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Lawyers as Trusted Agents in Nineteenth-Century American Commerce: The Influence of Fiduciary Law and Norms on Economic Development

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The role of fiduciary law in the development of North American capitalism has been overlooked by institutional economists, who interpret fiduciary law as a form of contract and make the judicial enforcement of contract central to the transaction-cost theory of economic development. This article argues that the emergence of distinctive, equity-based fiduciary laws and norms significantly influenced the development and growth of early-nineteenth-century American markets. Our historical research identifies lawyers as important economic actors, who served as catalysts for the emergence of this governance culture. Lawyers adopted fiduciary principles that allowed them to become trusted intermediaries, thereby addressing the agency-cost problems inherent in complex economic exchange that vex the institutionalists' contractual account of economic development.

I. INTRODUCTION

Which legal institutions promote economic development has been a focus for institutional economics (Dam 2006, 2; Trebilcock and Leng 2006, 1520–21). This question continues to be a pressing public policy concern and a major interest of law and development efforts (Santos 2006; Cooter and Schäfer 2012; Eslava 2015; Cao 2016; Lin and Monga 2017; World Bank 2017). Institutional economists have argued that the ability of contracting parties to make credible commitments is essential to the rise of capitalist economies. In a world full of risk, such commitments require the support of institutions that reduce uncertainty and encourage exchange (North 1990, 33–35; Williamson 1996; Dam 2006, 123; Thomas 2011, 996–97). Without such support, self-interested parties would simply abandon agreements when their incentives changed (Hadfield 2005, 180). From this perspective, the judicial enforcement of contracts is central

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to economic growth (North 1990, 35, 54; Knack and Keefer 1995, 210–11; Williamson 1996; Acemoglu and Johnson 2005; Acemoglu, Johnson, and Robinson 2005; Dam 2006, 123; Trebilcock and Leng 2006; Klerman 2007, 427–34; Thomas 2011, 996–97; Cooter and Schäfer 2012, 64–100; Fernández and Tamayo 2015, 17, 22). According to Douglass North, one of the founders of institutional economics, "the inability of societies to develop effective, low-cost enforcement of contracts is the most important source of both historical stagnation and contemporary underdevelopment in the Third World" (North 1990, 54).

For economists like North, the nineteenth-century American economy provides a case study of uniquely successful development in this regard. The American economy grew because "the underlying institutional framework persistently reinforced incentives for organizations to engage in productive activity" (North 1990, 9). But recent historians of capitalism paint a messier picture. In their detailed accounts of everyday life under capitalism, historians have observed the fraud that plagued the nineteenth-century American economy (Mihm 2007; Kamensky 2008), illustrated the frequency of financial failures (Balleisen 2001; Sandage 2005), highlighted the devastating effects that financial swings had on the confidence of market participants (Fabian 1990; Mann 2002; Levy 2012), and pointed out dozens of impediments to commercial transaction (Fabian 1990; Balleisen 2001; Mann 2002; Kamensky 2008; Levy 2012). The historical record, in other words, reflects an economic reality beset by a large variety of serious obstacles to market development.

Institutionalists, including North (1990) and Oliver Williamson (1996), have recognized that the institutional framework that supported the emergence of modern markets involved more than state-based enforcement of property and contract. North regarded informal norms as an important element of such an institutional framework, and Williamson and others studied private orderings (North 1990, 36–39; Greif 1993; Williamson 1996). A subsequent, somewhat more empirical literature has examined differences in legal regimes (and legal cultures) to explain significant differences in twentieth-century firm organization and ownership structures (and therefore security markets development) in different national economies, such as the United States, Germany, and France (Gorga and Halberstam 2014, 1387–88). Despite these efforts to explore more broadly the legal institutions that support economic growth, the institutionalist analysis tends, for theoretical reasons, to make contract central to its account (North 1990, 52–55; Williamson 1996, 10), and, more broadly, relies on contract as the model for economic relationships and economic organization in general (Blair and Stout 2001, 1735; Trebilcock and Leng 2006, 1520). This focus on contract overshadows inquiry into other legal rules and legal norms that helped Americans overcome the obstacles to market development identified by the new historians of capitalism. For their part, historians of capitalism have recognized that wealthy commercial actors were able to overcome the impediments to trade presented by the risky nineteenth-century economy and have charted the rise of interconnected global markets for cotton, cloth, and other commodities (Beckert 2001, 2014; Rockman 2012). Some historians have recognized the importance of trust and risk management to economic development in the nineteenth century (Sunderland

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2007, 1; Klaus 2014, 3). They have devoted less attention, however, to governance mechanisms and legal institutions (Agnew 2012, 277–80).[1]

Our work brings historical research to bear on the institutionalist question of which formal and informal background rules lowered transaction costs sufficiently to encourage exchange in the early to mid-nineteenth-century American economy. We briefly review historical research that shows both the critical importance of agency relationships for the development of nineteenth-century markets, as well as the substantial obstacles to governing and policing such relationships under these historical circumstances. We then relate the historical picture to the theoretical "agency problem" identified by institutional economists and ask how such agency problems were overcome. Our answer to this question draws on original research by Justin Simard on the routine commercial work of lawyers during this period. Archival research illustrates the critical role lawyers played in mediating, negotiating, and executing economic transactions in early America (Simard 2016a). On behalf of their clients, lawyers surveyed land, hired workers, paid taxes, collected notes, drafted agreements, examined titles, prepared and interpreted insurance policies, brought suits, managed finances, organized partnerships, transferred money, and prepared detailed reports (Simard 2016a). In all these activities, lawyers acted as trusted agents for their clients. Although deceit and fraud were not absent, Simard's research shows that businessmen expected lawyers to exercise discretion on their behalf, and in their best interests; and that lawyers did so to an extent that they were relied upon heavily for such services. By shepherding their clients through a hazardous economic landscape, lawyers encouraged participation in high-risk markets.

This article offers a hypothesis as to why lawyers were able to play such a role: their fiduciary norms. Lawyers established skills suited to conduct market transactions, but they also developed professional norms that made them more trustworthy. A good lawyer was to work diligently, not for his own benefit, but for the benefit of his clients. Lawyers, or at least the leaders of the profession, thus aspired to a privileged position outside of the market. They claimed to pursue a professional ethos of competency and integrity and scorned the immediate pursuit of wealth. In so doing, lawyers drew on a nascent professional culture informed by principles of equity taken from the law of agency and trusts. As the quintessential "agents," lawyers were subject to equitable duties of trust that went beyond the law of contract. Equity developed principles to police trustees who controlled property for beneficiaries, just as lawyers did for their clients. These principles included prohibitions against self-dealing and profiting from transactions made on behalf of beneficiaries, even where such transactions were otherwise lawful in contract. In their professional practice in the rapidly evolving commercial world, lawyers adopted and developed these fiduciary principles, as well as more specific rules that would later become the foundation for the law of lawyering.[2]

If our hypothesis about the importance of these fiduciary principles to the success of the legal profession is true, it is significant, not only for understanding the importance of lawyers to economic development in the United States during the nineteenth

1. They have, however, identified the exploitation that supported nineteenth-century commerce, exploitation that Eric Williams (1994) first drew attention to in the 1940s (Kilbourne 1995; Beckert 2001; Martin 2010; Rockman 2012).

2. Frank Dobbin has argued that routine practices such as this can reinforce norms (Dobbin 1997, 13).

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century (Simard 2016a, 1059–63) but also for understanding the special role of fiduciary laws and norms in constituting markets.[3] Engaging the theoretical literature about the relationship between fiduciary law and contract, we argue that fiduciary principles and norms should be understood on their own terms and should not be treated merely as default rules to contracts of agency, as the economic literature on this subject suggests.

II. THE EARLY NINETEENTH-CENTURY US ECONOMY

High risk, uncertainty, and extreme information asymmetry characterized nineteenth-century markets. Historians of capitalism have documented the pervasiveness of failure and the devastating effects it had on the livelihoods and perceptions of nineteenth-century Americans. Economic downturns, known in the nineteenth century as panics, seemed to occur without any obvious cause (Larson 2009, 34–35). Nearly one in four Americans living in the early nineteenth century became insolvent during their lifetime, and businesses failed at an even greater rate (Coleman 1974, 287–88). The increasingly complex American economy that relied on distant and anonymous transaction also created opportunities for fraud and economic loss (Balleisen 2017). By the early nineteenth century, exertion of social pressure alone was often insufficient to force the repayment of their debts or discourage fraud (Mann 1987, 101–36; Wright 2001, 29). Increasingly distant and anonymous transaction also meant that businesses could not primarily rely on direct observation of trading partners or clients.

