁷ For more on the regulation and integration of Ohio see Clark, “The Ohio Country,” 152-53.

³²⁸ John S. Edwards to Samuel Wm. Johnson, July 28, 1802, in Edwards, *A Pioneer Homemaker*, 8-9.

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, during the nineteenth century its population and importance grew dramatically. In 1820, the city boasted a population of 123,706, making it the largest in the country, and it continued growing at an average rate of 65 percent per decade throughout the nineteenth century, twice the rate of the national average during the same period. By 1860, New York City was home to more than 800,000 people; sixty-four percent of the country's imports and 35 percent of its exports traveled through New York's harbor. Its industry also took off, leading it to become one of the most important manufacturing locations in the world. New York traders, merchants, manufacturers, bankers, insurers, and speculators monopolized the economy, exerting influence across the country and around the world. Lord, then, found himself in the perfect place to establish a commercial law practice, after he finished his Litchfield education.³²⁹

³²⁹ Campbell Gibson, "Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990," (Population Division Working Paper No. 27, U.S. Bureau of the Census, Washington, DC, 1998): Table 5, available at <https://www.census.gov/population/www/documentation/twps0027/tab05.txt>; William Pencak, "Introduction," in *New York and the Rise of American Capitalism: Economic Development and the Social and Political History of an American State, 1780-1870*, eds. William Pencak and Conrad Edick, (New York: New York Historical Society, 1989), xii; Michael R. Haynes, "The Population of the United States 1790-1920" (Working Paper Series on Historical Factors in Long Run Growth, Historical Paper No. 56, National Bureau of Economic Research, Cambridge, MA, 1994): Table 1, available at <http://www.nber.org/papers/h0056.pdf>; Pencak, "Introduction," xii.

According to Sven Beckert, New York was "the world's most important manufacturing location." Sven Beckert, *The Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie, 1850-1896* (Cambridge: Cambridge University Press, 2003), 18. Tomas Cochran disagrees, arguing that Philadelphia was a more important hub of American industry. Cochran, however, also acknowledges the importance of New York industry and trade to the American economy. See Thomas Cochran, *Frontiers of Change: Early Industrialism in America*, (New York: Oxford University Press, 1981), 18, 110-12.

Although the New York economy grew rapidly, its upward trajectory would not always have been obvious to Lord and his clients. In the volatile American economy of the nineteenth century, amidst the “radical uncertainty of capitalism,” even experienced commercial actors understood failure firsthand.³³⁰ According to one historian’s calculations, approximately 20 percent of Americans living in the early nineteenth century would become insolvent during their lifetimes.³³¹ Among businessmen, the prognosis was worse. In 1850 San Francisco, for example, nearly 70 percent of merchants failed.³³² Oft-circulated nineteenth century common wisdom pegged the number even higher, suggesting that 97 percent of merchants eventually became insolvent.³³³

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.³³⁴ 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 traded. The incentive for fraud of

³³⁰ Jonathan Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America* (Cambridge, MA: Harvard University Press, 2012), 18.

³³¹ Scott Sandage, *Born Losers: A History of Failure in America* (Cambridge, MA: Harvard University Press, 2006), 7, citing Peter J. Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900* (Madison: The State Historical Society of Wisconsin, 1974), 287-88.

³³² *Ibid.*, 7.

³³³ *Ibid.*, 7-8; Edward Balleisen pegs the rumored number at a still unbelievable 95 percent. See Edward J. Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (Chapel Hill: University of North Carolina Press, 2001), 3.

³³⁴ See John Lauritz Larson, *The Market Revolution in America: Liberty, Ambition, and the Eclipse of the Common Good* (Cambridge, Cambridge University Press, 2009), 39-45. Prior panics could be blamed on “drought, revolution, or wartime embargoes.” See Sandage, *Born Losers*, 29.

every kind increased, because it was harder to discover.³³⁵ Fraudulent bank notes, either forged or issued without backing, frequently passed in commerce.³³⁶ 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.³³⁷ The risk (and fear) of failure haunted market participants. Some killed themselves when faced with economic ruin.³³⁸ 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.³³⁹ Still others obsessed over the "get-rich-quick scheme[s]," "confidence games" and "mania for speculation" that characterized the era.³⁴⁰

Despite these challenges, the antebellum American economy expanded and grew more complex, under what the economic historian Douglass North describes as "conditions for economic growth . . . relatively unusual in world history."³⁴¹ Although the market remained volatile throughout the nineteenth century, Lord's commercial clients

³³⁵ See Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990), 34. 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 *ibid.* For historical analysis of exchange in a relatively simple economy see Bruce Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill: University of North Carolina Press, 2001).

³³⁶ Determining whether a note was fraudulent was hard 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* (Cambridge, MA: Harvard University Press, 2009), 3, 6-9; Jane Kamensky, *The Exchange Artist: A Tale of High-Flying Speculation and American First Banking Collapse* (New York: Viking, 2008).

³³⁷ For an example of one failure and its effects see Jane Kamensky, *The Exchange Artist*, 115-64.

³³⁸ Sandage, *Born Losers*, 6-7.

³³⁹ Ann Fabian shows how middle-class Americans used gambling reform campaigns to distance themselves from the risk inherent in the market. See Ann Fabian, *Card Sharps, Dream Books, and Bucket Shops: Gambling in Nineteenth Century America*, (Ithaca, NY: Cornell University Press, 1990) 59-107.

³⁴⁰ Sandage, *Born Losers*, 15.

³⁴¹ North, *Institutions*, 34. This does not mean that they should be emulated. As North also acknowledges the nineteenth century American economy was "admitted with adverse consequences." *Ibid.* at 9.

vigorously participated in commerce. They built enterprises that made them wealthy while the American economy expanded and contracted at unprecedented rates.³⁴² This chapter argues that the work of lawyers was a private complement to public structures. Lawyers like Lord facilitated trade by implementing what North calls formal and informal constraints on human action.³⁴³ Put simply, they made it harder for market participants to break promises. They did so not only formally, by applying law, but also informally, through professional custom. Lord's papers, which include account and docket books that provide detailed descriptions of his practice, establish that much of the most important work of New York lawyers occurred in their day-to-day practice rather than in litigation.³⁴⁴ For real-estate speculators, Lord and his colleagues 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 deposits.

By developing 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. Viewed as part of an increasingly integrated economy, the work of lawyers in New York City qualifies earlier

³⁴² North attributes this economic growth to the strength of American institutions, whose importance, he argues, increased with the market's complexity. *Ibid.*, 25.

³⁴³ North defines formal constraints as explicit rules of conduct. See North, *Institutions*, 46-53. He defines informal constraints as extensions of formal rules, socially sanctioned norms, and internally enforced standards of conduct. See *Ibid.*, 36-45.

³⁴⁴ Lord's books are currently held in the private collection of John D. Gordan, III, a lawyer who worked for the firm Lord founded.

studies in which lawyers were either absent or relegated to courtrooms.³⁴⁵ Studying their papers also shows the process by which New York lawyers, like their colleagues in Connecticut and Ohio, adapted their professional skills to the needs of commercial clients. Lord's law firm, founded in 1848, established a new institutional model that drew on a long commercial-law tradition to strengthen the elite bar's ties to business. 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.

Lord, who was born in Stonington, Connecticut in 1795, moved to New York City with his father and mother when he was a small child. After graduating second in his class at Yale, Lord immediately went on to study at the Litchfield Law School.³⁴⁶ He joined the New York bar in 1817 and eventually founded a law firm that outlived him.³⁴⁷ Lord did not serve as a judge or politician, nor did he write a treatise or teach a law school class. He also lacked the rhetorical skill that allowed advocates like Daniel Webster and William Pinckney to capture the public's attention.³⁴⁸ Instead, 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

³⁴⁵ 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 Friedman, *A History of American Law*, 4th. ed. (New York: Simon and Schuster, 2005).

³⁴⁶ *Ibid.*, 7-9. Lord finished his legal education by clerking with George Griffin in New York. Franklin B. Dexter, *Biographical Sketches of the Graduates of Yale College: With Annals of the College History*, vol. 6 (New York, 1885), 679.

³⁴⁷ *Memorial of Daniel Lord* (New York, 1869), 10.

³⁴⁸ Lord's style was subdued. Even his most ardent eulogists admitted that Lord was not as beautiful of an orator as many of his colleagues. See *ibid.*, 18. For a description of the advocacy of other famous lawyers see David C. Frederick, "Supreme Court Advocacy in the Early Nineteenth Century," *Journal of Supreme Court History* 30 (2005): 4-5; see also G. Edward White, *The Marshall Court and Cultural Change, 1815-1835, History of the Supreme Court of the United States*, vol. 3, eds. Paul A. Freund and Stanley N. Katz (New York: Macmillan, 1988).

law, real property, commercial law including revenue cases, and the law of shipping and insurance.”³⁴⁹ Even his admiring eulogists admitted that a “recital” of his accomplishments “would . . . be dull and monotonous to all but professional readers.”³⁵⁰ Yet Lord and his colleagues, by encouraging transaction, helped elite New York businessmen dominate the city and transform the American economy.³⁵¹

One of Lord’s first major clients was the Crary family, to whom he was related through his mother.³⁵² The Crarys had been in the dry goods business since the turn of the century. 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.³⁵³ The firm earned fame for trading “in every article of merchandize,” and its “capital was very large and its credit unquestioned.”³⁵⁴ 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.³⁵⁵ He, and eventually his partners as well, worked for members of the Crary family into the 1860s, providing them with over fifty years of legal services.³⁵⁶ 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,

³⁴⁹ Dexter, *Biographical Sketches*, 679.

³⁵⁰ *Memorial of Daniel Lord*, 13.

³⁵¹ For information on the power of New York businessmen, see Beckert, *Monied Metropolis*.

³⁵² Lord’s connections with his mother and wife were particularly important because his father was not wealthy. See *Memorial of Daniel Lord*, 4-5.

³⁵³ See Daniel Lord, Ledger, 1815-1823, Collection of John D. Gordan III, Norwalk, CT (Hereinafter “JG”). Lord’s work before that date mostly was mostly minor drafting work. See *ibid*.

³⁵⁴ Joseph Alfred Scoville, *The Old Merchants of New York City*, vol. 2. (New York, 1870), 80.

³⁵⁵ See Daniel Lord, Ledger, 1815-1823, JG; Daniel Lord, Ledger, 1815-1823, JG.

³⁵⁶ See Daniel Lord, Letters, 1864-65, JG.

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.³⁵⁷

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.³⁵⁸ 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. According to the legends told by Lord's eulogists, his connection with Astor developed after Astor was so impressed with Lord's representation for his opponent in an insurance case that he decided to hire him. The case arose from dispute between Astor and his insurer, who argued that the damage to Astor's bear skins by rats was not a "peril of the seas."³⁵⁹ Although the case may have helped Lord rise in Astor's esteem, it is likely that Astor's decision to hire him in 1829 was also encouraged by Lord's work for the Crarys, who traded with Astor, and on behalf of whom Lord drafted agreements with Astor. By the 1830s, Lord's client list had grown significantly, thanks in part to the prominence that his representation of Astor gave him.³⁶⁰ Lord represented a significant

³⁵⁷ See Daniel Lord, Ledger, 1815-1823, JG, 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.

³⁵⁸ 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., John Lloyd Stephens to Benjamin Stephens, Nov. 28, 1823, quoted in Victor W. von Hagen, "Introduction," in *Incidents of Travel in Egypt, Arabia Petraea, and the Holy Land*, ed. Victor W. von Hagen (New York: Dover, 1996), xiv, in which Lord writes admiringly of Lord's "very active friends" who "interest[ed] themselves . . . openly" in his career when he was a young lawyer.

³⁵⁹ *Memorial of Daniel Lord*, 15.

³⁶⁰ According to Judge Blatchford, in a remembrance before he adjourned the New York Circuit Court in honor of Lord:

the case which first gave him professional eclat, and placed him at the age of about thirty among the foremost of 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

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. 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.³⁶¹ 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 \$7,000 a year.³⁶² In the 1840s, when industrial workers earned less than \$0.06 an hour, this was a

prepared and managed by him, so far as arrangement of it out of court was concerned.

See “Local Intelligence: Death of Daniel Lord,” *New York Times*, Mar 6, 1868.

³⁶¹ See Daniel Lord, Ledger, 1831-38; Kenneth J. Blume, “Aymar & Co.” in *Historical Dictionary of the U.S. Maritime Industry* (Toronto: Scarecrow Press, 2012), 54; Thomas Longworth, *Longworth’s American Almanac, New York Register, and City Directory of the Sixty-first Year of American Independence: Containing An Almanac for the Sixty-first Year of American Independence; a List of All the Banks and Insurance Companies in the City with the Names of Their Respective Officers, and All Necessary Information Relative Thereto; A Continuation of the American Chronological Table; Also the Names, Occupation, and Place of Residence of All Heads of Families, Firms, and Those Doing Business in the City, Amounting to About Thirty-Eight Thousand in Correct Alphabetical Arrangement;--and Other Useful Information*, (New York, 1836), 91, 628, 629; Walter Barrett, *The Old Merchants of New York City*, vol. 1 (New York, 1870), 100-101; 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* (New York, 1834), 259; Walter Barrett, *The Old Merchants of New York* (New York, 1866), 174; Lewis Tappan, *The Life of Arthur Tappan*, (New York, 1870), 70; Jessica M. Lepler, *The Many Panics of 1837: People, Politics, and the Creation of a Transatlantic Financial Crises* (Cambridge: Cambridge University Press, 2013), 142-43.

³⁶² 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*, eds. Conrad Edick Wright and Kathryn P. Viens (Boston: Northeastern University Press, 1997), 282-83, 293.

tremendous amount of money.³⁶³ Even in 1856, only 5 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.³⁶⁴ Lord's clients admired his work, and they continued 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.³⁶⁵ With Astor, Lord also developed a close and long-lived relationship, working for him the last seventeen years of Astor's life.³⁶⁶ Astor's family members continued to turn to Lord for their own business ventures after their father died.³⁶⁷ 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."³⁶⁸

Such reliance on lawyers may seem out-of-place, especially in the mid-nineteenth century when middle-class attacks on lawyers gained strength.³⁶⁹ Businessmen, however, recognized the importance of law to their enterprises. A series of how-to manuals,

³⁶³ See Lawrence H. Officer, *Two Centuries of Compensation for U.S. Production Workers in Manufacturing* (New York: Palgrave Macmillan, 2009), 166.

³⁶⁴ These calculations are based on records for 1851, 1856, 1857, and 1858. See Daniel Lord, Daybook, 1847-1856, JG; Daniel Lord, Ledger, 1859-1866, JG.

³⁶⁵ See Daniel Lord, Ledger 1831-38, JG; Daniel Lord, Ledger, 1839-1844, JG; Daniel Lord, Daybook, 1857-65, JG; Daniel Lord, Daybook, 1865-1868, JG. They may have also relied on his firm after his death, but I did not have access to those records.

³⁶⁶ John Jacob Astor first appeared in Lord's account book in 1831. See Daniel Lord, Ledger, 1831-1838, JG.

³⁶⁷ Daniel Lord, Ledger, 1847-1856, JG.

³⁶⁸ William Beach Lawrence, "Speech," in *Memorial of Daniel Lord*, 88-89.

³⁶⁹ See Maxwell Bloomfield, *American Lawyers in a Changing Society* (Cambridge, MA: Harvard University Press, 1976), 32-58; Benjamin H. Barton, *Glass Half Full: The Decline and Rebirth of the Legal Profession* (Oxford: Oxford University Press, 2015): 21-22.

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.³⁷⁰ As one book noted, merchants could not safely extend credit to “customers . . . scattered throughout the country” unless they understood the laws in the states in which they were trading. Nor could retailers make loans to their purchasers without understanding “the legal details concerning false representations on the part of buyers.”³⁷¹ The books contained forms for notes, contracts, mortgages, and other common legal documents, as well as basic summaries of relevant law so that

³⁷⁰ See, e.g., *Every Man's Lawyer, or Every Man his Own Scribener and Conveyancer: Containing All the Most Useful Forms: Laid Down in So Plain a Manner, that Every Man Can Draw Any Instrument of Writing, Without the Assistance of an Attorney in a Method Entirely New* (Philadelphia, 1830); Moses Crowell, *The Counsellor, or Every Man His Own Lawyer: The Several Modes of Commencing and Conducting Actions in the Justices' Courts in the State of New-York, Rendered Plain and Easy; with a Variety of Forms for Drawing Declarations, and Other Instruments of Writing Used Between Man and Man; Together with Numerous References to the Statutes and Decisions of the Supreme Court, and Other Standard Law Books* (Ithaca, NY, 1844); Gentlemen of the Bar, *The New American Clerk's Magazine, and Young Conveyancer's Pocket Companion: Containing All the Necessary Forms of Articles of Agreement, Bonds, Bills, Recognisances, Leases and Releases &c., with Necessary Directions for Making Distresses for Rent, &c., As the Law between Landlord and Tenant Now Stands, The Whole Made Conformable to the Laws of the United States and Adapted More Particularly to the State of Virginia, by a Gentleman of the Bar* (Alexandria, VA, 1803); Frederic W. Sawyer, *The Merchant's and Shipmaster's Guide, in Relation to their Rights, Duties and Liabilities, under the Existing Commercial Regulations of the United States, As Established by Statute, and According to Judicial Decisions in This, and Other Countries, on Commercial Law* (Boston, 1840); Member of the Chicago Bar, *The Business Man's Assistant and Legal Guide: Containing the Laws of Michigan, Indiana, Illinois, Iowa and Wisconsin on Conveyances, Collection of Debts, Exemptions from Execution, Mechanics' Lien, Landlord and Tenant, Estrays, Limitation of Actions, Contracts, Mortgages, Rights of Married Women, Dower, Apprenticeship, Promissory Notes, Rates of Interest and Wills, Together with the Most Approved Forms of Deeds, Articles of Agreement, Mortgages, and Various Other Forms with Full Directions for Drawing and Executing the Same, and the Laws of the United States Relating to Naturalization, Preemption Claims on Public Lands and Military Bounty Land, Being a Complete Assistant to Merchants, Mechanics, Farmers, &c* (Chicago, 1856).

³⁷¹ John G. Wells, *Wells' Every Man His own Lawyer, and United States Form Book: Being a Complete Guide in All Matters of Law, and Business Negotiations, for Every State in the Union, with Full and Complete Instructions for Proceeding, without Legal Assistance, in Suits, and Business Transactions of Every Description, Also, Containing List of Property Exempt from Execution, Lien Law, Law of Limitations, Law of Contracts, Usury Laws, Guide for Proceedings in Cases of Divorce, Constitution of the United States, Complete System of Book-keeping Interest Tables, Gold and Silver Coin Tables, Seals of Every State in the Union, &c., &c., &c.* (New York, 1858).

businessmen could undertake basic legal tasks themselves.³⁷² 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.”³⁷³ Another recommended that a businessmen turn to a lawyer in a matter involving “any considerable amount.”³⁷⁴ 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.” Attorneys, Freedley maintained, recognized issues that businessmen, clouded by “anxious cupidity” might not. Their true worth was not in the courtroom but outside it, “to save men from lawsuits [was] the noblest office of their profession.” For those who could afford what Freedley considered a “moderate . . . sum,” lawyers promised to ease the difficulty of navigating a treacherous economic climate.³⁷⁵ As another author concluded, if “pa[id] honorably,” a client could expect “safe and correct advice.”³⁷⁶

³⁷² Most also contained other general reference information, such as instructions for keeping books or calculating interest.

³⁷³ I.R. Butts, *The Man of Business, a Practical Manual, Consisting of “The Business Man’s Assistant,” “The Trader’s Guide,” and “Merchant Shipper’s and Common Carrier’s Assistant,” Adapted to the Wants of Merchants, Manufacturers, Mechanics, Farmers, Containing a Large Amount of Legal Information, Indispensable to Business Men, with a Collection of the Most Useful Legal Forms which Occur in Business Transactions, and a Great Number of Practical Business Tables Than are to Be Found in Any Other Work* (Boston, 1854).

³⁷⁴ See Moses Crowell, *The Counsellor, or Every Man His Own Lawyer*, 17.

³⁷⁵ 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* (Philadelphia, 1852), 119.

³⁷⁶ Benjamin Swaim, *The Man of Business, or, Every man’s Law Book: Showing How to Execute Properly All Deeds and Writings Obligatory, with Approved Forms and Precedents Suited to Every Class of Cases According to Modern Practice Interspersed with Legal Advice, Useful Statistics, Tables for References, Improving Anecdotes, Scientific Suggestions, &c. &c, the Whole Intended to Form a Book of Convenient*

As the books recommended, Lord 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, his 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.³⁷⁷ As insurers, they protected merchandise and real property, earning profits from the premiums they charged.³⁷⁸ 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.

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." 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." For other clients, Lord drew mortgages, drafted deeds, and wrote "[p]arty wall agreement[s]."³⁷⁹ Deeds and leases were the basis of the land transactions that allowed New York's business class to

Reference; and a Safe Guide to All Classes in the Community Whether Public Officers or Private citizens, vol. 2 (Greensborough, NC, 1834), 419-20.

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." See Marc Galanter, *Lowering the Bar: Lawyer Jokes and Legal Culture* (Madison, WI: University of Wisconsin Press, 2005): 66-67.

³⁷⁷ Bankers became some of the richest New Yorkers. See Beckert, *Monied Metropolis*, 25.

³⁷⁸ From January 1844 to January 1854, The Atlantic Insurance Company, one of Lord's largest clients generated returns of 33 percent and an annual average of over \$500,000 a year. See Freeman Hunt, *Lives of American Merchants*, vol. 1 (New York, 1856), 420.

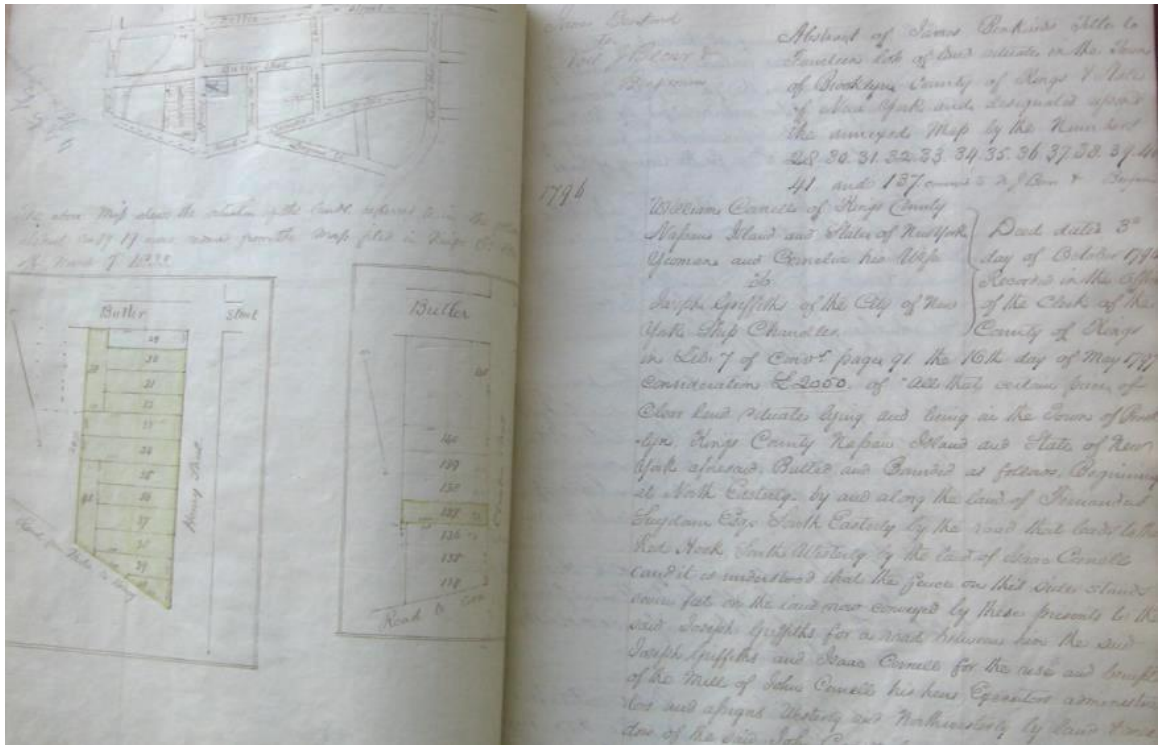
³⁷⁹ Daniel Lord, Ledger, 1815-1823, JG.

establish shops and homes, speculate on land, and develop 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 unscrupulous trading partners or trained judges.

Lord's real estate work also included the examination of titles to property.³⁸⁰ 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 the extensive examination of the provenance of a piece of land. Lord researched and recorded its exact boundaries and provided a detailed history of prior sales and transfers. In his searches, Lord checked for liens, unsatisfied judgments, and other legal encumbrances that could reduce or destroy the value of the land.³⁸¹

³⁸⁰ See *ibid*, charging \$20 for examining a title.

³⁸¹ See Grant Morrison, "A New York City Creditor and His Upstate Debtors," *New York History* 61 (1980): 267-268, describing importance of title searches. Before lawyers helped organize titles, clear ownership of land could be very difficult to ascertain and could decrease land values. See, David Thomas Konig, "Community Custom and the Common Law: Social Change and the Development of Land Law in Seventeenth-Century Massachusetts," *American Journal of Legal History* 18 (1974): 148, 157-61, 163.



Daniel Lord, Title Register³⁸²

³⁸² Daniel Lord, Title Register, JG.

This entry from Lord's records illustrates the fastidiousness and practical reach of his title work. These two pages contain a description and map of the fourteen lots his client sought to purchase in Brooklyn 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, 1835.³⁸³ 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.³⁸⁴ Lord and his partners at the firm drew assignments and deeds, wrote leases, negotiated sales, provided title searches, and even "attended the closing of sale of property" into the 1860s.³⁸⁵ They provided the legal expertise that businessmen agreed was essential to commerce.

Like earlier Litchfield alumni, Lord also deeply enmeshed himself 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. Lord drafted securities, filed legal protests when debtors refused to pay, and secured hundreds of debts on behalf of lenders.³⁸⁶ Although Lord's practice was especially note-heavy in its early years, his involvement with finance lasted his entire

³⁸³ Daniel Lord, Title Register, JG.

³⁸⁴ See, e.g., Daniel Lord, Ledger, 1859-1866, JG.

³⁸⁵ See Daniel Lord, Ledger, 1859-1866, JG.

³⁸⁶ See Daniel Lord, Ledger, 1815-1823, JG, listing, for example, charges for "securing debt," "drawing securities," and "protesting note."

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.³⁸⁷ That his clients continued to hire him suggests that they valued the reassurance that financial work by an experienced and well-regarded lawyer provided.

Lord helped his clients deal with other risks as well. In New York, merchants 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 payouts.³⁸⁸ 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.³⁸⁹ 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.³⁹⁰ Lord also provided advice respecting policy provisions and drafted insurance payout agreements to ensure that settlements were final.³⁹¹ 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,

³⁸⁷ See Daniel Lord, Daybook, 1847-1856, JG.

³⁸⁸ See Daniel Lord, Ledger 1815-1823, JG.

³⁸⁹ 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." See *Memorial of Daniel Lord*, 15.

³⁹⁰ Daniel Lord, Daybook, 1833-1835, JG; Daniel Lord, Daybook 1837-1838, JG.

³⁹¹ See Daniel Lord, Daybook, 1837-1838, JG, listing extensive work on behalf of the Atlantic Insurance company and charging for writing an "award between B De Forest & Co & Ocean Ins. Company."

was only involved in six lawsuits in the first twenty four years of the company's existence.³⁹² Relying on Lord helped them avoid the cost, delay, and uncertainty of trial.

Lord also worked extensively for New York merchants. 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 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.³⁹³ 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.³⁹⁴ His contractual work further included the review and drafting of contracts and other agreements.³⁹⁵ 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.³⁹⁶

³⁹² 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, *Merchants*, 419.

³⁹³ See Daniel Lord, Ledger, 1815-1823, JG.

³⁹⁴ See *ibid*, listing the drawing of an agreement and a bill sale, as well as charges for "advice & services purchasing order & memorandum for silk goods."

³⁹⁵ *Ibid.*, listing \$1 charge for "examining agreement with J. J. Astor.

³⁹⁶ *Ibid*; Daniel Lord, Daybook, 1837-1838, JG.

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 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.³⁹⁷ Similarly, when Astor died in 1845, he not only provided for Lord to act as the executor of his estate (with a \$5,000 yearly allowance) but also appointed him, along with twelve others, including both the mayor of New York City and the Chancellor of New York, to oversee his charitable bequests.³⁹⁸ Business relationships thus became personal, building the confidence that Lord's clients had in him and strengthening Lord's economic ties to his clients.

³⁹⁷ Hunt, *Merchants*, 419.

³⁹⁸ "Astor Will Net's \$5,000 A Year As Executor," *Boston Daily Atlas*, April 1, 1848; "John Jacob Astor's Gift," *New York 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, the Mayor of the City of New York. *Ibid.*

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.³⁹⁹ 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.⁴⁰⁰ In the mind of his fellow lawyers, this proved that he worked not for the love of money but out of devotion to his profession and its highest values. As another elite New York lawyer explained, Lord

very conscientiously and very thoroughly adhered to the rule and principle that the compensation of the lawyer should be proportioned to the service he performed in every case and yet never upon any other standard than what would furnish a suitable support according to the customs of society and give an opportunity to provide against want in the possible misfortunes and vicissitudes of life.⁴⁰¹

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.⁴⁰² Lord

³⁹⁹ William Evarts "Speech," reproduced in *Memorial of Daniel Lord*, 74-75. He worked, Evarts said, "as if work was all that there was of life that was worthy to be done." *Ibid.*, 69.

⁴⁰⁰ See *Memorial of Daniel Lord*, 12, noting that Lord "did not suffer the withdrawal of the absolute necessity for work to check the ardor with which he continued his accustomed labor."

⁴⁰¹ *Ibid.* 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.

⁴⁰² *Ibid.*, 63. Lawyers who seemed overly concerned with money were criticized for this concern. See Elisha Sterling. The similarity to the way that modern lawyers function is striking. See Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (Chicago: University of Chicago Press, 2011), 69, describing lawyers as "[b]eing intimately involved by being just a little distant" which prevents them "from lapsing into the (slightly vulgar, in lawyer' eyes) role of an actual market participant."

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.”⁴⁰³ 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.”⁴⁰⁴ Commercial work, according to the bar, was “worthy work, for worthy ends, and by worthy means.”⁴⁰⁵ It was so worthy, in fact, that Lord’s colleagues claimed his practice was just as “as useful, and as influential” as the work of those who “held judicial or official station or [were] honored by political distinctions.”⁴⁰⁶ 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

⁴⁰³ “Speech of E.C. Benedict,” reprinted in “Local Intelligence: Death of Daniel Lord” *New York Times*, Mar 6, 1868.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ William Evarts, “Speech,” 69.

⁴⁰⁶ *Ibid.*

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.⁴⁰⁷ 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.⁴⁰⁸ 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.

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.⁴⁰⁹ Thus, by helping clients redeem notes in default or sue for enforcement of contracts, lawyers encouraged their clients to participate

⁴⁰⁷ See Maxwell Bloomfield, “Lawyers and Public Criticism: Challenge and Response in Nineteenth Century America,” *American Journal of Legal History* 15 (1971), 269; Bloomfield, *American Lawyers*, 44-58. Most of these criticisms came from middle-class Americans.

⁴⁰⁸ Bloomfield, *American Lawyers*, 42.

⁴⁰⁹ The formal role of lawyers as gatekeepers of the court system has been acknowledged by North and others. See North, *Institutions*, 54-59.

in trade. In complex suits, in which precedent did not clearly dictate an outcome, lawyers helped to set formal rules for future transactions.⁴¹⁰ As Lord's account books reveal, however, he was more often an advisor or drafter than a litigator.⁴¹¹ 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 economic activity. Moreover, other historians have found that Americans appealed to law and legal language in many different settings.⁴¹² John Philip Reid, for example, maintains

⁴¹⁰In more complex suits, in which outcomes were not clearly dictated by precedent, lawyers helped to set rules for future transactions. 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 (N.Y. S. Ct. 1826).

⁴¹¹ Even as a young lawyer, Lord offered advice to his clients—about suits, business, and notes. See, e.g., Daniel Lord, Ledger, 1815-1823, JG, listing charges for “advice” and “advice related to deed.”

⁴¹² See, e.g., John Philip Reid, *Law for the Elephant: Property and Social Behavior on the Overland Trail* (San Marino, CA: Huntington Library, 1980); J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956); Jack Greene, *The Constitutional Origins of the American Revolution* (Cambridge: Cambridge University Press, 2010); William Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

that even on the Overland Trail, “law-mindedness” persisted.⁴¹³ 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.⁴¹⁴ Even critics of the profession acknowledged that lawyers held significant power.⁴¹⁵ Participants in the market were primed to believe in the law’s constraining power.

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.⁴¹⁶ 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 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

⁴¹³ Reid, *Law for the Elephant*, 10.

⁴¹⁴ Jacob Multer, *The Farmers’ Law Book and Town Officers’ Guide: Containing the Election, Qualifications and Duties of the Supervisor, Justice of the Peace, Constable, Collector, Town Clerk, Assessors, Overseers of the Poor, Commissioners and Overseers of Highways; Pound Master, Town Sealer, Common School Officers, and Executors and Administrators* (Albany, NY, 1852); Gentlemen of the Bar, *The New American Clerk’s Magazine*; Wells, *Wells’ Every Man*, iii;

⁴¹⁵ Part of the reason that reformers wanted to change the profession was to take away some of the power of lawyers see Bloomfield, *American Lawyers*, 44-45.

⁴¹⁶ See Riles, *Collateral Knowledge*, 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.”

transaction.⁴¹⁷ 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.⁴¹⁸

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 businessman was more likely to feel that his commercial transactions were calculated risks rather than gambles.⁴¹⁹ This is likely one reason why Lord’s clients continued to turn to him, rather than a cheaper, less established lawyer, for basic legal tasks, even as his rates increased. Just as middle-class reformers looked to anti-gambling campaigns to make market swings seem more rational, businessmen turned to lawyers to help them navigate the unstable market.⁴²⁰ 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 was especially important in an economy in which confidence was in short supply. In such a context, trust was one of the most

⁴¹⁷ This may be one reason why clients continued to employ Lord and his firm to perform basic legal tasks.

⁴¹⁸ Mark C. Suchman and Mia L. Cahill, “The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley,” *Law and Social Inquiry* 21 (1996): 682.

⁴¹⁹ See Suchman and Cahill who have argued that Silicon Valley lawyers have helped their clients to face a “complex, turbulent, and unpredictable social environment.” *Ibid.*, 681.

⁴²⁰ See Ann Fabian, *Card Sharps*, 59-107.

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.⁴²¹

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.⁴²² 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 constrainters 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.⁴²³ By strengthening elite New Yorkers' confidence in the market, lawyers not only encouraged them to trade with one another, they also encouraged the circulation of capital and goods in the American economy, affecting the millions of Americans who were connected to New York through the market.

⁴²¹ 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 North, *Institutions*, 59, 138-40; Stephen Knack, "Social Capital, Growth, and Poverty: A Survey of Cross-country Evidence" (Social Capital Initiative Working Paper Series no. 7, The World Bank, Washington, D.C., 1999), 16-19; George A. Akerlof and Robert J. Shiller, *Animal Spirits: How Human Psychology Drives the Economy, and Why It Matters for Global Capitalism* (Princeton: Princeton University Press, 2009), 11-18;.

⁴²² See North, *Institutions*, 54-59

⁴²³ 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, New Orleans, LA (June 3, 2016).

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. Lord was at the forefront of institutional development. During the nineteenth century, most lawyers practiced alone. Even legal partnerships were rare: only a “handful” existed in New York, and just a few multi-member firms existed in the entire country.⁴²⁴ 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 a 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. Thus, in 1848, Lord formed Lord, Day & Lord, with two young lawyers: Daniel De Forest Lord and Henry Day.⁴²⁵

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.⁴²⁶ The next partner, George De Forest Lord, joined the firm in 1859, after graduating from Harvard Law School.⁴²⁷ 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.⁴²⁸ Most other early law

⁴²⁴ Friedman, *A History of American Law*, 232; Kermit Hall and Peter Karsten, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 2009), 232.

⁴²⁵ “Henry Day,” *New York Times*, June 10, 1893.

⁴²⁶ See *Personal Records of the Brick Presbyterian Church in the City of New York, 1809-1908*, ed. Shepherd Knapp (New York: Trustees of the Brick Presbyterian Church, 1909), 60.

⁴²⁷ 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 Charles F. Southmayd, “Memorial of George De Forest Lord,” in *The ‘Memorial Book’ and Mortuary Role of the Association of the Bar of New York*, reproduced in The Association of the Bar of New York, *Yearbook, 1889-1893* (New York, 1893), 84.

⁴²⁸ See *ibid.*

firms also relied on kinship. The Cadwalader firm, founded in New York in 1818, was full of Strongs and Griffins.⁴²⁹ Cravath another elite New York firm, was established by a father, son, and brother-in-law.⁴³⁰ 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.⁴³¹ 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.⁴³²

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.⁴³³ Even

⁴²⁹ See Henry Taft, *A Century and a Half at the New York Bar, Being the Annals of a Law Firm and Sketches of Its Members with Brief References to Collateral Events of Historical Interest* (New York: privately printed, 1938), 27, 70.