In addition, relatively rudimentary transportation made it difficult to monitor trading partners from a distance (Sandage 2005, 99–188; Howe 2009, 211–42). A trip from South Carolina to Connecticut in 1809, for example, took one healthy young man nearly a month, and involved perilous bridge crossings, expense, and multiple forms of transportation (Martin 1959, 10, 41–42). Travel west took just as long, and travelers recounted enduring treacherous stream crossings, "arm[ies]" of fleas and bedbugs, "excessively muddy" roads, and "poor water," among many other hazards (Badger 1851, 22–26; Ellsworth 1985, 54–66, 70–74; Dwight 1991, 5–6, 47). Communication could also be slow, expensive, and unreliable. Although the postal service played an important role in connecting Americans across the country, it was also hindered by the difficulties of travel and the expense of postage; even in the 1850s, Americans sent an average of only five letters a year (Henkin 2006, 17). Those who depended on parcels for business had to find ways to work around the postal service's limitations by sending them with friends or trusted travelers. Other technologies that sped up communication, such as railroads and the telegraph, were not widely adopted until later in the nineteenth century (Woodman 1990, 273–74; Howe 2009, 211–42, 563–69, 690–98).

An economy dependent on bills of exchange and private bank notes created additional problems (Myers 1970, 72, 163). Bills of exchange, which were promises to pay made on an individual basis, depended on the solvency (and integrity) of a distant trading partner or his financial backer. If a businessman failed to pay what he owed, it might

3. Although we do not address the importance of fiduciary duty as a governance mechanism in the public sector, this function has been recognized by others (Clarke 1996; Painter and Hill 2010). Other scholarly work has explored the role of lawyers in government and public service (Gawalt 1979, 38–40, 66–68; Miller 1995, 58–69; Parrillo 2013, 80–124).

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be difficult or impossible to track him down or to seize his assets. Failures could also compound. One businessman's inability to pay might cause problems for hundreds of others who were depending on his money to maintain payments on the webs of debt that enmeshed many commercial actors (Mann 1987, 14–17, 28–35). Banknotes, on the other hand, depended on the solvency of private banks. Especially in the early nineteenth century, the risk of bank failures created problems for commercial actors (Gorton 1996, 372). The circulation of counterfeit notes was also widespread, with contemporaries estimating that counterfeit notes ranged from 10 to 50 percent of currency in circulation (Gorton 1996, 369; Mihm 2007, 14–16). Thanks to the "ubiquity of counterfeiting," bank notes, especially those from Western banks, sometimes traded at high discounts (Mihm 2007, 6; Kamensky 2008, 51–42). The nineteenth-century American economy, then, was far from a perfect environment for exchange. Market volatility, anonymous transaction at a distance, fear of failure, slow transportation and communication, and lack of a reliable means of exchange combined to create significant obstacles to commercial activity (Mihm 2007, 14).

Americans who nevertheless wished to participate in commerce faced additional problems posed by the far-flung market. Delegation to representatives was necessary because the lack of modern communication technology, especially earlier on, and the market's large geographic scope hindered its participants from personally engaging in a given transaction. Because communication was slow, it was difficult if not impossible to provide representatives detailed and specific instructions for transactions. Moreover, the reliance on private notes meant that representatives needed to be able to draft and negotiate enforceable notes, evaluate the risks involved in accepting bills of exchange from trading partners, and, if necessary, force payment on overdue notes. All of these conditions required the delegation of significant authority. The prevalence of fraud heightened the issues of trust inherent in the delegation of authority, and the volatility of markets made it that much more difficult to second-guess the judgment of agents. Yet in the face of these obstacles, the American economy grew at an unprecedented rate. Whereas relatively stagnant economies were the norm throughout much of human history, by 1800, the US economy began to expand at 2 percent a year for the rest of the nineteenth century (Lindert and Williamson 2012, tbl.4). Despite massive population growth, GDP per capita in the United States jumped from $1,257 in 1820 to $2,445 by 1870 (Maddison 2001, tbl.B0–21).

The challenges we describe were not unique to the US economy. Similar conditions prevailed in other regions of the world where trade was carried out at a distance, without the tools of modern communication and currency, under circumstances fraught with risks, and where, moreover, no robust legal bureaucracy governed commerce.

Under such circumstances, we know from economic history, merchants organized themselves into associations with internal rules and monitoring mechanisms in early medieval Mahgreb (Greif 1993; Bernstein 2019), in Renaissance Italy (Lane 1944), and in early modern England (Watts and Zimmerman 1983, 619–21). In Germany, the medieval guild system provided some of the organizational and normative infrastructure for the development of capitalism (Greif, Milgrom, and Weingast 1994, 758–62). In the Anglo-American context, other scholars have charted the rise of reputational mechanisms, market governance structures, and organizations that helped to address the risks of nineteenth-century commerce (Gorton 1996, 386; Sunderland 2007, 1;

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Mokyr 2009, 382; Taylor 2013, 13; Klaus 2014, 4–5; Cook 2017, 140–41; Maggor 2017, 99). The theoretical literature conceptualizes these organizational forms as "agency relationships." In the following, we briefly review the importance of agency relationships for economic development, as well as the special problems to which such relationships give rise on the institutionalist model.

III. ECONOMIC DEVELOPMENT AND THE AGENCY PROBLEM

Agency relationships are fundamental to economic development. They occur when one person (the agent) acts on behalf of another (the principal) in the conduct of the principal's affairs. Agency relations "fuel social differentiation" and promote the division of labor and the specialization of functions that characterize a complex economy (Shapiro 1987, 626; Sitkoff 2014, 199). They allow a principal who lacks certain abilities or knowledge to, nonetheless, deploy them for his own purposes (Mitnick 1975). A demand for agents in diverse fields provides the incentive for agents to specialize, yielding substantial economic gains. Other types of agency relationships simply answer to "the need to delegate responsibility for performing tasks of which the principal is capable" (Shapiro 1987, 627). Such opportunity permits the principal to specialize. Both types "initiate and facilitate collective forms of action" and provide the building blocks for hierarchy and more complex economic organization, including partnerships and corporations (Shapiro 1987, 626).

Substantial efficiencies flow from delegating to agents. These include the ability to put property to use at a distance. Delegation of authority allows the agent to make use of property when the principal could not, bridging physical and social distances that limit exchange. They also allow an agent to put a principal's property to use over time. This permits the investment of property as well as the pooling of investments (Shapiro 1987, 628). Agency relationships are therefore especially important in complex economies characterized by anonymity, diversity, and high specialization of functions (Dam 2006, 125). But agency relationships also give rise to special problems, collectively referred to by institutionalists as "the agency problem." Giving discretion to an agent results in information asymmetry between the agent and the principal (Jensen and Meckling 1976; Sitkoff 2014, 197). When hiring the agent, ex ante, the principal has imperfect knowledge of the character of the agent, that is, whether the agent is of such character that he will tend to shirk his duties or expend his best efforts on behalf of the principal. Ex post, because of the uncertainties and contingencies surrounding the exercise of the agent's judgment, the principal cannot be sure that the agent applied his best efforts in carrying out the business of the principal. Because the agent's discretionary acts are imperfectly observable by the principal, the agent has opportunities to deviate from the principal's instructions and pursue his own self-interest at the expense of the principal. The agency relationship thus requires the principal to expend resources on monitoring, which can be very costly depending on the circumstances (North 1990, 32). Economists account for this (threat of) deviance on the part of agents in terms of "moral hazard" (Jensen and Meckling 1976) or "opportunism" (Williamson 1993, 99; Williamson 1996, 6).

As we discussed above, the institutionalist literature explains the persistence of inefficient economic exchange during much of history, and in most nation-states, by

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the absence of institutions to secure property rights and enforce the contracts that make agency relationships possible. Without such institutions, they argue, transaction costs are prohibitively high. Capitalist economic development is driven by specialized capital investments that dramatically increase the scale and scope of production. Such investments depend on the ability of rational actors to develop contractual relationships under conditions of uncertainty. Faced with expropriatory threats in the absence of secure property rights, entrepreneurs would "not only reduce investment" but "also invest in less specialized capital (human and physical)" (Clarke 2003, 90). Because economic growth in nineteenth-century America was so dramatic in spite of the specific challenges we described above, we know that Americans found ways to address the risks they faced when delegating to agents.

We now turn to an historical examination of a particular type of agency relationship—that between nineteenth-century lawyers and their clients—to further inquire into the question of what formal or informal institutional mechanism may have provided for the support of agency relationships in nineteenth-century America.

IV. LAWYERS AS TRUSTED AGENTS

Nineteenth-century lawyers were prominent and active agents in American commercial life. As early as the 1780s, lawyers acted as agents for their clients, remotely conducting business on their clients' behalf and serving as important intermediaries in commercial life throughout the United States (Simard 2016b). When talking about the profession's economic role before the Civil War, historians focus on litigation, lawmaking, and law enforcement (Horwitz 1977, 108; Novak 1996; Balogh 2009, 13). According to the economically focused literature, it was not until the late nineteenth century that lawyers played important professional commercial roles outside of the courtroom (Hurst 1950, 310; Lipartito 1990, 480; Gordon 2002, 290, 294). Institutional economists have also overlooked much of this out-of-court work, instead paying more attention to the organization of law firms and the markets for legal services.[4] We suggest that the day-to-day work of lawyers as commercial agents in the first three-quarters of the nineteenth century helped to establish trust and confidence in transactions that were conducted in new and uncertain markets. This confidence was supported both by lawyers' capacity to bring specialized knowledge and substantive expertise to bear on such transactions and by their adoption of (potentially enforceable) norms, which addressed the increased risk of abuse that their role as such agents presented.