⁴³⁰ See Robert T. Swaine, *The Cravath Firm and Its Predecessors, 1819-1947*, vol. 1 (New York: privately printed at the Ad Press, 1946), 2.

⁴³¹ See Park B. Dilks, Jr., *Morgan, Lewis & Bockius: A Law Firm and Its Times 1873-1993* (Philadelphia: Morgan, Lewis, and Bockius, 1994), 1-7; Kenneth Lipartito and Joseph Pratt, *Baker and Botts in the Development of Modern Houston* (Austin: University of Texas Press, 1991). See also William Bryson, "The Virginia Bar 1870-1900," in *The New High Priests: Lawyers in Post-Civil War America*, ed. Gerard W. Gawalt (Westport, CT: Greenwood Press, 1984), 175, who finds 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."

⁴³² In her study of Boston firms, Naomi Lamoreaux found that family firms tended have longer lifespans. See Lamoreaux, "The Partnership Form of Organization," at 285.

⁴³³ These calculations are based on records for 1851, 1856, 1857, and 1858. See Daniel Lord, Daybook, 1847-1856; Daniel Lord, Ledger, 1859-1866, JG.

when work declined during the Civil War, Lord, Day & Lord still brought in thousands of dollars.⁴³⁴ After the war, the firm grew even 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.⁴³⁵ 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.⁴³⁶ By sharing the expenses of new acquisitions, the three lawyers could more readily afford to acquire treatises and reporters for its library, a cost Willard

⁴³⁴ See Daniel Lord, Ledger, 1859-1866, JG.

⁴³⁵ See "Henry Day," *New York Times*, June 10, 1893, 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."

⁴³⁶ See Daniel Lord, Daybook, 1847-1856, JG.

Hurst has identified as one of the largest expenses of running a law office.⁴³⁷ 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 1994) was tied to its ability to recruit new lawyers who could continue its work.⁴³⁸ 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.

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,

⁴³⁷ According to Hurst, the requirements for law books were extensive, especially toward the end of the nineteenth century. J. Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little Brown and Company, 1950), 308.

⁴³⁸ Lord, Day & Lord dissolved in 1994 following a vote by its partners. See Jan Hoffman, "Oldest Law Firm Is Courtly, Loyal and Defunct," *New York Times*, Oct. 2, 1994. 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." As one of the firm's partners put it, "The coin of the realm ceased being loyalty, predictability and continuity . . . and became money, money and money." Ibid.

Shearman & Sterling, Cadwalader, and Cravath grew naturally from small partnerships to the specialized and capacious legal representatives of the late-nineteenth 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 1910.⁴³⁹ The Cadwalader firm also developed with the economy, establishing a practice with work ranging from commercial suits to title examinations and corporate finance, on behalf of banks, trusts, estates, and railroads.⁴⁴⁰ 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.”⁴⁴¹ The firm model spread among elite lawyers outside New York as well. Like their counterparts in New York, these firms distinguished themselves by their advanced work that extended far beyond the boundaries of their cities.⁴⁴²

⁴³⁹ Walter Keese Earle, and Charles Coolidge Parlin *Shearman and Sterling, 1873-1973* (New York: Shearman and Sterling, 1973), 185.

⁴⁴⁰ Taft, *A Century and a Half*, 175-178, 191-201.

⁴⁴¹ Swaine, *The Cravath Firm*, 2. Historians tend to underemphasize the long history of the Cravath firm. See, e.g., Friedman, *A History of American Law*, 385-86.

⁴⁴² 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. Dilks, *Morgan, Lewis, and Bockius*, 7, 24. In Houston, Baker and Botts grew from a father-son partnership in 1840, to a major corporate law firm in the late-nineteenth century. See Lipartito and Pratt, *Baker and Botts*; see also Kenneth Lipartito, “What Have Lawyers Done for American Business? The Case of Baker & Botts of Houston,” *Business History Review* 64 (1990), 499.

Despite these benefits, however, large law firms remained relatively uncommon. In 1904 just 29 existed in New York. Wayne K. Hobson, “Symbol of the New Profession,” in *The New High Priests: Lawyers in Post-Civil War America*, ed. Gerard W. Gawalt (Westport, CT: Greenwood Press, 1984), 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*, JG; Daniel Lord, *Ledger, 1859-1866*, JG. 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.⁴⁴³ 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."⁴⁴⁴ The new breed of lawyer was an advisor rather than an advocate, his job was to avoid litigation rather than to win it.⁴⁴⁵ Leading lawyers (such as Lord and other Litchfield alumni), however, had long been providing advice and counsel. 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 representation, firms represented the evolution of

⁴⁴³ Kermit Hall and Peter Karsten for instance, argue that "it was not until the post-Civil war era that professionalization of law practice surged." Hall and Karsten, *Magic Mirror*, 232.

⁴⁴⁴ Hobson, "Symbol of the New Profession," 3.

⁴⁴⁵ See, e.g., Hurst, *Growth of American Law*, 302 (1950), 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." Earle and Parlin, *Shearman and Sterling*, 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 to the glamorous career of advocacy;" Jean M. Lynch, "The Corporate Law Firm: Organizational and Ecological Perspectives" (Ph.D. diss., Brown University, 1989), 15; Friedman, *A History of American Law*, 552; Hall and Karsten, *Magic Mirror*, 232; Gordon Morris Bakken, "Industrialization and the Nineteenth-Century California Bar," in *The New High Priests: Lawyers in Post-Civil War America*, ed. Gerard W. Gawalt (Westport, CT: Greenwood Press, 1984), 137.

an already established relationship between lawyers and their clients.⁴⁴⁶ 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.

Although law firms could live on indefinitely, their founders could not. On March 5, 1868 all the courts in New York City closed.⁴⁴⁷ They adjourned not for a holiday, emergency, or political event but to honor Daniel Lord, whose death, according to the *New York Times*, “created a sadness among the members of the Bench and Bar of New-York, such as we have seldom if ever seen produced in consequence of the death of a New-York jurist.”⁴⁴⁸ The *Times* reprinted the hagiographic statements made before each court adjourned. Lord, it was said, distinguished himself with his “great purity of character, high eminence in his profession, great celebrity for learning and firmness in all professional transactions.”⁴⁴⁹ Two days later, on March 7, 1863, the Brick Presbyterian Church in New York City was “crowded from floor to gallery” with the city’s elite paying their respects.⁴⁵⁰ The bar continued to honor its colleague when, on March 10, it held a meeting to celebrate the achievements of “the most eminent of the jurists in the

⁴⁴⁶ Like Lord, Day & Lord, Shearman and 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 and Parlin, *Shearman Sterling*, 21; Taft, *A Century and a Half*, 1-7; Swaine, *The Cravath Firm*, 2.

⁴⁴⁷ As the *New York Times* reported in a lengthy article the next day, “None 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,” *New York Times*, Mar 6, 1868.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *Ibid.* (quoting former judge, John Slosson before Supreme Court Circuit Part II).

⁴⁵⁰ *Memorial of Daniel Lord*, 36.

city.”⁴⁵¹ The remarks—along with sermons from his funeral and a brief biography—were collected in a book published early the next year.⁴⁵²

Lord’s passing occasioned much commentary from lawyers and the commercial elite but little from the general public. To them, Lord was an obscure character. His work, however, had enormous effects on them, whether they recognized it or not. The economy that Lord and his colleagues helped develop and expand was supremely unequal. In 1856, 5 percent of New Yorkers owned 71 percent of the city’s real and personal wealth, and inequality continued to increase from there.⁴⁵³ Lord and other elite lawyers made more money in an afternoon than some workers made in a year. Their clients made even more. Through the building of extended relationships and the development of new forms of legal organization, Lord and his colleagues adapted their profession to serve their commercial clientele. These adaptations positioned the New York bar as partners of commerce and catalysts for the city’s economic growth, while also institutionalizing the elite bar’s narrow understanding of justice. The commercial bar’s dutiful service helped transform the country, but it left many behind.⁴⁵⁴

After they had transformed the country, neither lawyers nor commercial actors wanted to disturb an economic system that benefited them both. In the middle of the nineteenth century, as sectional tensions developed with increasing fervor, Daniel Lord warned of the dangers that secession posed to the national economy. Breaking up the

⁴⁵¹ Hon. William Beach Lawrence, “Address,” in *ibid.*, 86.

⁴⁵² *Ibid.* The proceedings of the bar were also republished in the *New York Times*. See “Local Intelligence: The Late Daniel Lord,” *New York Times*, March 10, 1868.

⁴⁵³ Beckert, *Monied Metropolis*, 18. Ten percent of these top 5 percent were lawyers. *Ibid.*

⁴⁵⁴ See Beckert, *Monied Metropolis*, 3 arguing that “capital” of New York elites “capital helped to revolutionize the way most Americans worked and lived.”

Union, he argued in a series of articles in the *New York Times*, would threaten vital financial links between North and South. In response to southern Fire-Eater rhetoric, he preached moderation and conciliation. The North, he argued, did “not desire to become implicated” with the “subject of slavery.” They preferred instead “to ignore the whole matter.”⁴⁵⁵ In the South, meanwhile, Lord’s Litchfield-educated southern counterpart, E.A. Nisbet, also feared the disturbances secession might impose. This did not prevent him, however, from using the law he learned at Litchfield to provide routine commercial work central to the maintenance of the southern slave economy.

⁴⁵⁵ The articles were collected in a book. See Daniel Lord, *The Effect of Secession Upon the Commercial Relations Between the North and South and upon Each Section* (New York, 1861). For the purposes of his argument, Lord discussed only the “material aspects and consequences” of secession, avoiding issues of “moral or political character” unless absolutely necessary. *Ibid.* 3, 60-61.

CHAPTER 5: THE FINANCE FACTOR

In 1869, near the end of his life, Eugenius Aristides (“E.A.”) Nisbet remembered slavery fondly. His father’s slaves, he recalled, “were part and parcel of the family.” Nisbet had “loved them all and they were happy and faithful and attached,” and he believed both he and they were better off before than after the War. Nisbet blamed this declension on the “rapacity and injustice of the Radical Party.”⁴⁵⁶ Yet he did not let his views on political thought in the North prevent his pursuing business there; even before the Civil War, Nisbet worked extensively on behalf of northern clients. He continued to work for them, and to participate in a southern legal system controlled by Republican judges, after the conflict. When reflecting on his career, he viewed his time serving as a judge on the Georgia Supreme Court most proudly, but his work for northerners—and in front of northern judges—did not embarrass him, nor did it seem to conflict with his pro-slavery sympathies.⁴⁵⁷

The majority of Nisbet’s work as lawyer, beginning soon after he graduated from Litchfield in 1823, involved out-of-court debt collection for northerners, most of whom had sold goods to southern wholesalers on credit. Nisbet received piles of collection requests, tracked down hundreds of Georgia debtors, and sent thousands of dollars to the North. At a time when other financial infrastructure was still in its infancy, Nisbet’s

⁴⁵⁶ E.A. Nisbet, Diary, November 28, 1869, Eugenius Aristides Nisbet Papers, David M. Rubenstein, Rare Book & Manuscript Library, Durham, North Carolina (hereinafter “DRML”). Nisbet’s original diary is not contained in his papers. Only handwritten copies made in the 1920s survive. See J.W. Nisbet, Annotation, July 7, 1927, on *ibid.*

⁴⁵⁷ *Ibid.* He had returned to “the exciting strife of the Bar,” only because his family needed the money. E.A. Nisbet, Diary, February 7, 1870, Eugenius Aristides Nisbet Papers, DRML; E.A. Nisbet, Diary, December 10, 1853, Eugenius Aristides Nisbet Papers, DRML

clients depended on him to ensure that their debtors in Georgia would repay them so that they could continue to trade with southern buyers. Lawyers like Nisbet manned the financial networks that facilitated exchange between the heterogeneous, interdependent markets of North and South; his work helped to hold the country, linked by a national economy, together.

Law in nineteenth century America is rarely viewed as a force for national cohesion; rather, it is usually seen as a political battleground. Historians have focused on the important role northern courts played in diffusing and supporting free-labor ideology and the role southern courts played in securing the slave system.⁴⁵⁸ Northern abolitionists furthered their cause through suits in state court by freeing slaves and taking advantage of the courtroom as a publicity tool.⁴⁵⁹ Southern slaveholders asked their state courts to enforce and extend the law of slavery, and southern judges obliged by slowing emancipation, securing slaveholders' interests against attacks from the North, and using their opinions to address northern audiences.⁴⁶⁰ Judges interpreted and enforced fugitive slave laws and the fugitive slave clause of the Constitution, freed slaves traveling in the

⁴⁵⁸ See, e.g., Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (Oxford: Oxford University Press, 1995); Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981); John Philip Reid, "Lessons of Lumpkin: A Review of Recent Literature on Law, Comity, and the Impending Crisis," *William and Mary Law Review* 23 (1982): 580-81; Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978); Paul Finkelman, et al., *Articles on American Slavery: Fugitive Slaves*, vol. 6 (New York: Garland Publishing, 1989); Steven Lubet, *Fugitive Justice: Runaways, Rescuers, and Slavery on Trial*, ed. Paul Finkelman (Cambridge, MA: Belknap Press, 2010); Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (Cambridge: Cambridge University Press 2010), 509-69; William W. Fisher III, "Ideology and Imagery in the Law of Slavery," *Chicago Kent Law Review* 68 (1992): 1051-1083; Thomas Morris, *Southern Slavery and the Law, 1619-1860* (Chapel Hill: University of North Carolina Press, 1996); Mark Tushnet, *The American Law of Slavery, 1810-1860* (Princeton: Princeton University Press, 1981).

⁴⁵⁹ See Lubet, *Fugitive Justice*; Paul Finkelman, *Slavery in the Courtroom: An Annotated Bibliography of American Cases* (Washington, D.C.: Library of Congress, 1985), 12-13.

⁴⁶⁰ Reid, "Lessons of Lumpkin," 580-81; Tushnet, *American Law of Slavery*, 18-20.

North, refused to recognize slave emancipations in other states, and forbid slave owners from freeing their slaves.⁴⁶¹ Federal courts also weighed in, developing a jurisprudence friendly to slaveholders that ultimately resulted in the Supreme Court's 1857 decision in *Dred Scott v. Sandford*.⁴⁶² These legal confrontations led to tremendous divergence of law in the North and South and an increasing reliance on arguments grounded in "higher law" rather than on statutes or the Constitution.⁴⁶³ The legal path to disunion culminated in secession, when southern politicians mustered legal arguments to justify leaving the Union. In this story, the law derived its greatest significance from the role it played splitting North and South.⁴⁶⁴

Examining the work of southern lawyers like Nisbet reveals that the legal profession helped to hold the country together even as legal arguments over slavery and secession played out contentiously in politics and the courts. Legalism, characterized by commitment to common law rules and legal reasoning, and legal practice, distinguished by dedication to routine commercial work, linked northern and southern lawyers. Their national legal culture allowed them to serve as economic intermediaries between North and South and their legal network allowed them to communicate across sectional divides. A legal and financial infrastructure manned by lawyers thus facilitated northern investment in the South before the Civil War, helping a heterogeneous national economy dependent on slavery function. Although political arguments and sectional clashes over law have received much attention from historians, the hidden commercial work of

⁴⁶¹ Finkelman, *Imperfect Union*, 126-235; Reid, "Lessons of Lumpkin," 580-81.

⁴⁶² Fehrenbacher, *Dred Scott*; Finkelman, *Imperfect Union*, 236-84.

⁴⁶³ Lubet, *Fugitive Justice*, 267-73, 294, 314, 325-26. Finkelman, *Imperfect Union*, 183.

⁴⁶⁴ See Mark Tushnet, *American Law of Slavery*, 229-32; Mark E. Brandon, *Free in the World: American Slavery and Constitutional Failure* (Princeton: Princeton University Press, 1998), 167-99.

lawyers mattered just as much. In their private work, lawyers, even those like Nisbet who had been educated in the North, supported slavery in subtle but important ways.

Nisbet's legal education at Litchfield prepared him with a set of skills that allowed him to communicate with elite lawyers throughout the country. Working on behalf of slaveholders did not conflict with the fundamental purposes of a private law focused Litchfield education. Instead, Litchfield's curriculum prepared southern lawyers to become commercial lawyers, to perform the legal tasks necessary to sustain and grow the southern slave economy and to bolster a national economy built on credit and strengthened through law.

The Litchfield Law School was very far from the South, especially in the early nineteenth century. William Dickinson Martin, a South Carolinian, viewed the trip to Litchfield as significant enough to warrant memorialization in a detailed journal.⁴⁶⁵ Martin's 1809 journey took twenty-six days.⁴⁶⁶ Before he arrived at school, he had crossed a broken bridge on a horseback trip to Richmond, Virginia, sold his horse at a cut-rate, taken a stage coach from Richmond to Paulus Hook, New Jersey, traveled by boat to New York, traveled by another boat to New Haven, and finally ridden a stage coach thirty-six miles to Litchfield.⁴⁶⁷ Connecticut was not only separated from the South by hundreds of miles but also by a drastically different way of life. Nisbet, Martin, and other southerners left behind their plantation homes and an economy built on slavery for Connecticut, a state in which gradual emancipation began in 1784, and where men

⁴⁶⁵ William Dickinson Martin, *Journal: A Journey from South Carolina in the Year 1809*, ed. Anna D. Elmore (Charlotte: Heritage House, 1959).

⁴⁶⁶ *Ibid.*, vii.

⁴⁶⁷ *Ibid.*, ii, 10, 41, 42.

worked as small farmers or artisan manufacturers.⁴⁶⁸ Martin noted in his journal that he encountered white servants for the first time on his trip to Litchfield.⁴⁶⁹

Once in Connecticut, southerners learned from two teachers who opposed slavery. As a young lawyer, Reeve worked alongside fellow attorney Theodore Sedgwick to win the freedom of a man and woman in Massachusetts by arguing that slavery was illegal under the equal-rights provision of the recently ratified 1780 Massachusetts Constitution.⁴⁷⁰ The jury agreed, finding that the couple “[were] not and [had not been] at the time of the purchase of the original writ the legal Negro servants of their former master” and awarding them “thirty shillings lawful silver Money, Damages, and the Costs of this suit Paned at five pound fourteen shillings and four pence like Money.”⁴⁷¹ The defendant appealed, but after the Massachusetts Supreme Judicial Court’s decision in *Caldwell v. Jennision*, which affirmed another case attacking slavery on similar grounds, he confessed judgment.⁴⁷²

Reeve also spoke against slavery in his lectures. Like the English jurist William Blackstone, he found slavery “repugnant to reason . . . and the principles of natural law.”⁴⁷³ Blackstone argued that slavery could be grounded in neither the law of war nor the law of contract: not in the law of war because there was no right to slaughter and thus

⁴⁶⁸ Percy Wells Bidwell, “Rural Economy in New England at the Beginning of the Nineteenth Century,” *Transactions of the Connecticut Academy of Arts and Sciences* 20 (1916): 270-71.