A. The Commercial Work of Lawyers

Of the hundreds of tasks recorded in the account books and legal papers of attorneys that Simard has studied, few involved the high-level doctrinal disputes that have tended to attract historians interested in the economic role of lawyers in the early to

4. Gorga and Halberstam provide a discussion of this literature on law firms (2007, 1192–1201).

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mid-nineteenth century.[5] Instead, these books show that in the first three-quarters of the nineteenth century, many lawyers spent their time drafting documents, giving advice, securing notes, and undertaking other straightforward, even mundane, tasks. Lawyers' papers also show that they did not confine themselves to narrowly defined "legal" work. Lawyers drafted writs to redeem debts, but they also tracked down debtors and negotiated settlements. They prepared mortgages, but they also inspected land and performed title searches. They provided legal advice, but they also managed their clients' commercial accounts. Some of this activity has been noticed by other historians, but its broader economic significance has remained relatively unexplored (Bakken 1991, 51–82; Pease and Pease 1995, 95–115; Moretta 2000, 63–110; Friedman 2005, 108–09, 229–30; Hadden 2009). Willard Hurst, for example, has observed the role that lawyers played in facilitating real estate transactions in the nineteenth century, but he sees the profession's in-court work in this time period as more significant (Hurst 1950, 319–20; Hurst 1967, 594–95).

In the turbulent world of nineteenth-century commerce, the work of lawyers helped to bridge the gap between clients and their increasingly distant counterparties to commercial exchange. Lawyers served roles later played by bankers, accountants, collection agencies, real estate agents, managers, credit reporters, title agents, and salesmen (Hurst 1950, 319–20; Friedman 2005, 108–09, 229–30; Simard 2016a, 1085). In so doing, they contributed to building institutions that helped develop modern markets. The benefits of transacting through lawyers, however, came with the potential for abuse. The risks of agency relations between attorneys and their clients lay in the danger that attorneys would pursue their own self-interest in advising clients and conducting transactions on their behalf—to the detriment of their clients' interests. The opportunities for abuse increased when clients afforded attorneys greater discretion, when they depended on their attorneys for information, or when physical distance or other factors made monitoring attorney client difficult. Unsurprisingly, court records suggest that some unscrupulous lawyers did take advantage of their clients. Lawyers engaged in self-dealing, shortchanged clients to benefit competitors, used information gained during the representation for their own purposes, took opportunities available to the client for themselves, accepted bribes from third parties, and engaged in outright fraud (Weeks 1878, §354-282; Winsberg 2016, 189–99). For obvious reasons, many other frauds never made it to court.

Our evidence suggests that these risks did not prevent clients from delegating significant discretion to their lawyers. Nor, as we shall see later, did it prevent lawyers from developing a reputation as loyal agents. In this section we present two examples of delegation, drawn from Simard's investigation into the careers of some of the more than one thousand lawyers educated at the Litchfield Law School. The school was particularly influential because of its focus on educating lawyers for private and commercial practice.[6] Such papers offer a window into the often-obscured world of the commercial lawyer. Surviving materials such as correspondence with clients, incomplete account

5. These examples and arguments are drawn from Justin Simard's dissertation, based on a study of the graduates of the Litchfield Law School. By the time it closed its doors in 1833, 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 (Simard 2016b, 576).

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books, and other miscellaneous legal papers cannot provide a comprehensive portrait of these lawyers' practice, nor of the bar's practice as a whole. Nevertheless, they illustrate the role lawyers played as commercial agents and the significant delegation of authority from their clients that such a role entailed.

1. Land Sales

In nineteenth-century America lawyers worked as long-distance land agents, helping eastern speculators sell land located in the West (Friedman 2005, 230–32). There, the problems of transportation and communication experienced in the rest of the country were magnified. Land sales took place in isolated towns, separated from the East by nearly month-long journeys and slow and unreliable mail service. Absentee landowners could not hope to closely monitor these sales, nor did they sell enough land to justify hiring a full-time employee. Lawyers, however, could work on behalf of several landowners. Research shows that clients delegated significant authority to their lawyers, who performed a variety of tasks on their behalf. They not only drafted mortgages and brought suits but also acted as bankers, salesmen, land managers, and accountants. These roles placed lawyers at the center of commercial exchange in the West and helped make land sales at a distance possible.

The following description of the work of lawyers as land agents draws primarily from the papers of Elisha Whittlesey, who began working in isolated northeastern Ohio in 1806. The papers of most other land lawyers on the American borderlands have been lost, but other surviving records suggest that Whittlesey was a typical, if especially successful, land lawyer (Friedman 2005, 230–32; Simard 2016a, 1080–82). Whittlesey's work fell into five main categories: management, sales, accounting, litigation, and communication. Each of these categories of work required him to use his discretion, knowledge, and expertise to make decisions on behalf of his client.

As a land manager, Whittlesey looked after his client's holdings. He calculated and paid taxes, organized workers who cleared land or surveyed it for division into smaller parcels, and inspected the land for features that would justify a higher selling price. He thus decided the appropriate level of taxes to be paid, determined the wages of workers, and assessed the appropriate value of land.[7] During land sales, Whittlesey investigated title, vetted buyers and sellers, prepared sales contracts, transferred deeds, and registered sales with the state.[8] In all these activities, Whittlesey's clients depended on his discretion and expertise. Ex ante, landowners could not easily anticipate all obstacles to transactions that could arise. If attorneys in Whittlesey's position misjudged a buyer or seller, carelessly investigated a title, made errors in a mortgage, or improperly registered a deed with the state, it might cost their client significant sums of money. Ex post, the

6. Other law schools such as Columbia and the University of Pennsylvania focused on educating lawyers for public service. These schools, however, were much less successful, educated far fewer lawyers, and eventually failed, leaving Litchfield as the major law school in early America (Spaulding 2003, 1418; Simard 2016b).

7. Elisha Whittlesey to Elisha Sterling, May 2, 1808, Western Reserve Historical Society (hereafter WRHS); Elisha Whittlesey, Account Book (1806-1817), WRHS; Elisha Sterling to Elisha Whittlesey, May 29, 1820, WRHS; Elisha Whittlesey to Elisha Sterling, October 10, 1810, WRHS.

8. Elisha Sterling to Elisha Whittlesey, October 2, 1804, WRHS; Elisha Whittlesey to Elisha Sterling, May 2, 1808, WRHS.

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difficulty, slow speed, and expense of travel meant that landholders would have faced significant difficulty in attempting to evaluate the conduct of their agents. If they wanted to sell land, they had little choice but to trust their lawyer.

As a de facto accountant, Whittlesey tracked his client's place within the web of promissory notes and mortgages that connected buyers and sellers in the West. He advised clients on the likelihood of repayment and worked to secure notes with property.[9] He also sent profits back East.[10] Work like this relied on a lawyer's financial acumen, judgment, and honesty, all of which were difficult for clients to assess at a distance. The delegation of authority was so extensive that clients even counted on lawyers like Whittlesey to pay themselves (Friedman 2005, 230).[11] Whittlesey's papers also show that he handled the fallout when transactions went bad. He negotiated with buyers in default, brought suit, took depositions, and repossessed property.[12] These legal disputes were sometimes long and complicated. Clients depended on Whittlesey's legal expertise, settlement skills, judgment, and persistence.

Lawyers like Whittlesey not only controlled their clients' money and land; they also governed their access to information about it. Clients relied on Whittlesey to provide updates from the West, accounting for and explaining the work that he undertook on their behalf. His surviving letters help explain the scope of this work. Some provide detailed accounting activities, listing expenses from payment on a note, investigations of titles, recording of deeds, tax payments, and income.[13] Others provide lists of outstanding notes along with status and likelihood of redemption along with summaries of court judgments and executions.[14] Letters of more modest scope provide updates on individual sales, cases, or notes.[15] These letters demonstrate the extent to which speculators depended on the reliability of land agents. Such delegation was a basic requirement of the land practice that monopolized the time of Whittlesey and other lawyers in early Ohio (Upton 1909, 149; Harris 1983, 95; Simard 2016a, 1080–82). We would also expect to find these agency relationships in other parts of the American West, where selling land and determining title were critical to economic activity (Friedman 2005, 110–11, 229–32). In any of these places, it would have been easy for a lawyer to lie about the amount of a land sale or note and pocket the difference. Speculators who had never seen their land would have significant difficulty uncovering such deception. Yet the high proportion of lawyers in many Western communities suggests that there was a strong demand for the work of lawyers as land agents.[16]

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9. Elisha Sterling to Elisha Whittlesey, October 7, 1816, WRHS; Elisha Whittlesey to Elisha Sterling, November 17, 1807, WRHS; Elisha Whittlesey to Elisha Sterling, May 27, 1811, WRHS.