⁴⁶⁹ Dickinson, *Journey*, 27.

⁴⁷⁰ Reeve’s co-counsel, Theodore Sedgwick, would later represent Massachusetts in Congress and serve on the Massachusetts Supreme Judicial Court. Richard E. Welch, *Theodore Sedgwick, Federalist: A Political Portrait* (Middletown, CT.: Wesleyan University Press, 1965); see *Bett v. Ashley* (1781); see also Arthur Zilversmit, “Quock Walker, Mumbet, and the Abolition of Slavery in Massachusetts,” 25 *William and Mary Quarterly* (1968): 622.

⁴⁷¹ Jury Verdict, *Bett v. Ashley* (1781), available at <http://www.mumbet.com/index.php/77-articles/mumbet/50-court>.

⁴⁷² For more on the case see Zilversmit, “Quock Walker.”

⁴⁷³ Sir William Blackstone, *Commentaries on the Laws of England: In Four Books with an Analysis of the Work*, vol. 1, ed. Thomas Lee (London, 1829), 423.

no right to enslave as an alternative; not in the law of contract because a slave received no consideration for bargaining away his freedom.⁴⁷⁴ Since slavery did not exist in the common law, Reeve maintained it could only be established through positive law.⁴⁷⁵ A government, in other words, had to explicitly ratify the institution with legislation. Applying this legal framework, Reeve believed that Connecticut had never officially established slavery. The state regulated it like other vices, but never gave it the approbation of the law.⁴⁷⁶

In his 1816 treatise, *The Law of Baron and Femme*, which included a section on master-servant law, Reeve was less candid. He mentioned slavery only briefly, and, in his words, avoided “urging” arguments “that, on the one hand, deny the legality of [slavery], in a moral point of view; or those which assert its legality.”⁴⁷⁷ Still, Reeve showed his discomfort with the institution. He asserted that slavery did not exist in the common law, and he observed that slavery in Connecticut was relatively mild and that it had been all but eliminated through a combination of emancipation laws and private manumission. A Connecticut slave owner, according to Reeve, held “no control over the life of his slave and was liable to the same punishment for killing a slave as for killing a freeman.” Slaves could also sue for abusive treatment and hold and protect property through the legal

⁴⁷⁴ Id. Reeve’s views on slavery are further discussed in Ellen Holmes Pearson, *Remaking Custom: Law and Identity in the Early American Republic* (Charlottesville: University of Virginia Press, 2011).

⁴⁷⁵ See Pearson, *Remaking Custom*, 120.

⁴⁷⁶ Ibid.

⁴⁷⁷ See Tapping Reeve, *The Law of Baron and Femme of Parent and Child, Guardian and Ward, Master and Servant, and of the Powers of the Courts of Chancery; with an Essay on the Terms Heir, Heirs, Heirs of the Body* (New Haven, 1816), 339

system. In a word, “slaves had the same rights of life and property, as apprentices” except that “an apprentice [was] a servant for time, and the slave . . . a servant for life.”⁴⁷⁸

Gould also opposed slavery in lectures that southern students attended. Like Reeve, he cited Blackstone to support the position that slavery was foreign to both common and natural law. He supplemented Blackstone’s arguments by adding that slavery violated the natural right to contract. Gould, however, disagreed with Reeve’s assertion that Connecticut had never sanctioned slavery. The presence of regulatory laws, even those that limited the rights of slaveholders, Gould said, embodied tacit approval of slavery by Connecticut lawmakers. But Gould did agree with Reeve that Connecticut law granted slaves rights. They could hold property even against their masters’ wishes, and if they married a free person with their master’s consent, they would earn their freedom.⁴⁷⁹

With these arguments, Reeve and Gould introduced legal tools with which their students could fight against slavery. Horace Mann, who studied at Litchfield in 1821, illustrated the power of these tools. In a speech before Congress in 1849, Mann supported a bill that would have abolished the slave trade in the District of Columbia. Slavery, Mann contended, was not only immoral, but illegal. Following Reeve and Gould, he argued that slavery could only be established through “positive law.”⁴⁸⁰ Because the

⁴⁷⁸ Ibid., 340. Reeve described the Connecticut slave system as follows: “I will only observe, that slavery is unknown to the common law of England; for, the moment that a person, who is a slave in any other country reaches the shores of that country, he is emancipated, and entitled to the same security for life, liberty, and property as any other man; nor can the laws of the country, where slavery is admitted, be-enforced in favour of it.” Ibid., 340, citing Blackstone, *Commentaries*, vol. 1, 424 and Edward Coke, *The First Part of the Institutes of the Lawes of England. Or, a Commentarie upon Littleton, Not the Name of a Lawyer Onely, but of the Law It Selfe* (1628), 77.

⁴⁷⁹ See Pearson, *Remaking Custom*, 119, 120-21, 125.

⁴⁸⁰ See Horace Mann, *Speech of Horace Mann, of Massachusetts, in the House of Representatives, February 23, 1849 on the Slave Trade in the United States, and the Slave Trade in the District of Columbia*

District had never officially enacted a law allowing slavery, slavery there was illegal. In making his argument, Mann cited legal authorities, but he also drew out the deeper implications of the distinction between positive and natural law only hinted at by Reeve and Gould. By explicitly linking his moral and legal arguments, Mann made his case against slavery: “The right of freedom is a natural right. It is a positive existence. It is a moral entity. Like the right to life, it pertains, by the law of nature and of God, to every human being.” Only when “the law of the State, upheld by the power of the State, overrides the law of nature” and “enslaves a portion of the people” did “[t]he law of nature recede[] before this legalized violence . . .”⁴⁸¹ From this perspective, a positive law ratifying slavery was a tragic violation of the law of nature. Placed in the realm of natural rights, the law was a source for powerful abolitionist arguments.

Such claims must have made southern students uncomfortable. Reeve and Gould, however, never took their arguments as far as Mann did. Both teachers agreed that positive law allowing slavery trumped the natural law of freedom. As long as a jurisdiction passed a law establishing slavery, slavery was legal.⁴⁸² Moreover, neither teacher devoted much attention to slavery in his lectures. A typical student’s notebook, composed of more than a thousand pages of material, included less than three pages on

(Boston, 1849). According to Mann, “Positive law . . . [was] the only foundation of slavery” and the “[t]he authorities [were] numerous, if not numberless, to establish this position. Ibid. 11.

⁴⁸¹ To support this proposition, Mann cited Lord Mansfield’s decision in *Somerset’s Case* (1772). He also referred to Chief Justice Marshall’s opinion in *The Antelope*, 23 US 66 (1825), which had been decided just after Mann left Litchfield. Mann supplemented his argument with citation to both British and Roman Law that maintained that slaves would remain enslaved only if they were in a territory where the positive law specifically allowed for slavery and *Forbes v. Cochrane*, 267 Mass. 417 (1824), which said that slavery is a “local right.” In other words, slaves would only remain slaves if they were in a territory that had specifically enacted it. Ibid.

⁴⁸² Even Mann recognized the power of positive law. The natural right to freedom, he admitted, ceased to exist when “abolished” by a specific legislative act. Ibid.

the fundamental law of slavery.⁴⁸³ Extensive lectures on the technical skills of a private lawyer, took up much more space.⁴⁸⁴ Reeve and Gould's lack of attention to the natural law of slavery may have had something to do with their reluctance to broach a politically charged subject, but it had more to do with the practical bent of the Litchfield curriculum. Because both teachers agreed that positive law could legalize slavery, they had little reason to present natural law criticisms of the practice. The acceptance of this narrow, positivist solution to the problem of slavery's legality emblemized a Litchfield education that eschewed political issues in favor of practical legal learning and a broader legal culture that embraced formalism.⁴⁸⁵

Southern students, who made up 25 percent of the school's graduates, thus embraced Litchfield, despite their teachers' opposition to slavery.⁴⁸⁶ Even John C. Calhoun, who spent many of his years in public life defending, justifying, and working to expand slavery, remembered his time at Litchfield fondly.⁴⁸⁷ In 1810, he wrote to Reeve to recommend a student for admission to Litchfield, and to "express his gratitude" for the

⁴⁸³ Samuel Cheever's two volumes notes from 1812, for example, contain less than 2.5 pages of notes related to the fundamental law of slavery. Samuel Cheever, *Notes on Lectures of Reeve and Gould, 1812*, vol. 1 and vol. 2, Harvard Law School, Cambridge, MA.

⁴⁸⁴ See, e.g., *ibid.*

⁴⁸⁵ Angela Fernandez and Andrew M. Siegel have both argued that Reeve's school was strongly influenced by his Federalist political leanings, but they also recognize that his school's curriculum was practically oriented. See Andrew M. Siegel "'To Learn and Make Respectable Hereafter': The Litchfield Law School in Cultural Context," *New York University Law Review* 73 (1998): 1978-2028; Angela Fernandez, "Spreading the Word: From the Litchfield Law School to the Harvard Case Method," (J.S.D. thesis, 2007).

⁴⁸⁶ I have hometown data for 836 of Litchfield's students. Of the 836, 225 left for Litchfield from below the Mason-Dixon Line.

⁴⁸⁷ According to Calhoun, slavery was "a positive good," and its regulation outside of Congress's jurisdiction. See John C. Calhoun, "Speech on the Reception of Abolition Petitions," Feb. 6, 1837 in *Speeches of John C. Calhoun: Deliver in the Congress of the United States from 1811 to the Present Time* (New York, 1843), 222-26.

“many advantages” he had received from Reeve’s teaching.⁴⁸⁸ John Y. Mason, a pro-slavery Virginian who attended Litchfield in 1817, referred to Reeve’s lectures as “masterly productions,” and noted the “decided advantage” Litchfield held over any apprenticeship.⁴⁸⁹ In 1822, when Reeve turned seventy and reached the mandatory retirement age for Connecticut judges, a group of his students organized a collection to help support their former teacher, noting “the important services which he has rendered to us individually, as well as to his country, by the promotion of legal science.”⁴⁹⁰ Six of the ten men on the organizing committee lived in the South. Appreciation for a Litchfield education extended beyond nostalgic alumni; Georgians valued the school’s reputation so highly that the legislature passed a special act in 1823 to allow Nisbet to join the bar before he turned twenty one.⁴⁹¹

The southern embrace of Litchfield not only illustrates the willingness of the profession to sideline broader political issues in order to focus on legal rules but also demonstrates that a shared legal culture united lawyers in the North and South. Although

⁴⁸⁸ John C. Calhoun to Tapping Reeve, Feb. 10, 1810, Tapping Reeve Collection, Helga J. Ingram Memorial Research Library, Litchfield Historical Society, Litchfield, CT (Hereinafter “LHS”).

⁴⁸⁹ John Y. Mason to Edmunds Mason, January 28, 1818, reprinted in Francis Leigh Williams, “The Heritage and Preparation of a Statesman, John Young Mason, 1799-1859,” *Virginia Magazine of History and Biography* 75 (1967): 322.

⁴⁹⁰ Nicholas Ware et al. to W. Sanford et al., May 4, 1822, LHS.

⁴⁹¹ See “Sketch of the Life of E.A. Nisbet,” *Macon Weekly Telegraph* (Macon, GA), April 4, 1871. Litchfield’s students from outside the South held a range of views on the subject. Some, like Roger Sherman Baldwin who attended Litchfield in 1812, worked against the institution. Baldwin, a future Senator and governor of Connecticut, defended the slaves who had rebelled on the Spanish ship *La Amistad*, eventually winning his clients’ freedom after arguing alongside former president John Quincy Adams at the U.S. Supreme Court in 1841. See *United States v. Libellants and Claimants of the Schooner Amistad*, 40 U.S. 518 (1841). Others such as Marcus Morton who attended Litchfield in 1806 and would become the Governor of Massachusetts, had a complicated relationship with the politics of slavery. He was characterized by political opponents both as an abolitionist and a defender of the institution but fell somewhere in between. See Jonathan H. Earle, *Jacksonian Antislavery and the Politics of Free Soil, 1824-185* (Chapel Hill: University of North Carolina Press, 2004), 113-14; see also, Jonathan Earle, “Marcus Morton and the Dilemma of Jacksonian Antislavery in Massachusetts, 1817-1849,” *Massachusetts Review* 4 (2002): 61-88.

federal courts heard few cases in the early nineteenth century, and communal rules continued to govern many local proceedings in the South, elite southern lawyers recognized that the law they learned at Litchfield could earn them “an honorable standing in the profession” and would be useful in southern practice.⁴⁹² They came north because there they could join a legal fraternity whose practical aims and formalistic foundation allowed them to work within a slave society while still maintaining legal ties with elite lawyers throughout the country.⁴⁹³

Nisbet’s work on the Georgia Supreme Court illustrates the important role that the formal legal reasoning he learned at Litchfield played in judicial decision making even on what one scholar has labeled as “the most conservative antebellum court.”⁴⁹⁴ Nisbet served on the Court from 1846 to 1853. In that time, he and the other two justices—Joseph Henry Lumpkin and Hiram Warner—authored 1,163 opinions. More than a thousand of these cases involved private-law-based civil disputes. Sorted into the categories that modern lawyers use, the cases most commonly involved real property, estate planning, commercial law, finance and banking, corporate governance, and family law. Few called for the court to settle legal issues that garnered widespread attention from the public. Although the slave economy stood as a backdrop, 80 percent of the court’s cases did not explicitly involve enslaved people. The cases instead mostly dealt with the

⁴⁹² Martin, *Journey*, 4. See Laura Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009).

⁴⁹³ Although Litchfield contributed to the development of this culture, it did not hold a monopoly on it. Apprenticeships also prepared young men to participate in a national commercial legal culture. Most of Nisbet’s fellow lawyers, including his legal partners and the other justices on the Georgia Supreme Court learned from apprenticeships.

⁴⁹⁴ A.E. Keir Nash, “Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South,” *Virginia Law Review* 56 (1970): 77.

legal rules governing suits and economic transaction in Georgia: Were account books sufficient evidence in a contract dispute?⁴⁹⁵ Were declarations admissible in a case over a disputed land sale?⁴⁹⁶ Had a litigant, in a suit for breach of contract related to the construction of a mill dam, erred by not posting security before appealing?⁴⁹⁷ Had a creditor followed the proper procedure against a debtor?⁴⁹⁸

The issues in these cases seemed even more removed from their social and economic context when translated into the language of a trained lawyer: “[S]hall the plaintiffs be compelled to go behind the books thus verified by the clerks who kept them, and resort to each of the sub-agents who participated in the transaction and sale of this produce?”⁴⁹⁹ “Is a defendant who is sued, *individually*, upon a contract which he himself has made with the plaintiff, entitled to appeal from a verdict rendered against him, without giving security, by proving that the contract on which the action was brought, was made for the benefit of the estate, which he represented as executor, and that he was authorized, by the will of his testator, to make such contracts?”⁵⁰⁰ “[Is] a Justice of the Peace, in [Georgia], . . . a collecting officer . . . ?”⁵⁰¹ Were “[t]he admissions of the claimant . . . good against his title, in favor of the plaintiff in execution, but not in favor of it, in his own behalf.”⁵⁰² The technical legal language of these questions illustrates the importance the court placed on finding and answering what it understood as

⁴⁹⁵ *Fielder, Bros. & Co. v. Collier*, 13 Ga. 496 (1853).

⁴⁹⁶ *Brown v. Upton*, 12 Ga. 505 (1853).

⁴⁹⁷ *McCay v. Devers*, 9 Ga. 184 (1850).

⁴⁹⁸ See, e.g., *Johnson v. Hall*, 5 Ga. 384 (1848); *Central Bank of Georgia v. Whitfield*, 1 Ga. 593 (1846); *Brown v. Chaney*, 1 Ga. 410 (1846); *Mahefey v. Petty*, 1 Ga. 261 (1846).

⁴⁹⁹ *Fielder, Bros. & Co. v. Collier*, 499,

⁵⁰⁰ *McCay v. Devers*, 184-85.

⁵⁰¹ *Johnson v. Hall*, 389.

⁵⁰² *Brown v. Upton*, 507.

quintessentially legal questions. In these cases, legalism, rather than the social relations of slavery, took center stage.

No doubt these decisions shaped Georgia's law and economy. If, for example, the Supreme Court had upheld the trial court's refusal in *Fielder, Bros, & Co.* to admit account books as proof of transactions, large-scale businesses using modern accounting techniques would have encountered difficulty establishing legal claims. More generally, by clarifying rules governing the actions of executors, creditors, and Justices of the Peace, the court increased the predictability of economic and legal transactions in a slave society. These cases, however, lacked the broad political intrigue or direct connection to slavery that attracts the attention of historians.⁵⁰³ They represent instead the formalism of the law that linked North and South.