10. Elisha Sterling to Elisha Whittlesey, October 2, 1804, WRHS; Elisha Sterling to Elisha Whittlesey, August 31, 1819, WRHS.

11. Elisha Sterling to Elisha Whittlesey, October 2, 1804, WRHS.

12. Elisha Whittlesey to Ansel Sterling, March 22, 1808, WRHS; Elisha Whittlesey to Ansel Sterling, November 22, 1808, WRHS; Elisha Sterling to Elisha Whittlesey, August 5, 1813; Elisha Whittlesey to Elisha Sterling, October 1, 1809, WRHS.

13. Elisha Whittlesey to Elisha Sterling, May 2, 1808, WRHS.

14. Elisha Whittlesey to Elisha Sterling, November 17, 1807, WRHS.

15. Elisha Whittlesey to Samuel Smedley, April 21, 1812, WRHS; Elisha Whittlesey to Ansel Sterling, March 22, 1808; Elisha Whittlesey to Elisha Sterling, July 3, 1809, WRHS.

16. Simard has found that the number of lawyers per capita was likely much higher in northeastern Ohio than it was in the East and that there is reason to believe that lawyers were especially prevalent in many Western communities (Simard 2016a, 1097).

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2. Debt Collection

Another important role lawyers played was in helping their clients to navigate an economy that relied on promissory notes for exchange in much of the nineteenth century (Friedman 2005, 230; Dirck 2007, 54–75; Simard 2016b). Notes depended on the solvency of their private backers. Because they were often traded at a distance, commercial actors could not easily track down and confront those who did not pay when the notes came due, nor could they conveniently rely on personal connections to ensure repayment. They therefore relied on lawyers to help them navigate the distance and the legal complexities of note redemption. As one treatise writer put it, "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]" (Chitty 1807). This emphasis was reflected in Litchfield Law School student notebooks, in which debt-related law merited more attention than all but a few other subjects (Simard 2019, 579–81). Even as currency stabilized, lawyers continued collection work on behalf of commercial actors who sold goods on credit to other businesses (Bakken 1991, 51). Legal account books and correspondence reveal that throughout much of the nineteenth century, many lawyers spent a significant portion of their time collecting debts, often for out-of-state creditors (Bloomfield 1976, 271–301; Konefsky 1982; Bakken 1991, 51–54; Pease and Pease 1995, 97; Friedman 2005, 230; Dirck 2007, 54–75; Simard 2016b; Simard 2019, 593–600).

Debt collection was not a simple enterprise, and it required lawyers to make many decisions their clients could not easily monitor. Such discretion was especially necessary because of the many factors limiting the effectiveness of court-centered remedies. Bringing a case to court cost—and might waste—time and money. Debtors took advantage of procedural tactics to delay financial embarrassment or repossession of their property, and they could also hide their property (or themselves) from legal process, making use of laws that shielded certain types of property from seizure (Mann 2002, 18–23, 30). Even if the 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 clients preferred to avoid court altogether. Some directly ordered lawyers to settle. Others gave them the power to pursue legal remedies if settlement attempts failed.[17] By necessity out-of-state clients therefore depended significantly on a lawyer's discretion. Not only did the lawyer have greater legal expertise than they did, he also had access to local knowledge about the debtor's situation.

Roger Minott Sherman's early nineteenth-century Connecticut practice provides a useful example. Debtors would write to Sherman to request his help to recover from a local debtor, including a copy of the note they wanted collected. Sherman's job was to track down and confront delinquent debtors, forcing them to pay. Although his clients

17. Robert Fairchild to Roger Minott Sherman, September 12, 1812, Fairfield Museum and History Center Library (hereafter FMHC); Richard Bayan to Roger Minott Sherman, April 20, 1832, FMHC; Lyman Law to Roger Minott Sherman, November 2, 1825, FMHC; Benjamin Strong to Roger Minott Sherman, June 25, 1803, FMHC; Roger Minott Sherman, February 15, 1806, FMHC.

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sometime gave him detailed instructions, they left significant room for Sherman's discretion. Enclosing a note against "Abel Belknap & Son," the merchants Cannon & Jarvis 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 Belknap's mill to "secure the payment."[18] Sherman's clients often lived beyond the boundaries of Fairfield County and even across state lines.[19] Because Sherman's clients lived hours away from the people who owed them money, they recounted difficulty in tracking down and settling with debtors. They therefore relied on him to accurately report on the debtor's circumstances, make an honest effort to collect the debt, engage settlement negotiations, and, if necessary, pursue legal action. They depended on Sherman to put their interests first, even though he was more proximately connected to the debtor.

The note-related work that played a significant part in Sherman's early practice characterized legal work throughout the nineteenth century. Lawyers in the West, East, and South found themselves answering the pervasive demand for collection work (Bakken 1991, 51–54; Pease and Pease 1995, 97; Friedman 2005, 230; Simard 2016b; Simard 2019, 593–600). In Georgia, for example, Eugenius Aristides Nisbet devoted much of his legal career to collection work for out-of-state creditors. From 1824 to 1870, Nisbet collected hundreds of notes from manufacturers, wholesalers, and importers, who sold their goods to southerners on credit (Simard 2019, 593–600). Like their counterparts active in Connecticut, northern merchants with outstanding debts in the South relied on their lawyers as agents to navigate not only legal rules but also the distance that made debt collection difficult (Simard 2019, 593–600).

The broad delegation of authority to such agents is reflected in historical records. A representative of a bank, for example, wrote to Nisbet that he should give their debtor "as much time as [he could] without inconvenience or risk."[20] John S. Martin, another client, wrote to Nisbet's firm, encouraging them to "use their best judgment" in redeeming a note on its behalf.[21] Similarly, the firm Allen, McLean, and Bulkey expressed the "willingness to accept ... settlement," but left the specifics up to Nisbet.[22] Thus, when Nisbet received a note for collection, he rarely sued the debtor immediately. Instead, he investigated a debtor's assets, researched liens on his property, and attempted to compromise or settle. Clients relied on his discretion for which method to pursue, even though they often lived hundreds of miles away and had never met Nisbet in person. Such delegated discretion appears to have been inherent in the work that lawyers like Whittlesey, Sherman, Nisbet, and their colleagues undertook. This delegation is especially notable since their work would have been almost impossible to monitor.

18. Roger Minott Sherman, Account Book, 1796-1804, FMHC; Cannon and Jarvis to Roger Minott Sherman, February 1797, FHMC.

19. Sherman's business originated from around Connecticut, and even when he was a young lawyer, from New York City.

20. People Bank to E. A. and J. A. Nisbet, March 18, 1858, David M. Rubenstein Rare Book and Manuscript Library (hereafter DRML).

21. John S. Martin to E. A. and J. A. Nisbet, December 31, 1860, DRML.

22. Allen, McLean, and Bulkey to E. A. and J. A. Nisbet, September 9, 1859, DRML.

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B. A Question for Institutional Economics

As the foregoing research shows, businessmen who engaged in exchange in nineteenth-century markets frequently delegated significant authority and discretion to their lawyers. In a market defined by volatility, risk, and arm's-length transaction, they depended on their lawyers' expertise and local knowledge. But clients had a very limited capacity to monitor a lawyer's conduct, given the extreme information asymmetry between them and their agents, and the lack of modern communication and transportation infrastructure. These conditions provided ideal circumstances for opportunistic conduct, outright fraud, and theft. Individual lawyers could (and did) divert resources, engage in self-dealing, shortchange clients to benefit a competitor, use information gained during the representation for their own purposes, take opportunities available to the client for themselves, cook the books, and take bribes from third parties (Weeks 1878, §354-282; Winsberg 2016, 189–99).

Under transaction-cost theory's behavioral assumption of self-interested conduct, or opportunism, markets would have collapsed, absent formal or informal institutions of contract enforcement.[23] But clients had very limited opportunities for sanctioning lawyers for abuse. The history of the legal regulation of lawyers suggests "[i]n general, tort and contract remedies against lawyers remained comparatively dormant well past the middle of the twentieth century, at least when measured by today's statistics" (Wolfram 2001, 469; Winsberg 2016). Attorneys could be disbarred, but such disbarment typically rested on a criminal conviction and was unavailable as a civil law remedy for the enforcement of a contract by an attorney's client (Wolfram 2001, 477).

And yet, businessmen consistently demonstrated confidence in their lawyers, as the delegated work outlined above attests. They not only hired lawyers as commercial agents, but also relied on them as trustees and executors (Pease and Pease 1995, 103; Moretta 2000, 185–86; Bator and Seely 2015, 32). Business manuals reflected the reliance businessmen placed in lawyers by vouching for the usefulness and trustworthiness of lawyers. The author John Frost, for example, encouraged the readers of his advice book for would-be businessmen, *The Young Merchant* (1840), to rely on "experienced and upright" lawyers in their commercial affairs (237). A "prudent merchant," according to Frost, had "frequent occasion for . . . advice" from lawyers who could "enable him to avoid law-suits" (237). "The advice of an honest and skillful attorney" was especially useful when dealing with financial "embarrassments and reverses" (237). Other business manuals echoed Frost's recommendations. Benjamin Swaim's guide to business explained that when a businessman consulted a lawyer he would receive "safe and correct advice" (Swaim 1834, 419–20). Edwin Freedley's *A Practical Treatise on Business* went further, explaining that "it would be 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, he concluded, "are generally men who can see as far through a millstone as the miller himself, and a conversation with them will frequently remove the film by which anxious cupidity sometimes obscures the sight." Such consultation would "save men from lawsuits" (Freedley 1852, 119).

23. We note that Williamson's approach may not be as susceptible to this syllogism as North's is.

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In short, businessmen seemed to believe that lawyers added value, and were not merely a cost to avoid. The accounts of such business manuals suggest that at least some lawyers were seen as trustworthy fiduciaries, to whom businessmen could safely delegate discretion.[24] We argue that the roots of this trust can be found in fiduciary laws and principles, which supported the historical governance of agency relationships between lawyers and their clients.

V. THE LAW OF TRUST IN THE NINETEENTH CENTURY

Economics and organizational theory have recognized trust as the most efficient mechanism for governing transactions (Frankel 2014). Historians have also focused on the importance of trust to establishing markets in the nineteenth century (Sunderland 2007, 1; Klaus 2014, 1). And yet, trust, as a concrete and distinct institution that supports economic development, tends to disappear in the economic analysis. To understand why, it is worth recalling that institutionalists model their concept of contract as a governance mechanism on the classical, voluntarist theory of contract. This model does not purport to describe contract as lawyers and judges understand it (Sitkoff 2014, 197–98, 208). Rather it builds a model of the contractual relation using nonlegal concepts and behavioral assumptions and turns it into an analytic tool. Transaction-cost economics then deploys this tool to explain various contractual arrangements, making predictions about their outcomes under varying conditions and assessing the implications for public policy. Contractual analysis, moreover, is not merely applied to what the law describes as contract, but to the economic analysis of institutional arrangements and organizational structure more generally (Blair and Stout 2001, 1781). Institutional economics, on which law and economics relies, treats contracts as "analytical tools" that apply "to almost any relationship: from transactions between firms to any relationship among entities" (Brousseau 2008, 37).

The abstraction necessitated by this analytic approach, however, also limits it. Its behavioral assumptions make the historic legal construction of an economic culture disappear (Blair and Stout 2001, 1784–85; Dobbin 2004, 20–21). It is this construction of an economic culture to which we now turn. Principles of trust dated back to the medieval period. But their development and diffusion in the nineteenth century—including as principles of attorney conduct—seems to have offered an institutional answer to some of the agency problems plaguing the early to mid-nineteenth-century American market.

A. The Law of Fiduciaries

The law of fiduciaries can be traced back to the late medieval law of trusts enforced in the English Court of Chancery. In England, land could be held only by certain

24. Few other scholars of this time period have focused on the trust between lawyers and their commercial clients. Most argue it was not until the 1870s or later that lawyers became valued out-of-court allies for business (Hurst 1950, 310; Gordon 1984, 59; Lipartito 1990, 1–2). When writing about the relationship between lawyers and business, scholars often focus on the ethical dilemmas such relationships posed for lawyers (Schudson 1977, 193; Gordon 1988, 52).

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(male) members of the aristocracy under the common law. Thus, to secure land for the benefit of others and to avoid the reversion of the land to the Crown, the land would be conveyed to a trustee, who would hold the property as an owner, for use by designated beneficiaries. The Court of Chancery recognized the practice of entrusting land to another person, the *feoffment of uses*, and enforced certain rights of beneficiaries against abuse by trustees as a breach of trust, or confidence (Holdsworth 1923, 373–75). By the eighteenth century, breach of trust or confidence covered "a good deal more ground than trusts of property" (Sealy 1962, 69). It expanded to include situations in which someone "undertook to exercise a power, to conduct a sale, to supervise an estate or business, or in some other way to become [an] employee or agent" for another. It also governed situations in which a party depended on another party's advice because of his greater expertise, local knowledge, or special relationship as a "trusted servant or friend or a person of dominant character" (69). In all these cases, courts of equity could afford relief for breach of trust. They exercised broad discretion, deploying a "simple legal vocabulary relying on general words such as 'trust' and 'confidence'" (70). By the beginning of the nineteenth century, broad discretion and the simple legal vocabulary gave way to more concrete rules and a more standardized technical vocabulary (Finn 1977, 4).

During the early nineteenth century the law's conception of agency changed to become a full-fledged fiduciary relationship that drew its inspiration from the law of trusts (Sealy 1962, 70–71). Previously equitable remedies had been available to principals in certain circumstances, such as in actions for an accounting, which typically required the assistance of fact discovery that could only be had in courts of equity (Paley 1819, 57). Also, in certain cases of fraud, principals could turn to equity for an exclusively equitable remedy such as a constructive trust or the disgorgement of profits (Smith 2015, 44–45). But it was during the early 1800s that agents, and in particular attorneys, increasingly were viewed as trustee-like fiduciaries for their clients (Story 1846, 242). Indeed, it was frequently attorneys who served as trustees (Bator and Seely 2015, 32).

The term "fiduciary" gained currency in the law reports toward the mid-nineteenth century as a descriptor of relationships recognized by the law as "relationships of trust" but that needed to be distinguished from actual trust law, because of the latter's increasingly more technical meaning (Sealy 1962, 71). In his 1846 treaty on equity jurisprudence, Joseph Story's listing of relationships with "fiduciary ties" included those between "Client and Attorney, Principal and Agent, Principal and Surety, Landlord and Tenant, Parent and Child, Guardian and Ward, Ancestor and Heir, Husband and Wife, Trustee and Cestui Que Trust, Executors or Administrators and Creditors, Legatees, or Distributees, Appointor and Appointee under powers, and Partners, and Partowners" (Story 1846, 242). Such relationships, Story noted, came to be governed by the "general principle" that "if a confidence is reposed, and that confidence is abused, Courts of Equity will grant relief" (327).

As Story explained, courts of equity did not impose a general morality on commercial activity. They did not vindicate expectations of honesty, trust, or fairness in contractual relationships in general (Mitchell 1990, 456). Equity instead imposed certain fundamental obligations only in relationships that it defined as relationships of trust or confidence, in which one person acquired "influence" or "control" over another person, their property, or their rights. Story described these obligations as "a technical morality" that applied specifically and exclusively to trusted agents. The protections of fiduciary

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law did not extend to "an act or contract, merely because a man of honor would not have entered it" (Story 1846, 327). The protections only arose when there was "some relation between the parties, which compels the one to make full discovery to the other, or to abstain from all selfish projects" (327). In such cases, "in aid of general morals," the courts of equity would "not suffer one party, standing in a situation, of which he can avail himself against the other, to derive advantage from that circumstance" (327). When acting on behalf of another, the fiduciary was therefore required to act honestly and in good faith, entirely set aside self-interest, and act solely in the interests ("personal good") of the other. The fiduciary could not personally profit or take advantage of the trust reposed, unless the circumstances were fully disclosed to, and approved by, the fiduciary. In policing fiduciary relationships, courts would look for any "taint" of "selfish interests," "cunning," or "overreaching bargains," and jealously protected the beneficiary from an abuse of trust (327).

The fiduciary relationship came to be defined in law and practice as a relationship of trust or confidence in which one person—the fiduciary—has been entrusted with the power or authority of making decisions that affect the property or the legal relations of another. Equity demanded that fiduciaries (1) follow and abide by the directives of the entrustment, (2) act exclusively in the best interests of the principal or beneficiary, (3) act with the "utmost good faith" (*superanima fides*) in performing fiduciary services, (4) provide account and complete disclosure to a principal, (5) refrain from delegating the fiduciary services to others, and (6) treat beneficiaries "fairly," in cases where there existed more than one beneficiary (Story 1846; Frankel 2014, 106–07).

In part because it emerged from the ambiguous (both technical-legal and colloquial) moral vocabulary of equity, fiduciary law propagated norms of trust in commercial relationships. A breach of fiduciary duty carried a special moral condemnation with it. And the moral language of the courts clearly reflects that courts sitting in equity considered norm-making as part of their function. This role of norm-making was self-consciously espoused by the Chancery. Judge and treatise writer Henry Home, for example, articulates the reasoning behind the prophylactic no-profit rule in the case of a guardian:

> [E]quity ... prohibits a trustee from making any profit by his management, directly or indirectly. However innocent an act of this nature may be in itself; it is poisonous with regard to its consequences; for if any opportunity be given for making profit in this manner, a trustee will lose sight of his duty, and soon learn to direct his management chiefly or solely for his own profit. (Home 1767, 255)

This quote makes clear that equity aimed not merely at punishing bad behavior but also at schooling a trustee in trustworthy conduct toward a beneficiary. The clear purpose of the no-profit rule is to establish a *habit of mind* and, as in Story's account of equity's "technical morality," to condition agents through self-abnegation to assume the role of a *non-self-interested actor*.[25] Story saw himself and other equity judges as needing a "refined moral sensibility" in order to accomplish such an important task (Kessler 2017, 38–45).