⁵⁰³ Even historians such as Thomas Morris who draw attention to the legalism of southern judges focus on the law's directly related to slavery rather than the broader system of southern (and national) law. See, e.g., Morris, *Southern Slavery*, 424-28. For examples of the run-of-the-mill cases seen by the Georgia Supreme Court see *N. Owsley & Son v. Woolhopter*, 14 Ga. 124 (1853) (cotton debt); *Elkins v. State*, 13 Ga. 435 (1853) (liquor licensing); *Dougherty v. Western Bank of Georgia*, 13 Ga. 287 (1853) (proper procedure for redeeming bank notes); *Wyche v. Winship*, 13 Ga. 208 (1853) (question of parol evidence in note redemption); *Stamper v. Griffin*, 12 Ga. 450 (1853) (evidentiary questions related to land sale); *Crawford v. State*, 12 Ga. 142 (1852) (jury instructions in homicide); *Protho v. Orr*, 12 Ga. 36 (1852) (debt and statutory drafting); *Gilbert v. Hardwick* 11 Ga. 599 (1852) (will administration); *Murphy v. Justices of Inferior Court of Wilkinson County*, 11 Ga. 331 (1852) (evidentiary question related to duties of official in sale of runaway slave); *Guerry v. Durham*, 11 Ga. 9 (1852) (estate dispute involving equity procedures); *Hotchkiss v. Newton*, 10 Ga. 560 (1851) (contract case over castings hinging on evidentiary issues); *Beall v. Blake*, 10 Ga. 449 (1851) (evidentiary and equity issues in will case); *Rolfe v. Rolfe*, 10 Ga. 143 (1851) (evidence in debt dispute); *Faircloth v. Freeman*, 10 Ga. 249 (1851) (duty of sheriff); *Davis v. Lowman*, 9 Ga. 504 (1851) (evidentiary and procedural issues in inheritance case); *Mobley v. Mobley*, 9 Ga. 247 (1851) (jurisdiction); *Wellborn v. Williams*, 9 Ga. 86 (1850) (land sale and vendor's lien); *Grant v. McLester*, 8 Ga. 553 (1850) (dispute over notes paid to assume clerkship); *Hardwick v. Hook*, 8 Ga. 354 (1850) (procedural and evidentiary issues in case involving judgment to be paid in slaves); *Settle v. Alison*, 8 Ga. 201 (1850) (evidentiary issues related to selling of slave); *Baldwin v. Lessner*, 8 Ga. 71 (1850) (procedural issues related agreement for use of mill); *Bird v. Adams*, 7 Ga. 505 (1849) (statute of limitations for note); *Stroud v. Mays*, 7 Ga. 269 (1849) (dispute over power over jury in case related to sale of slave who died); *Williams v. Turner*, 7 Ga. 348 (1849) (competition between ferries involving evidentiary issues); *Dougherty v. Bethune*, 7 Ga. 90 (1849) (estoppel in case related to railroad bank notes); *Brewer v. Brewer*, 6 Ga. 587 (1849) (paying of court costs); *Wilcoxson v. Myrick*, 6 Ga. 410 (1849) (execution for seizure of slave); *Perry v. Higgs*, 6 Ga. 43 (1849) (court procedure); *Frederick v. City of Augusta*, 5 Ga. 561 (1848) (tax of municipal corporation); *Doe v. Lancaster*, 5 Ga. 39 (1848) (land, titles and ejectment); *Hall v. Page*,

Even the roughly twenty percent of cases that directly involved slavery typically hinged on mundane legal issues in fields other than the law of slavery: Had children been properly granted slaves in a will?⁵⁰⁴ Did a constable follow the proper procedure when he seized slaves to satisfy a debt?⁵⁰⁵ Was the continued possession of borrowed slaves a “conversion” of property?⁵⁰⁶ Simple cases like these (and others) helped the slave economy function, but they relied on the same kind of legal reasoning and dealt with the same legal categories—executors, contracts, constables, conversions—that northern lawyers used in cases about non-human property.⁵⁰⁷ Scholars of the law of slavery focus on the difficulties that a slave society posed for lawyers and judges. They point to the tensions inherent in human property, the contradictory doctrinal positions that these tensions imposed, and the way that ideology and other extralegal forces influenced judicial decision making.⁵⁰⁸ Despite these pressures, judges like Nisbet approached cases from a legalistic perspective they shared with northern lawyers. The approach was similar

4 Ga. 428 (1848) (trover, garnishment); *Barron v. Chipman*, 4 Ga. 200 (1848) (sheriff’s duties related to seizing slaves); *Turk v. Turk*, 3 Ga. 422 (1847) (Will, procedure); *Smith v. Thompson*, 3 Ga. 23 (1847) (proper service of writs); *Cairns v. Iverson*, 3 Ga. 132 (1847) (cross suits in inheritance dispute); *Carter v. Buchanan*, 2 Ga. 337 (1847) (trover, procedure for multiple actions); *Guerry v. Perryman*, 2 Ga. 63 (1847) (procedure involving multiple suits); *Brown v. Chaney*, 1 Ga. 410 (1846) (promissory note procedure and evidence); *Hardee v. Stovall, Simmons & Co.* (1846) (procedural dispute between creditors).

⁵⁰⁴ See, e.g., *Jordan v. Thornton*, 7 Ga. 517, 517 (1849) (holding that children were absolute owners of slaves deeded to their mother in trust).

⁵⁰⁵ See *Hopkins v. Burch*, 3 Ga. 222, 222 (1847) (proper procedure for a constable levy “lands and negroes” from Act of 1811).

⁵⁰⁶ See *Adams v. Mizell*, 11 Ga. 106, 108 (1852).

⁵⁰⁷ See *Murphy v. Wilkinson County*, 11 Ga. 331, 334 (1852) (upholding action by justices of inferior court in collecting proceeds of runaway slave); *Cox v. Sullivan*, 7 Ga. 144, 145 (1849) (theft of eighteen slaves); *Broughton v. Badgett*, 1 Ga. 75, 76 (1846) (suing for warranty on slave that has already been sold); *Carter v. Buchannon*, 3 Ga. 513, 515 (1847) (allowing evidence of possession to establish gift of slave);

⁵⁰⁸ See, e.g., Tushnet, *The American Law of Slavery*, 11-42; Walter Johnson, “Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery,” review of Thomas Morris, *Southern Slavery and the Law*, *Law & Social Inquiry* 22 (1997): 430; Fisher, “Ideology and Imagery,” 1051-1083.

enough for northern lawyers and judges to cite the Georgia Supreme Court, even in the 1850s and 1860s.⁵⁰⁹

It should therefore not be surprising that, as a justice, Nisbet applied the tools he learned at Litchfield, even in cases explicitly dealing with the law of slavery. Take *Neal v. Farmer*, an 1851 case brought by Nancy Farmer, in which she sought damages from another slaveholder whose slave had killed her slave. The jury found for Farmer and awarded her \$825 as compensation. The defendant, William Neal, challenged the verdict because in Georgia, a plaintiff could not sue for damages in cases that would have been common law felonies, “until the offender [had been] prosecuted to a conviction or acquittal.”⁵¹⁰ He argued that because his slave had not been prosecuted, and because killing a slave was a common law felony, Farmer had no right to bring the suit. By the time the case reached the Georgia Supreme Court, it presented the question of whether, as Neal argued, the killing of a slave qualified as a common law crime. The question was not, as some commentators have written, whether murdering a slave was a crime; section twelve of the 1798 Georgia Constitution mandated that people who killed slaves be punished as if the slave were “a free white person.” The law contained two infamous exceptions—one for slave “insurrection,” and another for “accident[al]” death as a result of “moderate correction”—but neither applied in *Neal*. Instead, the case raised the issue

⁵⁰⁹ Northern lawyers cited some of the court’s cases before and after the Civil War. See, e.g., *Sears v. Cottrell*, 5 Mich. 251, 259 (1858), *Warren v. Commonwealth*, 37 Pa. 45, 51 (1861), and *Reckner v. Warner*, 22 Ohio St. 275, 278 (1872), all cases which cited *Flint River Steamboat Co. v. Foster*, 5 Ga. 194 (1848), a case related to a legislative act regulating, among other things, the work of slaves on steamboats; *People v. Vasquez*, 49 Cal. 560, 561 (1875), citing *Berry v. State*, 10 Ga. 511 (1851), a case stemming from larceny by a slave; *Emerson v. Atwater*, 7 Mich. 12, 15 (1859), citing *Miller v. Cotton*, 5 Ga. 341 (1848), a case disputing inheritance of slaves; *Howland v. Conway*, 12 F. Cas. 730, 732 (S.D.N.Y. 1848), citing *Bryan v. Walton*, 14 Ga. 185 (1853), a case related to the appointment of a guardian for a free person of color.

⁵¹⁰ *Neal v. Farmer*, 9 Ga. 555, 559 (1851) (citing *Adams v. Barrett*, 5 Ga. Rep. 404 (1848)).

of whether the murder was a *common law* crime, and therefore whether the crime needed to be prosecuted before damages could be collected by Farmer.⁵¹¹

The case, in Judge Nisbet's words, was "of great interest and gravity."⁵¹² Neal's argument depended on showing that slavery had existed in England before the American Revolution, and thus that the common law against murder applied to slaves in Georgia.⁵¹³ He argued that the existence of villeins, a class of servants who, according to Blackstone, "belong[ed] both they and their children . . . to the lord of the soil" provided a British precedent for chattel slavery.⁵¹⁴ In an opinion laced with learned citations, Nisbet and the Court disagreed. After analysis of English history, Nisbet concluded that "the Law of Villeinage had gone into disuse in England one hundred and fifteen years before the settlement of Georgia," and was therefore "no part of the Common Law in 1732." Moreover, according to Nisbet, "the unconditional ['pure'] slavery of the African race, as it exists in Georgia," differed greatly from ancient villeinage.⁵¹⁵ In other words, he came to the same conclusion that his teachers Reeve and Gould had: slavery was foreign to the common law.

⁵¹¹ The case has been misinterpreted. See, e.g., Louise Weinberg, "Methodological Interventions and the Slavery Cases; Or, Night-Thoughts of a Legal Realist," *Maryland Law Review* 56 (1997): 1316 n.77; "What We Talk about When We Talk about Persons: The Language of Legal Fiction," *Harvard Law Review* 114 (2011): 1748 & n.11. See Ga. Const. of 1798 art. IV., § 12. The Constitution's clause was put into effect by a bill passed by the Georgia legislature in 1799. An Act to Carry into Effect the 12th Section of the 4th Article of the Constitution, 1 Cobb's Digest 982 (1852). Punishment for murder was hanging without clergy, and for manslaughter branding. *Ibid.*

⁵¹² Neal v. Farmer, 560. Nisbet drew attention to the difficulty of the legal questions at issue and noted that he and the other justices were "pleased to record [their] sense of the value of the discussion which this cause has elicited at the hands of the counsel." *Ibid.*, 560.

⁵¹³ *Ibid.*

⁵¹⁴ *Ibid.* Nisbet made this point by citing Blackstone, *Commentaries* 2, 92-93; William Temple, *An Introduction to the History of England* (London, 1695), 59; Sharon Turner, *History of the Anglo-Saxons* (London, 1799), 292, 337.

⁵¹⁵ *Ibid.*, 566.

The benefits of the common law, Nisbet continued, could not apply to both master and slave: “two races of men living together, one in the character of masters and the other in the character of slaves, cannot be governed by the same laws.” Applying the common law to slaves, would inevitably lead to an expansion of rights, and the abolition of slavery. Nisbet also found space to elaborate on the argument, made by Reeve and others, that slavery required the ratification of positive law. Every time a court in the North enforced a contract for the sale of a slave it ratified the institution. Slavery in Georgia, he argued, rested on the powers of the British Trustees of the Colony “as a *civil* right, in 1751, by an ordinance of the board.” A slave owner’s possession derived from “the original captor.” Georgia law and the Federal Constitution “*confirmed*” rather than initiated possession. “Customary law,” in other words, provided sufficient sanction for slaveholding.⁵¹⁶

Nisbet’s opinion relied on a common law framework respected by northern and southern lawyers alike to make its points. That Nisbet’s reasoning shared so much in common with the reasoning of his Litchfield teachers illustrates the strength and persistence of the legal ties that linked North and South, even in the middle of the nineteenth century. Nisbet’s use of legal language allowed him to communicate with a northern audience while also affirming his ties to that audience.⁵¹⁷ For historians who sometimes see legal reasoning as window dressing for decisions driven by pro-slavery

⁵¹⁶ Ibid., 579-582.

⁵¹⁷ For more on the use of opinions to communicate with a northern audience see Reid, “Lessons of Lumpkin,” 580-81, 624.

sentiment, this shared language lacks significance.⁵¹⁸ Although pro-slavery sentiment clearly influenced decision making, historians who emphasize its influence understate the independent devotion to technique that opinions like *Neal* represent. In *Neal*, for example, which side is the pro-slavery one?⁵¹⁹ Would it have been better for slave owners to be able to sue for the death of their slaves or to avoid paying for deaths that their slaves caused? Which lawyer was the pro-slavery lawyer? Both lawyers who argued before the Georgia Supreme Court held elevated positions in Georgia's slave society. Neal's lawyer, James A. Meriwether, was a planter, former Congressman, and member of the State House of Representatives.⁵²⁰ F. H. Cone, who represented Farmer, also owned slaves.⁵²¹ In 1848, he even confronted and eventually stabbed Alexander Stephens, the future Vice President of the Confederate States of America, for insufficiently supporting slavery.⁵²² Although northern lawyers could have disagreed with the outcome or legal reasoning in *Neal*, so too did *Neal*'s lawyer, who failed to win the suit on behalf of his client, and so did other southern judges who came to opposite conclusions about the place of slavery in the common law.⁵²³

In other opinions, even those in which the Court clearly aimed to further the norms of southern slave society, Nisbet and his colleagues also relied on a shared legal

⁵¹⁸ See, e.g., Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1978); Fisher, "Ideology and Imagery," 1080-82.

⁵¹⁹ Walter Johnson has also recognized that it would not have been clear to litigants and judges whether a decision was "pro-slavery" or not. Johnson, "Inconsistency," 419-22.

⁵²⁰ See William J. Northen, *Men of Mark in Georgia: A Complete and Elaborate History of the State from its Settlement to Present Time, Chiefly Told in Biographies and Autobiographies of the Most Eminent Men of Each Period of Georgia's Progress and Development*, vol. 2 (Atlanta: A.B. Caldwell, 1910), 63; Anthony Gene Carey, *Parties, Slavery, and the Union in Antebellum Georgia* (Athens, GA: Georgia University Press, 2012), 60.

⁵²¹ In 1840, F.H. Cone owned 22 slaves. See 1840 Greene County Census.

⁵²² Daniel Walker Howe, *The Political Culture of the American Whigs* (Chicago: University of Chicago Press, 1984), 243-44.

⁵²³ See Morris, *Southern Slavery*, 52-55, for a discussion of these cases.

language to justify their decision. *Robinson v. King*, for example, involved a dispute over freeing slaves. In his will, Elisha King deeded a family of his slaves to Samuel Robinson and Henry Wood, in the hope that the slaves would “be made to live comfortable, under the superintendence of my friends” and be “treated with humanity and justice.”

Manumission, however, was illegal in Georgia, and in its decision, the Georgia Supreme Court upheld the lower court’s decision that the will violated Georgia’s prohibition on indirect manumission. The Act of 1818, wrote Nisbet, “looks to the prohibition of all manumission, and of all attempts to effect it, directly or indirectly.” King clearly intended “either to manumit . . . slaves, . . . or to place them or attempt to place them in a situation where they might be enabled to work for themselves, free from the control of a master, or where they might enjoy the profits of their skill or labor.” In his concluding remarks, Nisbet bluntly summarized the state of the law: “Now, either the property in these negroes is in them or it is not.” A society built on slavery left no room for a status of “quasi-servitude and of practical freedom.” The law, in other words, barred this kind of liminal status.⁵²⁴

The *Robinson* opinion was explicitly pro-slavery, yet its analysis was not—when interpreted through nineteenth-century legal standards—an outrageous act of legal interpretation. The legislature had banned manumission, and Nisbet and the rest of the Georgia court stayed true to the essence of what Nisbet had learned at Litchfield: that law was a practical and technical tool; that positive law trumped natural law. Understanding cases in this way does not justify Nisbet’s decisions morally, but it does illustrate the way that a national professional approach mattered to southern lawyers, even in politically

⁵²⁴ *Robinson v. King*, 6 Ga. 539 (1849), 547-48.

charged cases. This is not to say that the opinions were neutral, but rather to show that northern and southern lawyers agreed more than they disagreed, that legal technique united as much as legal ideology divided.⁵²⁵ Perhaps the best evidence of the role that formalism played in the Court's decisions is that decisions made by Nisbet and his fellow justices, including some that explicitly involved slaves, continued to be cited after emancipation and even as recently as 2015.⁵²⁶

Other southern judges and courts shared Nisbet's devotion to legalism. Even scholars who focus on the divisiveness of legal debates over the law of slavery have observed that judges and litigants often relied on legal rules in the slave cases they study.⁵²⁷ Putting the law of slavery in broader context further illustrates the prevalence and importance of legalism. The vast majority of the cases before Nisbet did not involve slaves and many of the cases that did relied on legal principles that northerners felt comfortable citing. Southern law must therefore be understood as part of national legalistic professional culture, one that Litchfield had helped transmit. Its position as part

⁵²⁵ Nash goes as far as to argue that southern courts exhibited "fairness and integrity" in their cases involving black defendants. Nash, "Fairness and Formalism," 99.

⁵²⁶ See, e.g., *Berry v. State*, 10 Ga. 511 (1851), which lawyers have cited 287 times, including as recently as 2015. The portion of the case most frequently cited relates to whether newly discovered evidence justifies a new trial. The case also involved the matter of whether a "negro" could testify. *Berry v. State*, 521. Other cases frequently cited include *Nunn v. State*, 1 Kelly 243 (Ga. 1846) (right to bear arms); *Mitchum v. State*, 11 Ga. 615 (1852) (evidentiary questions and permissible topics for closing argument); *Roberts v. State*, 3 Ga. 310 (1847) (accountability for criminal acts); *Flint River Steamboat Co. v. Foster*, 5 Ga. 194 (1848) (when trial by jury is required); *Potts v. House*, 6 Ga. 324 (1849) (evidence); *Wright v. Hicks* 12 Ga. 155 (presumption of parentage); *Hightower v. Thornton*, 8 Ga. 486 (1850) (equitable power of creditors to corporation); *Miller v. Cotten*, 5 Ga. 341 (1848) (wills).

⁵²⁷ For example, Paul Finkelman has found that, at least before 1840, courts seemed to rely on legal technicality and to enforce slave law in ways that contradicted their sectional interest. Judges analyzed slave transit cases, for example, in terms of the technical field of conflict of laws, and judges in free states granted slave owners permission to travel without having their slaves seized. See Finkelman, *Imperfect Union*, 13, 46, 181; see also Cover, *Justice Accused*, 199, noting that judges "seemed very reluctant to resort to, and thus legitimate, substantial doctrinal innovations that might have made certain cases less a choice between law and morality and more a choice between alternative legal formulations."

of this culture did not lessen its power; it increased it. By fitting slavery into an established legal framework, Nisbet and other judges strengthened ties to the North that allowed for lawyers to communicate across sectional borders and helped them build a national commercial economy.

These ties—and their effects on economic transaction—appear only abstractly in appellate cases, but they appear more clearly outside of the courts in routine commercial practice. Although this routine work relied on the common-law foundations established by formal legal rules, it looked very different. The papers from Nisbet’s private legal practice, to which he returned after his term on the court ended, offer a window into the normally hidden world of the southern commercial lawyer. Nisbet approached his legal work with energy and alacrity. He developed a solo practice, then a partnership with his brother-in-law, Junius Wingfield, and later a partnership with his brother, James A. Nisbet, and son, James T. Nisbet.⁵²⁸ Finally, he established a firm (“Nisbets and Jackson”) with his brother, son, and a third lawyer, James Jackson, which continued after Nisbet’s retirement in 1870.

⁵²⁸ James A. Nisbet attended the Litchfield Law School and was admitted to the bar in 1833. He worked for Nisbet and Nisbet after working for Poe and Nisbet. Later the firm was renamed Nisbets, Cobb & Jackson. See Southern Historical Association, *Memoirs of Georgia: Containing Historical Accounts of the State’s Civil, Military Industrial and Professional Interests, and Personal Sketches of Many of Its People*, vol. 1 (Atlanta, 1895): 576-78. For more on James T. Nisbet see Lucian Lamar Knight, *Georgia’s Landmarks, Memorials, and Legends*, vol. 2 (Atlanta: Byrd Printing Company, 1914), 388.