25. Henry Home's *Principles of Equity*, not quite incidentally perhaps, enjoyed considerable influence in the United States (Natelson 2004, n.207).

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B. The Formalization of Fiduciary Norms for Lawyers

Courts explicitly extended fiduciary law to govern attorney conduct. Over the course of the nineteenth century the courts articulated increasingly clear fiduciary obligations for attorneys. *Gibson v. Jeyes* (1801), a case from the English Chancery frequently cited by both English and American courts, explained that lawyers were presumed not to be in an arm's-length relationship with their clients. Because of the influence of a lawyer over his client, as "a general principle of public policy," the court placed the burden on the attorney to justify transactions with his client in order to "put[] fraud and incapacity out of the question" (271). American judges across jurisdictions followed *Gibson*, closely examining the conduct of lawyers and holding them to similarly trustee-like standards. In the 1812 New York Superior Court case, *Starr v. Vanderheyden*, for example, the court held that "general principles of policy and equity" required it to "always look into the dealings between attorney and client and guard the latter from any undue consequences."

American courts refused to enforce ordinary contract and property rules between attorneys and their clients on the grounds that equity made special demands on attorneys. As the Supreme Court of Alabama wrote in *Lecatt v. Sallee* (1836), "the confidence reposed by a client, in his attorney, and the influence which an attorney has, over his client" warranted close scrutiny of contracts made between attorney and client. The court explicitly followed English precedent, writing that it would not "take the liberty to depart from" a rule that had been "rigidly adhered to by [] the English Chancellors." Such measures, the court continued, were necessary to "preserve the high reputation of the profession, by elevating its members above the temptation to exercise their influence [and] above the suspicion of having done so" (124). The court went on to analogize the role of lawyers to that of trustees: "Upon the same reasons, trustees are not allowed to fix the amount of their compensation, by contracts, entered into, after they have accepted their trusts" (124).[26]

The US Supreme Court summarized the normative expectations of lawyers in *Stockton v. Ford* (1850). In *Stockton*, the Court held that an attorney had violated the obligation he owed to his client when he purchased the client's former plantation and the enslaved people who had worked it from the clients' creditor, against whose claims the lawyer had been hired to defend. The Court offered a broad statement of a lawyer's fiduciary obligation to his client:

> There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more

26. The Illinois Supreme Court similarly concluded in *Jennings v. McConnel* (1855) that "the law . . . not only watches over all the transactions" between lawyer and client but also would "declare transactions void, which between other persons, would be good" (150). The Connecticut Supreme Court agreed, writing in *Mills v. Mills* (1857) that there were "no transactions respecting which courts of equity are more jealous and particular, than dealings between attorneys and their clients" (219). In *Cox v. Sullivan* (1855), the Georgia Supreme Court outlined the equitable duties of a lawyer, writing that when collecting a note for his client a lawyer was "bound to the *highest honor and integrity*" and "to the *utmost* good faith" (emphasis in original) (247). For more cases along these lines, see Bibb v. Smith, 31 Ky. 580, 583 (1833); Rose v. Mynatt, 15 Tenn. 30, 36 (1834); Evans v. Ellis, 1846 WL 4716 (N.Y. 1846); Gray v. Emmons, 7 Mich. 533, 549–50 (1859).

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> honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it (247).

Here the Court made clear the strong moral component to the fiduciary law governing the lawyer-client relationship. That the Court felt the need to include this discussion, even though it believed the decision could be sustained on other grounds, illustrates the importance it placed on maintaining and disseminating ethical standards in the profession.[27]

By 1878, when Edward P. Weeks published his *Treatise on Attorneys and Counsellors of Law*, the body of law was developed enough for him to summarize a host of obligations that attorneys owed their clients. An attorney hired to draw deeds could not buy the land for himself (§ 258). Attorneys were obligated to "faithfully pay over to [their] client money received on his behalf" (§ 264). They had a duty to investigate the history and "nature of the accounts" when involved in the settlement of an "intricate transaction" (§254). They were required to read titles attentively and to "carefully examine every deed or instrument constituting or affecting the title" when assisting with the purchase of land (§ 267). Moreover, attorneys could "not in any way whatever . . . make gain or profit for himself at the expense of his client, beyond the amount of his just and fair professional remuneration" (§ 271). Even in the absence of bad faith, courts barred lawyers from purchasing land at sales on which they had consulted for their client and from buying land at an auction on which they had issued an execution (§ 274). Attorneys also had to provide full and accurate accounting for any transactions they entered into on a client's behalf. Courts were willing to open accounts "settled for many years" in order to punish an attorney accused of taking "unfair advantage of his client's confidence" (§ 282). In sum, "[t]he highest degree of fairness and of good faith [was] required from an attorney, and the courts . . . closely and jealously scrutinize[d] the dealings between attorneys and their clients, and . . . relieve[d] the latter from any undue consequence resulting from them . . . ." (§ 258). Fiduciary law was the primary vehicle that policed the agency relationship between attorneys and their clients.

The emergence of fiduciary law governing attorneys by the 1850s reflects the formalization of attorneys' norms of conduct by the courts, and exemplifies the courts' broader extension and application of trust-like principles to commercial activity: During the nineteenth century, both American and English courts also applied trust-like principals to partnerships (Collyer 1834, §182; Lindley 1860, §492; Szto 2004, 204). And they applied trust principals to the still quasi-public and emerging fully private corporations, their creditors, and the relationship between corporate directors

27. That the court provided ethical instruction in a case in which it also enforced rules governing the exchange of human property illustrates the ethical limitations of a profession that provided vital support for slavery in the nineteenth century (Simard forthcoming, Simard 2019).

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and shareholders during the first half of the nineteenth century (Szto 2004, 113; *Verplanck v. Mercantile Insurance Company* 1831).

VI. PROBING THE RELATIONSHIP BETWEEN LAW AND NORM

Based on our empirical investigation of the role of attorneys as trusted agents in the nineteenth-century economy and the historic application of fiduciary principles to the attorney-client relationship, it thus appears that fiduciary laws and norms contributed to addressing agency problems in nineteenth-century America. Fiduciary law did so in two ways. First by deterring self-interested, opportunistic conduct. The power of deterrence, however, was limited because of the problems of physical distance and information asymmetry inherent in the nineteenth-century economy and because attorneys were loath to participate in suits against one another (Wolfram 2001, 484–85). This would have made the second function of fiduciary law, the defining of an emerging social role, especially important. Institutional economists have recognized fiduciary law's power of deterrence, but they have missed its part in establishing a social role for commercial agents. They do so because their theoretical, contractual approach abstracts from the normative content of fiduciary law and redescribes social relations in terms of self-interested conduct (Fitzgibbon 1999, 303–06).

A. The Efficacy of Fiduciary Law

Fiduciary law is especially useful for governing agency relationships because, unlike contract law, it does not require parties to explicitly outline their obligations to one another (Silver 2019). Whereas the intentions of the parties are central to contract, judges do not look to the parties' intent when they examine breaches of fiduciary duty. Rather they act paternalistically in imposing rules of fiduciary conduct on the parties (Markovits 2014, 209; DeMott 2014, 321). The core principles of fiduciary duty cannot be contracted around or treated as default provisions. Because it is costly, if not impossible, for principals to specify how their agents should behave in all circumstances, ex ante rules cannot prevent agents intent on acting opportunistically from doing so (Smith 2015, 14). Fiduciary law has the potential to better discourage opportunistic behavior because a fiduciary's behavior is not judged by whether he followed the intentions of the beneficiary but rather by whether he properly used his independent judgment in the beneficiary's interests. This is a standard that is applied ex post by the exercise of judicial discretion. The open-endedness of the standard allows judges to target strategic behavior (Smith 2014, 263). And it protects against what economists consider "hard-to-foresee ways of engaging in opportunism" (Smith 2014, 265). The implementation of this open-ended judicial standard is guided by prophylactic rules that target likely indicators and strategies of opportunistic conduct. The duty of loyalty is thus elaborated by the duty not to profit directly or indirectly from the agency relationship without full disclosure, the duty to avoid or disclose conflicts, the duty to give an accounting, and the duty to disclose relevant information. These rules serve as proxies for loyal conduct. They are enforced by procedural rules that also increase deterrence.

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Although, the powers of fact discovery have since been greatly expanded (Subrin 1987; Gorga and Halberstam 2014), in the nineteenth century, equity courts were the only courts in possession of broad powers of fact discovery to depose defendants and other interested parties under oath before a trial and to demand documents in order to investigate wrongdoing (Smith 2014, 265). Courts sitting in equity also had the power to impose much more severe remedies in cases of fraud, deceit, or abuse of confidence. Contract remedies at common law were limited to monetary damages, typically calculated based on the parties' expectations. Expectation damages, as economists point out, allow or encourage efficient breach. Remedies for breach of fiduciary duty, however, consisted of restitution, which could include the disgorgement of any profits that a fiduciary obtained while acting on behalf of a beneficiary. This discouraged any breach of fiduciary duties.[28] So too did the remedies of constructive trust and the sometimes-extreme rules of tracing that gave beneficiaries every benefit of the doubt (Smith 2015, 44–45). Together with the substantive rules of fiduciary law, the equitable law of procedure forced the production of information, thereby addressing the problem of asymmetric information in the agency relationship that affords the opportunity for abuse.

B. Economic Theory of Fiduciary Law

The law and economics literature recognizes some of the distinct features of fiduciary law, but views fiduciary obligations as nothing more than implicit agreements.[29] This perspective is based on the economic theory of incomplete contracts (Hart and Moore 1988). Law and economics scholarship maintains that fiduciary duty is a doctrine of judicial discretion that enables courts to apply their judgment, based on general principles of obligation and precedent, to create particularized contract terms ex post that the parties would have negotiated and accepted ex ante, had they anticipated the dispute at hand (Easterbrook and Fischel 1993; Johnson et al. 2000). Thus, Judge Easterbrook and Daniel Fischel have described the duty of loyalty as a "replace[ment]" for "detailed contractual terms" and have viewed the duty to act in good faith as a somewhat more intense expression of the implied covenant of good faith and fair dealing (Easterbrook and Fischel 1993, 427). From this perspective, "[f]iduciary duties .... have no moral footing" (427). They are merely "the same sort of obligations, derived and enforced in the same way, as other contractual undertakings" (427). Fiduciary duties thus become "gap fillers" in incomplete contracts designed to maximize the parties' "joint welfare" (Easterbrook and Fischel 1993, 439).[30]

28. Economists thus consider fiduciary rules to be inefficient insofar as they interfere with the maximization of joint welfare by contracting parties.

29. Many such examples exist (Butler and Ribstein 1990, 4; Cooter and Freedman 1991, 1045; Langbein 1995; Easterbrook and Fischel 1996; Macey 1999, 1273; Ribstein 2005, 215; Ribstein 2011, 899; Sitkoff 2014).

30. Note that focusing exclusively on the "joint welfare" of the parties involved in a particular contract ignores that the special obligations of fiduciary duty may promote norms that support economic development more generally by preventing market failure or organizational failure (Hirschmann 1970; Williamson 1985).

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In a recent article on the economic theory of fiduciary duty, Robert Sitkoff restates the contractarian view that fiduciary law is an institutional strategy to address the agency problems that "arise from incomplete contracting" (Sitkoff 2014, 202). Like Easterbrook and Fischel, he is interested in analyzing fiduciary standards in "functional" contractual terms, "[s]tripped of legalistic formalisms and moralizing rhetoric" (201), thereby throwing our baby out with the bathwater. From this perspective, he describes several important aspects of fiduciary law. First, he argues that fiduciary law deters agents from taking advantage of discretion because it allows principals to "scrutinize" an agent's actions after they have been taken (200–02). Second, he maintains that fiduciary standards of "loyalty and care" allow the court "to decide whether, in view of all the circumstances, the fiduciary acted in accord with what the parties would have agreed if they had been able to anticipate those circumstances" (202). Third, he views the availability of disgorgement as a reflection of "the additional disclosure and deterrence purposes of fiduciary law" (207). Unlike Easterbrook and Fischel, Sitkoff does not believe that fiduciary law can be reduced to a set of default rules for contracts, but he does maintain that the efficacy of fiduciary law can be fully explained by understanding it in terms of contract and rational expectations theory.[31] From this perspective, fiduciary law is merely a form of contract with special features designed to deter opportunistic conduct.[32]

C. Normative Significance, Reflective Judgment, and Production of Trust

On our account, however, fiduciary law did not work solely by deterrence, but by establishing a social role that changed the cognitive orientation of agents and produced trust.[33] In so doing it addressed the agency problem in a way that has not been sufficiently taken into account by institutional economists who encourage us to see the moral language of courts interpreting fiduciary principles as merely superfluous. To interpret fiduciary law as economists tend to do leads them to ignore, inter alia, the stated purpose of courts in enforcing these principles of trust. As we noted above, courts and treatise writers continually returned to moral language designed explicitly to cultivate a habit of mind among lawyers. In the words of the Alabama Supreme Court in 1836, the goal of the equitable review of attorney-client relations was to "preserve the high reputation of the profession, by elevating its members above the temptation to exercise their influence [and] above the suspicion of having done so" (Lecatt v. Sallee 1836, 124).

Fiduciary law articulated a positive principle of conduct, which explicitly demands that the agent take up a particular "moral stance" with regard to the principal. The fiduciary principle requires that the agent distance himself/herself from his/her own self-interest and reflect, at all times, upon what would, under the circumstances, be

31. He concedes that there is a "mandatory core" to fiduciary obligations, which "addresses the need for clean lines of demarcation" between fiduciary relations and other types of contracts. He thus recognizes that "fiduciary obligation is a necessary constitutive element of certain legal categories, such as trust and agency" (205).

32. Historians writing about the legal rules that promote economic activity have also traditionally focused on the rules of contract rather than fiduciary law (see, for example, Hurst 1964, ix; Horwitz 1977; Hurst 1982, 35–38).

33. For a similar analysis from a behavioral economics perspective, see Blair and Stout 2001.

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in the best interests of another.[34] Fiduciary analysis therefore "constitutes a 'free-floating' duty applied at the time of the [potential] wrong" (Markovits 2014, 7). The judicial analysis of the wrong at the time of the injury, and the open-ended nature of the judicial inquiry into potential wrongdoing by a principal, require the fiduciary "to engage her independent judgment (concerning her beneficiary's interests) as she discharges her fiduciary duties" (1). Fiduciaries, and the judges who police fiduciary relationships, thus assume a different "deliberative posture" than the one that governs contract (1). The moral language used by the courts, the special opprobrium attached to breaches of fiduciary duty, and judicial reflection on what it takes to school fiduciaries to act in the interests of a beneficiary all remain unexplained if this social constructive aspiration of fiduciary law is not appreciated.

Trust, as economists have recognized, is the most efficient mechanism for governing transactions (Zucker 1986, 55). Contract enforcement, and other governance mechanisms that depend on altering incentives by means of sanctions, operate against what economists conceive of as background conditions of "generalized norms of trust and trustworthiness" and kick in only "when the limits of baseline norms of trust and trustworthiness are reached" (Hadfield 2005, 178). But it is precisely these "background conditions" that, we suggest, have been shaped by fiduciary law and its prescriptions. In the following section we present evidence that lawyers were indeed influenced by the norms expressed in fiduciary law.

VII. THE CONSTRUCTION OF PROFESSIONAL IDENTITY

Lawyers were educated in the emerging law of fiduciaries. And elite lawyers outwardly embraced fiduciary principles and the self-abnegation that such principles demanded in defining their role as agents. The expression of fiduciary ethos in the legal profession took a variety of forms and was not always explicit, but elite commercial lawyers consistently claimed to place integrity and fidelity in service to clients at the core of their professional vision. They self-consciously distinguished their role as professionals in social and economic life from that of self-interested market participants. Cooperating with judges who helped to define these duties, elite lawyers developed a professional ethos linked to fiduciary law.

For a variety of reasons, it is difficult to establish a clear portrait of the ethical principles of the profession in the early to mid-nineteenth century. Aside from the Litchfield Law School, which closed in 1833, and a handful of other law schools that educated relatively few students, legal training was almost exclusively accomplished by apprenticeship (Friedman 2005, 238–41). Few sources provide direct insight into the professional ethos learned by students in apprenticeships.[35] Bar associations and entry barriers to the profession also weakened during the first half of the nineteenth century, making it difficult to look to them as sources for ethical standards (Hurst 1950, 329;

34. The particular "moral stance" of the agent does not comport with a generalized morality, because it requires the agent to pursue the interests of his principal to the extent that is legally permissible, even if such interests conflict with ordinary morality (Wasserstrom 1975, 2–24).

35. Accounts of apprenticeship also suggest that apprentices might not have had much time to reflect on the rules of their profession when busy copying documents and learning legal rules (McKirdy 1976, 128).

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Friedman 2005, 235–37). In part, the difficulty of finding useful sources has led to widely divergent interpretations of the bar's ethics in the first three-quarters of the nineteenth century. Willard Hurst argues that the profession experienced an ethical decline during the first half of the nineteenth century as it abandoned the public-spirited values it had espoused in the early Republic. Hurst thus finds that lawyers viewed the relationship with their clients as purely contractual. They were not, he argues, governed by a strong "professional obligation," and their "ethical principles . . . lacked breadth and penetration" (Hurst 1950, 329–30). Max Bloomfield and Robert Ferguson also chart a shift from a profession that viewed itself broadly as a protector of the state to one that had a narrower, more technical approach to law (Bloomfield 1968, 318–20; Ferguson 1984, 273–87). Other scholars see the early nineteenth century as dominated by "a republican vision of legal ethics," in which lawyers felt a duty to act for the public good, even when it conflicted with their clients' objectives, arguing that a shift away from this perspective happened later (Gordon 1984, 54; Gordon 1988, 51; Pearce 1992, 250; Pearce 2001, 384–92; Kessler 2017, 156–58).