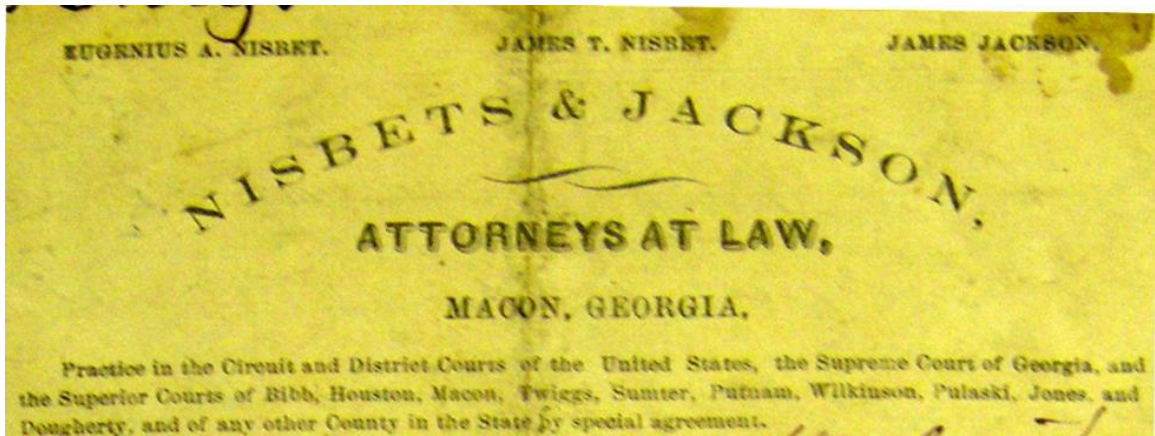


Image from Nisbets & Jackson Letterhead⁵²⁹

⁵²⁹ J.T. Nisbet to Nisbets and Jackson, April 18, 1870, Eugenius Aristides Nisbet Papers, DRML. The text below Macon, Georgia reads as follows: "Practice in the Circuit and District Courts of the United States, the Supreme Court of Georgia, and the Superior Courts of Bibb, Houston, Macon, Twiggs, Sumter, Putnam, Willkinson, Pulaski, Jones, and Dougherty, and of any other County in the State by special agreement."

Nisbet and his partners worked for their neighbors, particularly wealthy planters, whom they assisted with transactions, wills, and estate management.⁵³⁰ They devoted the bulk of their practice, however, to assisting creditors from outside the county. Nisbet's network of clients extended throughout the South to other parts of Georgia, South Carolina, and Maryland.⁵³¹ Most of his creditor clients, however, lived in the North, especially in New York, a city whose economic power led its residents to be especially active in southern markets.⁵³² Nisbet also worked with businessmen in other northern hubs of manufacturing and trade such as Philadelphia and Boston.⁵³³

These northern clients usually contacted Nisbet because they sought repayment of outstanding loans from debtors in Georgia. In general, the loans grew from business transactions in which merchants sold goods to southern purchasers on credit. Nisbet worked on behalf of purveyors of musical instruments, hats and caps, "importers of wine, liquors and foreign produce," dealers in "butter, cheese, &c.," "Jobbers in Wooden & Willow Ware, Brooms, Brushes, Cordage, Twine, Mats, and French & German Baskets," "Importers of Brandies, wines and Havana segars, Dealers in fine groceries, and

⁵³⁰ See, e.g., William Bullock to E.A. and J.A. Nisbet, Jan. 28, 1853, Eugenius Aristides Nisbet Papers, DRML, discussing "sale of negroes" in Drayton, GA; H. Green to E.A. and J.A. Nisbet, Feb. 17, 1859, Eugenius Aristides Nisbet Papers, DRML, discussing repossession of "a negro woman named Ann and her children" to satisfy a debt.

⁵³¹ See A.G. Gibson to E.A. Nisbet, Sep. 9, 1857, Eugenius Aristides Nisbet Papers, DRML (Barnsville, GA); A.C. Wyly & Co. to E.A. & J.A. Nisbet, May 3, 1860 (Atlanta, GA); Ulna S. Lawton to E.A. Nisbet, June 20, 1854 (Lawtonville, SC); E.H. Stabler & Co. to E.A. & J.A. Nisbet, Jan. 6, 1860, Eugenius Aristides Nisbet Papers, DRML (Baltimore, MD).

⁵³² For information on the power of New York businessmen in the nineteenth century, see Sven Beckert, *The Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie, 1850-1886* (Cambridge: Cambridge University Press, 2003). See also Chapter Four.

⁵³³ See, e.g., Prince I. Patton & Co. to J.C. Plant, Jan 10, 1854, Eugenius Aristides Nisbet Papers, DRML (Philadelphia); William Goodrich & Co. to E.A. & J.A. Nisbet, Jan. 9, 1855, Eugenius Aristides Nisbet Papers, DRML. L. Haywood to E.A. & J.A. Nisbet, Jan. 31, 1860 (Boston).

tobacco,” and “Importers & Jobbers of Dry Goods.”⁵³⁴ Outstanding notes ranged in value from \$30 to \$18,700.⁵³⁵

As Nisbet’s diverse set of clients illustrates, sectional borders meant little to merchants, and debt knew no geographical limitations. Northerners came to Nisbet because they depended on southern markets and because the national economy depended on debt. Just as the lack of availability of a reliable, government-backed means of exchanged led businessmen in Connecticut, Ohio, and New York to seek out lawyers to help them navigate the web of promissory notes that resulted, the same issue led northern clients to turn to Nisbet. Scarcity of cash and the southern agricultural economies’ cyclical nature meant that most northern business sold on credit.⁵³⁶ Given the volatility of the market, the work of collection was vital to the functioning of a debt-fueled economy.

Because the debt collection process was both frequent and routine, creditors printed forms that they used to request the collection of notes. These forms regularized

⁵³⁴ Firth, Pond, & Co. to E.A. & J.A. Nisbet, Sept. 15, 1856, Eugenius Aristides Nisbet Papers, DRML; Prince I. Patton & Co. to J.C. Plant, Jan 10, 1854; B. Douglas & Co. to E.A. & J.A. Nisbet, Oct 10th, 1857, Eugenius Aristides Nisbet Papers, DRML, redeeming note on behalf of Edward Block & Co., see F.G. Duffield, *The Merchants’ Cards and Tokens of Baltimore*, 20 *Numismatist* 65, 68 n.13 (1907); J.S. Martin to E.A. and J.A. Nisbet, Dec. 31 1860, Eugenius Aristides Nisbet Papers, DRML; Bradley Brothers to Nisbet and Nisbet, Nov. 15, 1860, Eugenius Aristides Nisbet Papers, DRML; Bradley Brothers apparently did a “large and apparently prosperous business . . . principally with the merchants of the Southern States, and on a credit,” see George P. Allen, *A History and Genealogical Record of the Alling-Allens of New Haven, Conn., The Descendants of Roger Alling, First, and John Alling, Sen., From 1639 to the Present Time* (New Haven, 1899): 187; Allen McLean to E.A. & J.A. Nisbet, Sep. 9, 1859, Eugenius Aristides Nisbet Papers, DRML (“Importers & Jobbers”).

⁵³⁵ See D. Devlin & Co. to E.A. & J.A. Nisbet, Oct 19, 1858, Eugenius Aristides Nisbet Papers, DRML, seller of men and boy’s clothing requesting redemption of \$30 note; Frederick J. Conaut & Jesse W. Bolles to E.A. & J.A. Nisbet, May 11, 1853, Eugenius Aristides Nisbet Papers, DRML, requesting redemption of \$18,700 in debt by seizure of gold mine.

⁵³⁶ For a discussion of the importance of credit to the southern economy see Sven Beckert, *Empire of Cotton: A Global History* (New York: Vintage, 2014), 219-24; Harold Woodman, *King Cotton and His Retainers: Financing and Marketing the Cotton Crop of the South, 1800-1925* (Lexington: University of Kentucky Press, 1968), 30-42, 132-38.

the process that allowed lawyers to facilitate financial ties. A letter from B. Douglas & Co., an early forerunner of the credit agency R.G. Dun & Co., is illustrative:

Trinity Building, New-York,

October 10th 1857.

Messrs E.A. & J.A. Nisbet
Macon, Ga.

Dear Sirs

We enclose to you for collection, demand as described below.

Please acknowledge **TO US BY RETURN MAIL**, at the same time giving us your opinion of the prospects for its speedy collection; confer with **US ALONE**, in the premises; collect as speedily as possible, and remit proceeds **TO US**, by draft on New-York to **OUR ORDER**, and oblige,

Respectfully,

Can see no chance of collecting by suit or otherwise. If you have no prospects whatever of getting anything anyway you may return us the claims.

Demand consists of Notes of J.H. & J. King of your place, favor of Edward Block & Co. dated Jan'y 8th 1857 @ 4 mos. for \$71²⁵/₁₀₀. & Feb. 19th 1857 @ 4 mos. for \$285⁸⁰/₁₀₀. Please to give it your earliest attention. If you cannot get any money at present & get good Security or even an offer of Compromise, as our clients would be willing to settle for a reasonable per centage, if you

Letter from B. Douglas & Co. to E.A. Nisbet & J.A. Nisbet, October 10, 1857.⁵³⁷

⁵³⁷ B. Douglas & Co. to E.A. Nisbet & J.A. Nisbet, October 10, 1857, Eugenius Aristides Nisbet Papers, DRML. For the history of R.G. Dun & Co., which later became Dun & Bradstreet, see "D&B" in

The printed portion of the letter contains standard note-collection boilerplate, requesting Nisbet to acknowledge receipt of the letter, “give[] [his] opinion of the prospects for [the note’s] speedy collection” and to “collect as speedily as possible.”⁵³⁸ The handwritten portion offers more detail, explaining the parties involved, “J.H. and J. King,” the debtors, and “Edward Block & Co.,” the creditors, and explaining the willingness of the creditors to “settle for a reasonable percentage.”⁵³⁹ Other forms like this came from Philadelphia, Baltimore and elsewhere along with numerous handwritten requests.⁵⁴⁰ The relatively small sums at stake confirm the routineness of debt collection. In 1858, for example, Nisbet received a letter from D. Devlin & Co., New York merchants specializing in selling clothing to men and boys, asking him to redeem a note for just \$30.⁵⁴¹

Sometimes the creditor wrote directly, but other customers came to Nisbet through legal networks. Attorneys would contact Nisbet requesting the collection of loans on behalf of their clients. For example, in February, 1859 Baltimore lawyer Jabez D. Pratt wrote on behalf of the sugar refiners Egerton, Dougherty, Woods, & Co. He sought the collection of a note made out by Georgia-based shippers, C.A. Ells & Son, and asked for

International Directory of Company Histories 121, ed. Derek Jacques and Paula Kepos (Detroit: St. James Press, 2011), Business Insights: Essentials; see also Scott Sandage, *Born Losers: A History of Failure in America* (Cambridge: Harvard University Press, 2005).

⁵³⁸ Ibid.

⁵³⁹ Ibid.

⁵⁴⁰ See, e.g., W.M. Goodrich & Co. to E.A. & J.A. Nisbet, Jan. 9, 1855, Eugenius Aristides Nisbet Papers, DRML, writing from Philadelphia on behalf of Russel & Scott for collection of a note worth \$156; Jabez D. Pratt to E.A. & J.A. Nisbet, Feb. 9, 1859, Eugenius Aristides Nisbet Papers, DRML, writing from Baltimore on behalf of Egerton, Dougherty, Woods, & Co., operators of a steam-powered sugar refinery for collection of a note worth \$446.43; Baltimore Board of Trade, *Statistics of the Trade & Commerce of Baltimore for the Year Ending December 31, 1857* 34 (Baltimore, 1858); Robertson, Hudson, & Pulliam to E.A. & J.A. Nisbet, Dec. 25, 1857, Eugenius Aristides Nisbet Papers, DRML, documenting request of New York dry goods merchants; *Trow’s New York City Directory for the Year Ending May 1, 1857* (H. Wilson ed., 1857), 699.

⁵⁴¹ See D. Devlin & Co. to E.A. & J.A. Nisbet, Oct 19, 1858, Eugenius Aristides Nisbet Papers, DRML.

the money “as soon as [Nisbet could get it] by any means in [his] power.”⁵⁴² Attorneys coordinated not only the work but also the payment. Nisbet sent the money he recovered to a lawyer, who would then pass it on to his client.⁵⁴³ In addition to straightforward debt collection, Nisbet also assisted lawyers pursuing other sorts of legal work related to Georgia residents. For example, he prepared interrogatories on behalf of out-of-state lawyers, performed investigative work related to the inheritance of an Iowa estate, and drafted power of attorney forms that allowed another attorney to collect a debt for one of Nisbet’s clients.⁵⁴⁴

Work also flowed from collection agencies. Nisbet developed a strong relationship with the New York based Mercantile Agency of Dun, Boyd, & Co. Famous for their later work as credit reporters under the name Dun & Bradstreet, the agency also redeemed debts, and deeply embroiled itself in southern markets.⁵⁴⁵ Nisbet worked

⁵⁴²Jabez D. Pratt to E.A. & J.A. Nisbet, Feb. 9, 1859, Eugenius Aristides Nisbet Papers, DRML. For more on Egerton, Dougherty, Woods, & Co. see Baltimore Board of Trade, *Statistics of the Trade & Commerce of Baltimore for the Year Ending December 31, 1857* (Baltimore, 1858), 34; see also “Harndon’s Express,” *The Soil of the South* 3 (1853): 443, describing C.A. Ells & Son.

⁵⁴³ See Ward, Jackson, & Jones to E.A. & J.A. Nisbet, Oct. 14, 1859, Eugenius Aristides Nisbet Papers, DRML, writing on behalf of their clients, the Planter’s Bank of Savannah, Georgia.

⁵⁴⁴ Will Varnum to E.A. Nisbet, July 4, 1857, Eugenius Aristides Nisbet Papers, DRML; Brown & Sully to E.A. & J.A. Nisbet, Jan. 25, 1868, Eugenius Aristides Nisbet Papers, DRML, requesting investigatory work related to Iowa estate; S. Hunt to Judge Nisbet, May 21, 1860, Eugenius Aristides Nisbet Papers, DRML.

⁵⁴⁵ The New York Times published a letter from Dun, Boyd, & Co. to its subscribers, in which the firm tried to reassure northern investors in southern markets:

The tenor of the advices which reach us from all points South warrants us in saying that no one need doubt the honorable intentions of the Southern merchant, and that his indebtedness will be faithfully discharged as promptly as events permit. There will be delay in settlement, but this delay will not arise from any premeditated cause or present desire to postpone payment. The reclamations on cotton last Spring and at present have had their influence in producing a stringent money market.

The Political Crisis and Commerce: Failures of 1860 Compared with 1857—from the Office of the Mercantile Agency of Dun, Boyd & Co.,” *New York Times*, Jan. 3, 1861.

regularly for them, collecting notes held against Georgia residents for New Yorkers.⁵⁴⁶

Referrals from agencies and other lawyers linked creditors with reliable lawyers in distant locations. Just as it had on the Reserve, this legal and financial network allowed lawyers to communicate effectively over significant distances.

Lawyers like Nisbet helped build this network by actively cultivating ties to northern creditors and their agents. Nisbet and his firm generated business through personal introductions and referral letters from prior clients.⁵⁴⁷ He also advertised. By the 1830s, just six years after he had been admitted to the bar, Nisbet printed and mailed a circular designed to solicit business from New York firms.⁵⁴⁸ Because prospective clients needed to be able to trust that the lawyer to whom they were sending work would conduct their business efficiently and honestly, Nisbet's advertisements included a list of clients who served as references alongside a description of the kind of work that he did.⁵⁴⁹ Other lawyers elected to make their plea directly. For example, William Pitt Ballinger, who worked in Galveston, Texas, took a trip to the East Coast to generate business.⁵⁵⁰

⁵⁴⁶ See, e.g., Dun, Boyd & Co. to E.A. & J.A. Nisbet, Dec. 30, 1859, Eugenius Aristides Nisbet Papers, DRML; Dun, Boyd, & Co. to E.A. and J.A. Nisbet, July 10, 1860. His work for Dun, Boyd, & Co. resumed after the war. See E.A. Nisbet, Ledger, 1865-1870, Eugenius Aristides Nisbet Papers, DRML.

⁵⁴⁷ See John Merryman to James T. Nisbet, April 29, 1855, Eugenius Aristides Nisbet Papers, DRML, noting meeting in the "Spring of 1853;" Letter to E.A. & J.A. Nisbet, March 27, 1860, Eugenius Aristides Nisbet Papers, DRML, introducing secretary of Humboldt insurance in Newark, NJ; John S. Martin to E.A. Nisbet, Dec. 31, 1860, sending note for collection worth \$441.70 and noting that he was referred by a fellow New Yorker.

⁵⁴⁸ See Hopkins, Allen, & Co. to E.A. & J.T. Nisbet, April 24, 1856, Eugenius Aristides Nisbet Papers, DRML, writing that they had "received your circular and [were] honored with a prominent place among your references in this city."

⁵⁴⁹ See *ibid.* In the 1870s, Nisbet's firm was still circulating flyers trumpeting its ability "to go anywhere in Georgia, examine into the assets of debtors, the liens on their property, and in any and every case, settle by getting money, or security, or compromise" and bragging that its "long standing and great success in the past, [was] a guarantee for the future." Advertisement for Nisbets & Jackson, Attorneys at Law, Nov. 1, 1872, Eugenius Aristides Nisbet Papers, DRML. 217.

⁵⁵⁰ See Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776-1876* (Cambridge, MA: Harvard University Press, 1976), 276-77.

Still other enterprising attorneys attempted to regularize the referral process. In 1866, Nisbet received a letter from the Merchants' Union Law Company, run by the entrepreneurial lawyer John Livingston.⁵⁵¹ The letter informed Nisbet of his inclusion in the company's "printed report" of its "correspondents." The goal of the report, the company explained, was to

keep before the prominent merchants, bankers, and businessmen in every principal City and Town, a list, selected from among the best and safest lawyers, those whose names will guarantee efficiency and facility in the collection of claims and the transaction of all other legal business throughout the United States.

Nisbet's inclusion, however, would cost him: the firm asked for a \$10 fee, or a reference to another local lawyer if he were unwilling to pay.⁵⁵² Although the publication Livingston wrote Reeve about never appears to have been printed, Livingston did periodically publish more general legal directories, intended as a resource for lawyers, "bankers, merchants, manufacturers, [and] insurance companies," to find members of the legal profession outside their state or county.⁵⁵³

As Nisbet's correspondence indicates, northern merchants relied on their lawyers to navigate not only legal rules but also the distance that made debt collection difficult. Even in the second half of the nineteenth century, decades after lawyers on the Western Reserve and Connecticut faced the same problem, distance continued to hinder collection. In a market full of impersonal and far-flung transactions, businesses

⁵⁵¹ For more on John Livingston, see M.H. Hoeflich, *Legal Publishing in Antebellum America* (Cambridge: Cambridge University Press, 2010), 145-69.

⁵⁵² Merchants' Union Law Company to E.A. Nisbet, Nov. 3, 1866, Eugenius Aristides Nisbet Papers, DRML.

⁵⁵³ See Hoeflich, *Legal Publishing*, 149-51, 168-69. A version of Livingston's *Law Register* is still published today as the *Martindale-Hubbell Bar Register of Preeminent Lawyers*. See *ibid.*, 149.

encountered trouble tracking down debtors and making them pay. Moreover, many of the technologies that later helped to speed up communication and regulate the financial markets—credit reporting agencies, national banks, the railroad, and the telegraph—although more developed than when Roger Minott Sherman and Elisha Whittlesey had practiced, were still insufficient to protect investment.⁵⁵⁴ Lawyers like Nisbet were still uniquely positioned to redeem debts. He and other southern lawyers understood how notes worked and how to redeem them in court, but they also lived in close proximity to debtors and could pressure, bargain, and threaten, when far-off merchants could not.⁵⁵⁵ Lawyers' standardized approach to debt collection allowed them to work effectively, even across sectional boundaries. Although the legal rules related to debt redemption remained an important backdrop to the work that Nisbet and other southern lawyers undertook, the majority of their debt collection work took place outside courts.

Nisbet's firm described the typical steps involved in a collecting debt in an advertisement circulated to potential New York clients:

Homestead, Relief, and other Laws obstructing collections, added to the destruction of values by the war, render it indispensable to make personal visitation to debtors in Georgia, to arrange and secure claims and judge of remedies. Our Senior proposes to make this a specialty—to go anywhere in Georgia, examine into the assets of debtors, the liens on their property, and in any and every case, settle by getting money, or security, or compromise; suit is the last alternative. Our long standing and great success in the past, is a guarantee for the future.⁵⁵⁶

⁵⁵⁴ See Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (Oxford: Oxford University Press, 2007), 211-42, 563-69, 690-98; Woodman, *King Cotton*, 273-4.

⁵⁵⁵ See Advertisement for Nisbets & Jackson, Attorneys at Law, Nov. 1, 1872, Eugenius Aristides Nisbet Papers, DRML. 217.

⁵⁵⁶ Ibid. Although the advertisement was published after the Civil War, Nisbet's records illustrate that his firm used a similar redemption process in the antebellum period.

As the firm's advertisement suggested, after a lawyer received a note for collection he rarely sued the debtor immediately. Such suits took time, opened the door to legal gamesmanship, and did not benefit the creditor if the debtor had no assets to seize. Lawyers instead began by researching a debtor's finances. When a "low river and curtailed facilities of Cotton Planters" made it difficult for a debtor to pay his New York creditor, it was Nisbet's job to determine if such excuses were valid, if waiting for a financial return made sense, if the payment plan suggested by the delinquent debtor was acceptable, or if it were better to sue quickly before other creditors did.⁵⁵⁷

Investigation often led to settlement. Nisbet's papers and books from the 1850s to the 1870s demonstrate the commitment to settlement and compromise reflected in the firm's advertisement.⁵⁵⁸ Clients frequently preferred settlement and expressed their willingness to compromise, or at least delegated the decision making on whether to settle to Nisbet.⁵⁵⁹ As in the North, only rarely did cases land in federal or state court. Suit actually seemed to be "the last alternative."

For collection work, Nisbet charged a commission based on the amount he recovered. Rates depended on the complexity of the work, the more desperate the client

⁵⁵⁷ Trowbridge, Dwight, & Co. to "Gentlemen," March 9, 1855, Eugenius Aristides Nisbet Papers, DRML. It is unclear whether the letter was originally addressed to Nisbet's firm or to one of his clients who forwarded it to the firm.

⁵⁵⁸ See, e.g., G.W. Robert to E.A. Nisbet, July 27, 1855, Eugenius Aristides Nisbet Papers, DRML discussing settlement; Copy of E.A. & J.A. Nisbet to B.A. Fahnstock, Hull & Co., Oct. 24, 1859, Eugenius Aristides Nisbet Papers, DRML, reporting on settlement negotiations.

⁵⁵⁹ See, e.g., Allen, McLean, & Bulkey to E.A. & J.A. Nisbet, Sep. 9, 1859, Eugenius Aristides Nisbet Papers, DRML, noting "willingness to accept . . . settlement; Agency People Bank to E.A. & J.A. Nisbet, March 18, 1858, Eugenius Aristides Nisbet Papers, DRML, instructing Nisbet to give debtor "as much time as [he could] without inconvenience or risk;" John Priestel, Jr. to E.A. Nisbet & Junius Wingfield, July 26, 1848, Eugenius Aristides Nisbet Papers, DRML, discussing prospects of settlement; John S. Martin to E.A. & J.A. Nisbet, Dec. 31, 1860, encouraging firm to "use [its] best judgment" in redeeming note."

and the harder the debt to collect, the higher the fee. Nisbet often charged 5 percent commission for basic collection cases, but tougher ones could lead to fees up to 50 percent.⁵⁶⁰ Nisbet's clients did not have much bargaining power save appeals to his generosity. As one client wrote in a letter asking for a reduction of a fee, "If you think you can in justice to yourselves, abate from the fee charged, we shall be glad, but we feel under many obligations for your saving this debt to us and are not disposed to cavil at your charge."⁵⁶¹ Despite occasional complaints, clients seem to have found Nisbet's work satisfactory. They wrote to thank him for collecting debts and returned with more business, although they do not seem to have developed the same close connections that Lord and his clients shared.⁵⁶²

A practice focused primarily on work for businessmen outside the state earned Nisbet a lot of money. According to his relatives he accumulated a fortune of \$100,000 before the Civil War.⁵⁶³ This sum put Nisbet in the upper echelon of southern elites. An average southern estate in 1860 was worth just \$3978, and an average northern estate only \$2040.⁵⁶⁴ Even though the war cost him much of his fortune, including his human property, Nisbet rebuilt his practice and left his heirs nearly \$25,000 when he died in

⁵⁶⁰ See, e.g., Robertson, Hudson, & Pulliam to E.A. & J.A. Nisbet, Sept. 30, 1859, Eugenius Aristides Nisbet Papers, DRML; E.H. Stabler & Co. to E.A. & J.A. Nisbet, Jan. 6, 1860, Eugenius Aristides Nisbet Papers, DRML.

⁵⁶¹ Dun, Boyd, & Co. to E.A. & J.A. Nisbet, Oct 10, 1870, Eugenius Aristides Nisbet Papers, DRML.

⁵⁶² See, e.g., Dun, Boyd, & Co. to E.A. & J.A. Nisbet, July 10, 1869, Eugenius Aristides Nisbet Papers, DRML.

⁵⁶³ E.A. Nisbet, Diary, Nov. 28, 1869, annotated by J.W. Nisbet, Eugenius Aristides Nisbet Papers, DRML July 7, 1927.

⁵⁶⁴ Lee Soltow, *Men and Wealth in the United States, 1850-1870* (New Haven: Yale University Press, 1975), 65.

1871.⁵⁶⁵ The sum dwarfed the estate of the average Georgian, who, according to the 1870 census, held only \$831 of real and personal property.⁵⁶⁶

Recently, scholars have been particularly attuned to the way that the southern economy generated profits like these, emphasizing the importance of slavery and the South to national economic development in the nineteenth century. We now know that slaveholders pioneered accounting methods, that southerners “[strove] for technological advancement,” that the southern economy shared financial links with national and international markets and that it helped to develop these markets, that slaves served as loan collateral and were even securitized, that slave-grown commodities were key to the northern economy, and that the slaveholder demand for products encouraged northern industrial activity.⁵⁶⁷ In short, plantation owners were among the most successful businessmen in America and the South “easily one of the richest and most developed

⁵⁶⁵ See E.A. Nisbet, Diary, Nov 28, 1869, Eugenius Aristides Nisbet Papers, DRML, discussing loss of “the greater part of” his estate during the war. According to his relatives, Nisbet’s property was valued at \$25,000 at his death. See E.A. Nisbet, Diary, Nov. 28, 1869, annotated by J.W. Nisbet, Eugenius Aristides Nisbet Papers, DRML.

⁵⁶⁶ See Joshua L. Rosenbloom and Gregory W. Stutes, “Reexamining the Distribution of Wealth in 1870,” Working Paper 11482 (National Bureau of Economic Research, 2005), <http://www.nber.org/papers/w11482.pdf>.

⁵⁶⁷ See Seth Rockman, “The Future of Civil War Era Studies: Slavery and Capitalism,” *Journal of the Civil War Era* 2 (2012), <http://journalofthecivilwarera.org/forum-the-future-of-civil-war-era-studies/the-future-of-civil-war-era-studies-slavery-and-capitalism/>; Caitlin Rosenthal, *Slavery’s Scientific Management: Accounting for Mastery* (Cambridge, MA: Harvard University Press, forthcoming); Aaron Marrs, *Railroads in the Old South: Pursuing Progress in a Slave Society* (Baltimore: John Hopkins University Press, 2009), 12; John Majewski, *Modernizing a Slave Economy: The Economic Vision of the Confederate Nation* (Chapel Hill: University of North Carolina Press, 2014); Edwards, *People and their Peace*, 78-79; Richard Holcombe Kilbourne, Jr., *Debt, Investment, Slaves: Credit Relations in East Feliciana Parish, Louisiana, 1825-1885* (Tuscaloosa: University of Alabama Press, 1995); Beckert, *Empire of Cotton*, xvi-xviii. Although these questions have generated significant attention recently, they have long interested historians see Eric Williams, *Capitalism and Slavery* (Chapel Hill: University of North Carolina Press, 1994), originally published in 1944; Douglass North, *The Economic Growth of the United States, 1790-1860* (Englewood Cliffs, N.J.: Prentice-Hall, 1961), 101-121.

regions of the world.”⁵⁶⁸ Although historians have recognized the importance of the financial links between North and South, they have overlooked the vital role legal intermediaries played in linking two different but economically interdependent regions. Nisbet’s collection work helps to explain how lawyers helped to place southern slavery at the center of a national economy. Financial investments in the South were not simple or faceless. Business relied on a financial infrastructure manned by lawyers to secure their transactions. Lawyers, who shared a legal culture of routine commercial work that supported economic exchange, happily obliged.

Nisbet’s work demonstrates that the same tools that northern lawyers used to encourage economic exchange in Connecticut, Ohio, and New York also supported slavery. In the South, being a professional lawyer meant working within the slave system, and the malleability of the law learned at Litchfield made this work possible. A consistent flow of private agreements between creditors and debtors both facilitated slave commerce and secured the positive laws that cemented slavery’s position in southern life. Understanding the important economic role of southern lawyers illustrates that lawyers were not merely vessels for political ideology but also professionals who embraced the legalism and routine commercial work that were central to legal practice in both North and South. Lawyers could demonstrate their devotion to their profession’s values by arguing about bank bonds or slave coffles or by tracking down debtors in Milford or Macon because American legal culture was flexible enough to embrace slavery. This was

⁵⁶⁸ J. William Harris, “Preface,” in *Southern Society and its Transformations, 1790-1860*, eds. Susanna Delfino, Michele Gillespie, and Louis M. Kyriakoudes (Columbia, MS.: University of Mississippi Press, 2011), 1-8; Robert Wright, “Corporate Entrepreneurship in the Antebellum South,” in *Southern Society and its Transformations, 1790-1860*, ed. Susanna Delfino, Michele Gillespie, and Louis M. Kyriakoudes (Columbia, MS: University of Mississippi Pres, 2011), 197-216: 208.

one legal culture, not two, as the attraction of southern lawyers to Litchfield demonstrates, and this common legal culture allowed lawyers to communicate across geographical, political and social divisions.

Neither law nor commerce, however, prevented lawyers from participating in sectional conflict. Nisbet never hid his pro-slavery views from northern clients. He worked closely with northern merchants in the 1850s and 1860s, even as secession became more and more likely. Nisbet's ties with the North may have encouraged his early unionist leanings, but by the time the Georgia secession convention met, it was he who introduced Georgia's secession ordinance to the floor of the convention.⁵⁶⁹ Even at the convention, however, Nisbet continued his allegiance to legal formalism by helping to maintain legal distinctions. The secession ordinance, which he helped draft, drew its authority from "the people of the State of Georgia," not the Legislature, a detail important to Nisbet, as he believed that breaking ties with the Union depended on revolution rather than on a state's right to secession embedded in the U.S. Constitution.⁵⁷⁰

During the war, Nisbet's correspondence with northern clients stopped, and his legal practice slowed dramatically. He took time away from his law office to collect bonds to fund the Confederate government and to run—unsuccessfully—for governor of

⁵⁶⁹ Ralph Wooster, *The Secession Conventions of the South* (Princeton, Princeton University Press, 1962), 91.

Businessmen in the North were also slow to embrace secession. See Michael Zakim, "The Dialectics of Merchant Capital: New York City Businessmen during the Secession Winter, 1860–1861," *New York History* 87 (2006): 67, 70-78.

⁵⁷⁰ *Journal of the Public and Secret Proceedings of the Convention of the People of Georgia: Held in Milledgeville and Savannah in 1861, Together with the Ordinances Adopted* (Milledgeville, GA, 1861), 31. Before the convention was called, Nisbet had written that only a convention of the people—not the legislature—could break ties with the United States. He did, however, signal his willingness to compromise on this point. See Nisbet, "Speech at Concert Hall in Macon, November 30, 1860," *The Macon Weekly Telegraph*, Dec. 12, 1860.

Georgia.⁵⁷¹ Despite Nisbet's support for secession and the Confederate government, he had little difficulty rekindling ties with northern clients after the war ended. In August 1865, only three months after the Confederacy surrendered, Nisbet's legal correspondence with northerners resumed: the collection department of the Office of the Mercantile Agency of Philadelphia wrote, asking about the status of two cases.⁵⁷² Other letters followed: from the Bankers and Government Loan Agents in New York offering to serve as agents, from another New Yorker with an attempt to settle a case, from still others looking to collect money, and from a Washington D.C. client following up on a sale of land.⁵⁷³

The ease with which Nisbet and other lawyers reconstituted commercial and legal ties to the Union did not indicate a desire to reconcile with the North politically. Until his death, Nisbet blamed northern abolitionists—"led on by fanatical preachers and ecclesiastical demagogues"—for leading the nation on a path to war.⁵⁷⁴ He considered Reconstruction a usurpation of "all states rights by force" and criticized governments led by Republicans for being dominated by "ignorant, depraved negroes and low, scoundrelly immigrant whites from the North."⁵⁷⁵ Yet, he worked with northerners and argued before Republican-appointed judges. This was due at least partially to perceived necessity. The

⁵⁷¹ Ezra J. Warner and W. Buck Yearns, *A Biographical Directory of the Confederate Congress* (Baton Rouge: Louisiana State University Press, 1975), 148; James Horace Bass, "The Georgia Gubernatorial Elections of 1861 and 1863," *The Georgia Historical Quarterly* 17 (1933): 176-77.

⁵⁷² R.G. Dun & Co. to E.A. & J.A. Nisbet, Aug. 28, 1865, Eugenius Aristides Nisbet Papers, DRML.

⁵⁷³ Henry Hews & Co. to E.A. & J.A. Nisbet, Dec. 20, 1865, Eugenius Aristides Nisbet Papers, DRML; Letter to E.A. & J.A. Nisbet, Oct. 30, 1865, Eugenius Aristides Nisbet Papers, DRML; R.G. Dun & Co. to E.A. & J.A. Nisbet, Oct. 20, 1865, Eugenius Aristides Nisbet Papers, DRML, writing on behalf of John F. Raithbone; Letter to E.A. & J.A. Nisbet, Jan 29, 1866, Eugenius Aristides Nisbet Papers, DRML. Nisbet's firm was also dealing with the consequences of war for his clients. See, e.g., to E.A. Nisbet, Brother, & Son, May 8, 1866, Eugenius Aristides Nisbet Papers, DRML, discussing use of Confederate currency.

⁵⁷⁴ E.A. Nisbet, Diary, Feb 3, 1870, Eugenius Aristides Nisbet Papers, DRML.

⁵⁷⁵ E.A. Nisbet, Diary, Feb. 16, 1870, Eugenius Aristides Nisbet Papers, DRML.

war cost Nisbet much of his estate, and legal work allowed him to begin rebuilding it.⁵⁷⁶ The persistence of a common legal culture, however, made it possible for him to continue his legal work for northern clients in a Republican-governed legal system. Nisbet's initial skepticism of the new Georgia Supreme Court ("was the eight year labor of Lumpkin, Warner, and myself for naught?") changed to pleasant surprise when he won all of his cases.⁵⁷⁷ Nisbet also approved of the new "Radical" Circuit judge he argued before in the Federal District Court; the judge was "fair, unpretending and respectable as to ability."⁵⁷⁸ As long as judges and lawyers met the standards of professionalism—as long as they followed legal rules and continued to speak a familiar legal language—a unified American legal culture functioned despite major political disagreements. Because debt collection work fit comfortably within this framework, it could sustain economic ties between the North and South.

Studying the papers of Litchfield lawyers, both southern and northern, places lawyers' other interventions in context. The maintenance of slavery depended on the slave codes and fugitive slave laws that have garnered the most attention from historians, to be sure. Still, the day-to-day work of southern lawyers is a key but long overlooked element of such maintenance. For every judicial opinion about a runaway slave or slave hiring, judges authored dozens of routine commercial cases, and for every one of those commercial cases, lawyers collected hundreds of debts. This work kept business moving despite political uncertainty. In a national economy reliant on slavery, and in which

⁵⁷⁶ E.A. Nisbet, Diary, Nov. 28, 1869, Eugenius Aristides Nisbet Papers, DRML.

⁵⁷⁷ E.A. Nisbet, Diary, Dec 15, 1869, Eugenius Aristides Nisbet Papers, DRML.

⁵⁷⁸ E.A. Nisbet, Diary, May 3, 1870, Eugenius Aristides Nisbet Papers, DRML.

slaveholders depended on lawyer-backed northern finance, all commercial law could be understood as slave law.

Nisbet's career thus reveals the ethical defects of a business-centric legal culture that understood serving commercial clients as the ultimate end of legal work. Near the end of his life, when Nisbet described his profession's development, he spoke proudly of the professional bar that he and his colleagues had built. Lawyers, he believed, came to success through "hard work, diligent study, persistent energy" and "integrity."⁵⁷⁹ They had developed an "esprit du corps of kindness as well as of pride & honor" and made the legal profession "more genial—more liberal—more patriotic—more publick spirited—than any other class." By upholding "the science of the Law" they defended "right & justice."⁵⁸⁰ Northern lawyers, even those whom Nisbet might have termed members of the Radical Party, would have agreed. Formalism and the embrace of routine commercial practice allowed them to work together and to agree on a conception of the profession's value and service of right and justice, divorced from its social and political effects.

⁵⁷⁹ E.A. Nisbet, Diary, Oct 8, 1870, Eugenius Aristides Nisbet Papers, DRML.

⁵⁸⁰ Ibid. E.A. Nisbet, Diary, February 7, 1870, Eugenius Aristides Nisbet Papers, DRML.

CONCLUSION

In 1854, when speaking about his experiences at the Litchfield Law School nearly forty years earlier, Charles G. Loring shared many fond memories. He remembered “passing along the broad shaded streets of the one of the most beautiful of the villages of New England” with his fellow students, carrying “inkstands” and “portfolios” as they made their way to the school’s lectures. He reminisced about James Gould’s transmission of his “clear, well-defined and accurate knowledge” of common law principles and Tapping Reeve’s “glowing eloquence upon the sacredness and majesty of the law.” Finally, Loring recalled he and his fellow students leaving Litchfield “the very knight errants of the law burning to be the defenders of the right and the avengers of the wrong.” Reeve and Gould, he argued, had “laid one of the corner stones in the foundation of true American patriotism, loyalty to the law.”⁵⁸¹

One need not be a cynic to be suspicious of Loring’s grand pronouncements. As the account books and legal papers of Litchfield alumni show, much of the work that Loring and his fellow “knight errants” undertook involved routine work for commercial clients. In practice, they often used the “sacredness and majesty of the law” they learned at Litchfield to help wealthy creditors redeem debts, sell and buy property, and build commercial enterprises. The success of many of Litchfield’s alumni could be traced back to the school but for reasons that Loring either did not recognize or want to admit.

Litchfield’s practical, private-law-focused curriculum had prepared its students to solve

⁵⁸¹ Dwight C. Kilbourn, *The Bench and Bar of Litchfield County, 1709-1909: Biographical Sketches of Members, History and Catalogue of the Litchfield Law School, Historical Sketches* (Litchfield, CT: Dwight C. Kilbourn, 1909): 186-87.

problems for the commercial clients who could afford to hire them. Through the course of the nineteenth century, the legal profession's routine, mostly out-of-court work had helped transform the economy and made lawyers indispensable to capitalists.

Although Reeve may have inspired his students to promote justice, he had also taught them a curriculum that prepared them to have successful careers as lawyers. Unlike other legal educators who were most concerned with training the next generation of political leaders, Reeve and Gould seemed content teaching their students private law. By offering a prestigious and useful alternative to the much-maligned apprenticeship, Litchfield's teachers attracted hundreds of ambitious young men to Connecticut. There these lawyers-in-training used their inkstands and portfolios to carefully record detailed lessons in private law that they would apply in their routine legal work.

After leaving Litchfield, the first generation of Reeve's students had not set out to encourage economic transaction writ large; instead they were more concerned with establishing financially stable careers as lawyers. They soon discovered, however, that their expertise, professional standing, and legal network made them valuable to those active in an economy dependent on debt. By helping creditors redeem outstanding notes, Litchfield students and their colleagues in the American bar facilitated exchange in a cash-starved economy. They may not have found the work fascinating, but it paid well, and it did not conflict with their vision of the profession focused on serving clients.

Although debt work remained a staple of legal practice throughout the nineteenth century, Litchfield graduates and their colleagues also developed a broad set of legal, financial, and managerial skills that made them even more useful to their commercial

clients. They became particularly adept at negotiating the difficulties that distance posed. In an expansive market loosely knit together by slow and sometimes unreliable methods of transportation and communication, demand for this work was high. On the Western Reserve lawyers worked as agents of land speculators. On behalf of these men, they managed workers, drafted documents, sold land, and performed other tasks that played an important role in preparing the Reserve for mass settlement by easterners. In the process, they also helped to expand the reach of eastern legal procedures, strengthening the capitalist order that provided them with work.

As the nineteenth century progressed, ties between lawyers and their commercial clients strengthened. In New York, lawyers provided a wide variety of legal services for those active in one of the busiest markets in the world. The profession used private law, kinship, and legal culture to reassure businessmen who witnessed the swings of a volatile economic climate. Elite lawyers also began to formalize their ties to these commercial clients, putting together law firms that increased their capabilities and building a legal culture that categorized commercial work as central to the profession's mission.

This flexible legal culture helped lawyers connect to clients in the South as well. In their routine commercial work, southern lawyers facilitated financial connections between North and South that were essential to the functioning of the southern economy. Because they focused on private law and commercial routine like their northern counterparts, southern lawyers' support of an economy based on slavery grew naturally from the lessons that they learned at Litchfield. Their debt work on behalf of northern financiers looked much like that of their predecessors in Connecticut. Like most of their

legal work, it seemed to benefit those with the most economic resources.

In sum, Litchfield's "knight errants" and their colleagues played a vital role in supporting commerce, particularly commerce undertaken by the wealthiest Americans. This view of lawyers as servants of capitalism seems to contradict Loring's paean to the Litchfield Law School's nobility. In a nineteenth century economy increasingly wedded to capitalism, however, perhaps there was, as Loring said, some "true American patriotism" in the profession's routine legal practice after all. Although the work of lawyers may appear similar to that of clerks, managers and other white collar professionals, whom historians have identified as contributing to the functioning of American capitalism, members of the legal profession provided something more.⁵⁸² When lawyers strengthened a private substitute for cash, encouraged settlement on the American frontier, expanded the boundaries of eastern capitalism and legal order, settled disputes, secured titles, increased investor confidence, supported cross-sectional trade, and performed or facilitated countless other economic activities they shaped the American economy. Under the guise of private law, they played a uniquely public role.

Recent histories of capitalism have reminded us that markets did not arise naturally; rather they were in constant danger of failing. Historians have shown how American capitalism had to be supported and reined in by a host of institutions: government, market participants, and private orderings. The picture the new historians of

⁵⁸² For work on clerks see Michael Zakim, "Producing Capitalism: The Clerk at Work," in *Capitalism Takes Command: The Social Transformation of Nineteenth Century America*, eds. Michael Zakim and Gary J. Kornblith (Chicago: University of Chicago Press, 2011). Tamara Plakins Thornton argues that the scientifically inclined also played an important role in developing capitalist standards. See Tamara Plakins Thornton, *Nathaniel Bowditch and the Power of Numbers: How a Nineteenth-Century Man of Business, Science, and the Sea Changed American Life*. (Chapel Hill: University of North Carolina Press, 2016).

capitalism paint of the calamities and grotesqueries of exchange suggests that it was a miracle that the nineteenth century economy managed to grow at all.⁵⁸³ Looking to the practical private-law focused curriculum at Litchfield, and its reflection in the routine work of lawyers like Roger Minott Sherman, Elisha Whittlesey, Daniel Lord, and E.A. Nisbet, provides one compelling reason why it did. Private law was a powerful economic tool. Along with classmates and colleagues, Sherman, Whittlesey, Lord, and Nisbet provided simple but important services that encouraged transaction, settlement, investment, and enterprise. Lawyers helped provide the checks on the market—and the encouragement toward participation—that facilitated exchange. That they maintained and built on this role throughout the turbulent nineteenth century hints at both their adaptability and the demand for their specific skills; that they helped develop an economy that often led to unfair results hints at the limitations of a profession linked so closely to private commercial law.

By the second half of the nineteenth century even lawyers who might have subscribed to the broad vision for the profession forwarded by James Wilson, George Wythe, and James Kent in their legal lectures began to come to terms with the bar's narrower commercial role. Lawyers did not, however, cede the claims to relevance or moral authority to which Loring gestured in his speech. Instead, like Lord and Nisbet,

⁵⁸³ See, e.g., Ann Fabian, *Card Sharps, Dream Books, and Bucket Shops: Gambling in Nineteenth Century America*, (Ithaca, NY: Cornell University Press, 1990); Edward J. Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (Chapel Hill: University of North Carolina Press, 2001); Scott Sandage, *Born Losers: A History of Failure in America* (Cambridge, MA: Harvard University Press, 2006); Jane Kamensky, *The Exchange Artist: A Tale of High-Flying Speculation and American First Banking Collapse* (New York: Viking, 2008); Stephen Mihm, *A Nation of Counterfeiters: Capitalists, Con Men, and the Making of the United States* (Cambridge, MA: Harvard University Press, 2009); Jonathan Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America* (Cambridge, MA: Harvard University Press, 2012).

they staked out ethical standards compatible with commercial engagement. Of the men attempting to guide the moral compass of the profession, none were as influential as University of Pennsylvania professor George Sharswood, whose essay on professional ethics, first published in 1856, went through four editions in twenty two years.⁵⁸⁴ Nisbet, who read Sharswood's "Little Book," soon after it was published, found it to be "pure gold" and wrote that it deserved to "be read by every Lawyer in the Union."⁵⁸⁵

Sharswood's moral rules shared much in common with those lauded by Nisbet and his classmates.⁵⁸⁶ Just as Sherman's and Lord's colleagues in Connecticut and New York praised each other for their intelligence, knowledge of the law, hard work, and diligent service for clients, Sharswood wrote that a good lawyer needed "real learning," "the strictist integrity and honor," and "attention, accuracy, and punctuality, in the transaction of business." "[F]idelity to the client," was especially important to Sharswood. A lawyer, he maintained, ought to "regard himself, as far as the cause is concerned, as completely identified with his client." A lawyer like Daniel Lord, who spent his entire career developing close relationships with his clients, would have no doubt agreed.⁵⁸⁷

Notably absent from Sharswood's essay was consideration of the effect that zealous client service would have on the public. He discussed the importance of a

⁵⁸⁴ George Sharswood, *A Compend of Lectures on the Aims and Duties of the Profession of the Law Delivered Before the Law Class of the University of Pennsylvania* (Philadelphia, 1854); George Sharswood, *An Essay on Professional Ethics*, 4th ed. (Philadelphia, 1876).

⁵⁸⁵ E.A. Nisbet, Diary, Dec. 15, 1854, Eugenius Aristides Nisbet Papers, David M. Rubenstein, Rare Book & Manuscript Library, Durham, North Carolina (hereinafter "DMRL").

⁵⁸⁶ Nisbet believed that the book "put[] the Legal profession upon high ground and prescribe[d] for it the most stringent rules of morality." E.A. Nisbet, Diary, Dec. 15, 1854, Eugenius Aristides Nisbet Papers, Eugenius Aristides Nisbet Papers, DRML.

⁵⁸⁷ Sharswood, *A Compend*, 55, 11, 50. Sharswood noted that a lawyer's legal responsibility to a client was merely to avoid "gross negligence," but he believed that his moral responsibilities were wider. *Ibid.* 22-24.

lawyer's "[f]idelity to the court . . . and fidelity to himself," but Sharswood here seemed more concerned with a lawyer's decorum, honesty, and integrity. An advocate, Sharswood wrote, should treat judges respectfully and should not represent a client who forced him to contradict "his own sense of just and right," but he was "not morally responsible for the act of the party in maintaining an unjust cause." For Sharswood, the overall justness of the law would compensate for "a few particular cases of hardship and injustice" that resulted from following "the strict rule of law." This limited consideration of legal outcomes left no room for thinking about the systemic consequences of legal rules and professional action. Commercial legal routine seemed not to present an ethical dilemma worth mentioning. As long as a lawyer demonstrated fidelity, integrity, and hard work, he would earn the approbation of the bar. The endorsement of the "real public" would soon follow.⁵⁸⁸

So who was this "real public" that lawyers aimed to impress? Sharswood clarified this curious phrase in the revised second edition of his book, published in 1860. There he explained that by the "the real public," he meant "the business men of the community, who have important lawsuits, and are valuable clients." Lawyers needed to win the favor of these men because—as Sharswood wrote, and as Sherman, Whittlesey, Lord, and Nisbet found in practice—routine commercial work paid the bills. It made sense for the profession to craft ethical rules that also allowed a young lawyer to "get business—as

⁵⁸⁸ Sharswood, *A Compend*, 24, 11, 26, 55. Despite his belief that lawyers were not responsible for the acts of the parties they represented, Sharswood did suggest that lawyers might want to avoid representing particularly unjust causes. *Ibid.* 28-31.

much business as he can.”⁵⁸⁹ Consideration of the effects this representation had on other (less real?) Americans fell by the wayside. Although many lawyers had recognized it earlier, by the second half of the nineteenth century the alignment between lawyers and business was hardly up for debate.

Sharswood’s book fit well within the legal climate that Litchfield and its graduates had helped create because it elided a basic tension in their professional outlook. Lawyers wanted to think of themselves as members of “a learned profession” and to distance them and their colleagues from the crassness of the market, but they also wanted to make money. The ethical rules in Sharswood’s essay gave them license to continue their routine commercial work while still fully belonging to a profession that demanded a “high-toned morality.”⁵⁹⁰ Perhaps this is why Sharswood’s essay struck a chord with American lawyers. In 1887, the Alabama Bar codified Sharswood’s principles into the Alabama State Bar Code of Ethics, and in 1908, the American Bar Association followed suit, basing its *Canons of Legal Ethics*, the first national legal ethics code, on Sharswood’s essay.⁵⁹¹

⁵⁸⁹ Sharswood, *An Essay*, 21; Sharswood, *A Compend*, 59. Sharswood, however, continued to maintain that the profession, was “a learned profession” and not merely a “mechanical art.” Ibid. 79-80. He was particularly disturbed by cases in which lawyers sued clients for fees because these suits reinforced negatives stereotypes about lawyers. Ibid. 80-84.

⁵⁹⁰ Sharswood, *A Compend*, 6, 34.

⁵⁹¹ Russell G. Pearce, “Rediscovering the Republican Origins of the Legal Ethics Codes,” *Georgetown Journal of Legal Ethics* 6 (1992): 241-42; “Canons of Ethics,” *American Bar Association Reports* 33 (1908): 575.

By codifying the rules, the Alabama Bar and the ABA fulfilled Nisbet’s wish that “the Bar by association . . . adopt as rules of conduct the moral rules laid down by Sharswood.” E.A. Nisbet, Diary, Dec. 15, 1854, Eugenius Aristides Nisbet Papers, Eugenius Aristides Nisbet Papers, DRML.

Subsequent ABA codes also demonstrated Sharswood’s influence. See Pearce, “Rediscovering,” 241-42; American Bar Association, *Model Code of Professional Responsibility* (Chicago: ABA Publishing, 1970);

Litchfield's commitment to private law influenced not only the profession's ethical codes but also how the bar trained lawyers. Although Litchfield had no worthy successors when it closed its doors in 1833, by the last quarter of the century university law schools began to assume its mantle. At Harvard, Dean C.C. Langdell installed the casebook method, instituted regular examinations, and enacted a system designed to reward academic merit that other schools eventually copied. Langdell's Harvard differed greatly from the informal and proprietary school Reeve founded, but its emphasis on private law meant that it shared much more in common with Litchfield than it did with any of Litchfield's competitors. Harvard's first year curriculum focused on civil procedure, contracts, property, torts, and criminal law, and Langdell required students to take evidence, equity jurisdiction, and pleading in the second year. Of these, only criminal law was not a private law class, and Litchfield had taught it too. Like Reeve and Gould, Langdell focused on formal legal rules in his lessons, and his narrow curriculum attracted serious students who sought careers as lawyers.⁵⁹²

Experiments with broader legal curriculums did not last. At Princeton, Woodrow Wilson helped plan a new kind of law school that would have integrated public policy, social law, and progressive law. But Wilson's vision never moved beyond the planning stages. More notoriously, an attempt by progressives at the University of Chicago to implement a similar blend of law and public policy was thwarted when the dean of

American Bar Association, *Model Rules of Professional Conduct* (Chicago: ABA Publishing, 1983). The current ABA legal ethics code is a revised version of the *Model Rules of Professional Conduct*.

⁵⁹² Bruce Kimball, *The Inception of Modern Professional Education: C.C. Langdell, 1826-1906* (Chapel Hill: University of North Carolina Press, 2009), 2-4, 193-94, 208-09, 264-70; Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983): 34-42; see also John Langbein, "Blackstone, Litchfield, and Yale: The Founding of the Yale Law School in History of the Yale Law School," *History of the Yale Law School: The Tercentennial Lectures*, ed. Anthony T. Kronman (New Haven: Yale University Press, 2004).

Harvard Law School refused to allow one of his faculty members to become the dean at Chicago unless the school removed the “polluting presence” of public law and policy courses from the law school’s curriculum. By 1914, 48 percent of American law schools used the casebook method, and another 24 percent were in the process of adopting it. Over the next three decades nearly every other American law school adopted Langdell’s model of legal education. The dominance of a relatively narrow, private-law-focused vision of the profession thus continued long after Litchfield’s demise.⁵⁹³

The public consequences of this vision continued to make themselves felt as well. Today, the United States has the largest and most powerful bar in the world, and the fate of its denizens is still linked closely to commerce.⁵⁹⁴ Modern lawyers still adhere to the ideals espoused by Litchfield’s alumni; as in the nineteenth century, integrity, diligence, and legal training tend to help those with economic power and the ostensibly private nature of legal works helps to shield modern lawyers from the consequences of their actions.⁵⁹⁵ The graduates of Litchfield secured a future for the legal profession not as ideological guardians of the state but as technical caretakers of the economy.

⁵⁹³ Stevens, *Law School*, 39-40; Robert Gordon, “A Geological Strata of the Law School Curriculum,” *Vanderbilt Law Review* 60 (2007): 344-47; Kimball, *The Inception*, 310.

⁵⁹⁴ Dietrich Rueschemeyer, “Comparing Legal Professions Cross-Nationally: From a Professions-Centered to a State-Centered Approach,” *American Bar Foundation Research Journal* 11 (1986): 415, 419. For research on the role that contemporary lawyers play in commerce see, e.g., Charles R. Epps, “Do Lawyers Impair Economic Growth?,” *Law and Social Inquiry* 17 (1992): 585, 617-18 (1992); Peter B. Pashigian, “The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers,” *Journal of Law and Economics* 20 (1977): 53, 81 (1977); 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,” *Texas Law Review* 70 (1992): 645, 647; Ronald J. Gilson, “Value Creation by Business Lawyers: Legal Skills and Asset Pricing,” *Yale Law Journal* 94 (1984): 239; Ronald J. Gilson, “How Many Lawyers Does It Take to Change an Economy?,” *Law and Social Inquiry* 17 (1992): 635, 638-39; Mark C. Suchman & Mia L. Cahill, “The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley,” *Law and Social Inquiry* 21 (1996): 679.

⁵⁹⁵ See American Bar Association, *Model Rules of Professional Conduct* (Chicago: ABA Publishing, 2016): Preamble, Rules 1.1, 1.3, 8.4 (2000); Bernard E. Harcourt, *The Illusion of Free Markets, Punishment and the Myth of Natural Order* (Cambridge, MA: Harvard University Press, 2012).

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