As Norman Spaulding has recognized, these perspectives tend to overdraw the distinctions between "republican," "morally activist" ideals of lawyering and their "client-centered, ethically neutral" alternatives (Spaulding 2003, 1399, 1445). Both ideals, Spaulding suggests, existed throughout the nineteenth century and likely informed one another (1458). Like other scholars, however, Spaulding views these norms through a court-centered lens, referring to a client-focused ideal as the "adversary ethic" (1445). This perspective, like those of the scholars who see a shift away from republican principles during this period, tends to understate the breadth of the ethical commitments of those focused on private commercial practice and misses their roots in fiduciary principles.[36] As we have shown above, judges during this period believed that profound moral principles, rooted in equity, were embedded in the attorney-client relationship, and they enforced such principles through fiduciary law. Admittedly, loyalty to clients sometimes meant benefiting a client at the expense of the public good, but loyalty was a powerful norm, nonetheless. It was therefore not a lack of republican norms that characterized nineteenth-century commercial practice but a different conception of professionalism.[37] Such a conception existed—albeit sometimes uneasily—alongside the other.

This conception of professionalism was reflected and disseminated not only by judges but also by lawyers in private practice. Although these norms are easiest to see where they made their way into ethical manuals later in the nineteenth century, they can also be seen in the biographies and obituaries published by members of the bar. As one major biographer of lawyers put it, biography could serve as "Philosophy Teaching by Example" (Livingston 1852–1853; Hoeflich 2010, 157). Such biographies were intended not only for lawyers but also for "schoolchildren and popular readers" (Gordon 1988, 15). At a time when institutions such as law schools and bar associations were relatively weak, these sources provide a useful window into the legal ideals held by

36. For similar reasons, scholars underestimate the importance of fiduciary principles to modern legal ethics (Silver 2019).

37. Spaulding hints at such a possibility when he recognizes that lawyers understood "client-centered . . . advocacy" as compatible with values like "'dignity,' 'honesty,' 'integrity,' 'good conscience,' [and] 'justice'" (2003, 1445).

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members of the bar that eventually made their way into ethical manuals that formalized the standards of professional practice.

Throughout the nineteenth century, lawyers across the country honored their colleagues with resolutions at bar meetings and published portraits in legal magazines, case reports, and books. Profiles of lawyers present a consistent picture of a profession aspiring to promote its devotion to client service. The Connecticut Bar, for example, established a well-honed professional image in the honorary portraits it included in the *Connecticut Reports*. In profile after profile, lawyers praised their colleagues for their intelligence, deep knowledge of the law, strong work ethic, and treatment of clients and colleagues with respect and honesty.[38] The proper treatment of clients, however, was especially emphasized. Lawyers praised their colleagues for their "honorable and high-minded . . . management of . . . cases" (Francis Parsons 1861, 604–06). A good lawyer was not only "courteous" to his client but also held himself to the highest standards of "integrity" when undertaking his clients' business (Jonathan Walter Edwards 1842, 26–28; Samuel Johnson Hitchcock 1845, 50–51). In a word, "fidelity" was at the core of legal practice (Francis Parsons 1861, 604–06). Although not explicitly tied to the law of fiduciary duty, the language of fiduciary service permeated the way Connecticut lawyers thought about legal practice.

In New York, elite lawyers similarly praised their most respected colleagues for remaining above the fray of a commercial market dominated by acquisitive values and for serving their clients with fidelity. For these men, "the profession of the law was not in and of itself the pursuit of gain" (Evarts 1869, 74–75). A good lawyer worked hard not for his own benefit but to benefit his client. He pursued his clients' ends diligently, "as if work was all that there was of life that was worthy to be done," and he did so at rates that were "proportioned to the service he performed in every case" (69). Lawyers claimed that the best of their profession were so devoted to their clients' interests and so appalled by self-serving behavior that they did not even charge as much as they could have (Memorial of Daniel Lord 1869, 12). Such sentiments appear to have extended to the West as well. In 1844, the founder of the Ohio-based *Western Law Journal* wrote that being a lawyer "embraces moderate emolument, and high reputation" (543). Lawyers, he argued, needed to give "strict attention to business," and to demonstrate "integrity" and "scrupulous[] honest[y]" when giving advice to clients (547). "Confidence and trust," he continued, "were the "life-blood of his being" and "integrity alone" could "inspire confidence and trust" (547).

American legal publishing pioneer John Livingston's edited collection of legal biographies demonstrates respect for similar values. The biographies praise lawyers for their "industry and strict attention to the business of his clients" and for their demonstration of the "highest integrity" (Biographical Sketches 1852, 673, 675). A good lawyer "appreciate[ed]" the "sacred duty" of loyalty and faithfulness he "owed his client" (198). He not only performed his work with diligence and skill but also "identifie[d] with his client," "forget[ting] himself and his own interest in his cause, and devot[ing] his utmost energies for the success of his client" (198, 315). In short, a good lawyer had the "duty" to exhaust "any honorable means . . . to secure and advance [his client's]

38. The *Connecticut Reports* included a list of all published obituaries (List of Obituary Sketches 1890, 635–37).

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interests" (117). Livingston's book emphasized the same fiduciary duties of loyalty, disinterestedness, and integrity identified by elite lawyers in Connecticut and New York as the core of their professional ethos. In this ethical framework, self-serving behavior had no place. Instead, the "integrity of purpose and fidelity to his client," qualities that one of Livingston's biographers understood as "not unusual in the profession," were the central tenets of a profession in which lawyers defined themselves as the trusted agents (44).

In 1854, George Sharswood, a lecturer at the University of Pennsylvania, distilled this fiduciary ethos in *A Compend of Lectures on the Aims and Duties of the Profession of Law*. The essay, based on lectures he gave his students, was the most popular manual on legal ethics in the United States. Subsequently published as *An Essay on Professional Ethics*, it went through four editions in twenty-two years. Like his colleagues, who identified intelligence, knowledge of the law, hard work, and diligence as essential to legal practice, Sharswood wrote that a good lawyer needed to demonstrate "real learning," "the strictist integrity and honor," and "attention, accuracy, and punctuality, in the transaction of business" (Sharswood 1854, 55). But he, like his colleagues, was most concerned with the obligations a lawyer owed his client. Sharswood recognized that lawyers faced many opportunities for fraud and deceit. "There is ... no profession," he wrote "in which so many temptations beset the path to swerve from the line of strict duty and propriety" (9). Because of these "pitfalls and man-traps at every step ... prudence and self-denial as well as ... moral courage" were needed by every lawyer. "High moral principle," Sharswood continued, "was [a lawyer's] only safe guide" (9).

Sharswood outlined the precepts of these moral principles using terms shared with fiduciary law. In his words, "immovable fidelity" was "the great duty which the counsel owes to his client" (50). "Every consideration," he continued "should induce an honest and honorable man to regard himself, as far as the cause is concerned, as completely identified with his client" (50). This meant not only undertaking work with honesty and integrity but also entailed "[e]ntire devotion to the interest of the client [and] warm zeal in the maintenance and defense of his rights" (22–24). Thus, the worst thing that a lawyer could do in Sharswood's opinion was to "allow[] himself to be approached corruptly," to be bribed or coerced into doing something that benefited himself at the expense of his client (50). For Sharswood, as for his colleagues, self-interested or opportunistic behavior was anathema to the legal profession. Concern with "money-making" was an insult lobbed at those Sharswood accused of "pettifogging" (80). To be successful, a lawyer's character needed to be "not only without a stain, but without suspicion" (95).[39]

Claims of purity and devotion to client service from lawyers have tended to generate skepticism. As is well known, already in the nineteenth century, the American public circulated lawyer jokes that accused the profession of many of the vices—fraud, overcharging, deceit, self-interested behavior—that elite lawyers took such pains to condemn (Galanter 2005).[40] Fears of the undue and inappropriate power of lawyers

39. This reading of Sharswood is at odds with those scholars who see him as part of the anti-adversarial ethical tradition (Simon 1998, 63–64; Pearce 2001, 390). Our reading is more closely aligned with that of Bloomfield, Spaulding, and Papke (Bloomfield 1979, 687; Spaulding 2003, 1419–23; Papke 2009, 47–48).

40. Such jokes might reflect as much on the anxieties that arise from the agency problem as they do on lawyers themselves.

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led middle-class reformers to attempt—with limited success—to limit the profession's influence (Bloomfield 1971, 269; Bloomfield 1976, 44–58). Scholars are also often skeptical of the ethical claims of lawyers and professionals more generally.[41] The sociologist Magali Sarfatti Larson, for example, argues that the primary concern of professionals is to seek their own interests in order to gain market power and ensure collective mobility (1977, xvi). Other scholars maintain that professionals are primarily concerned with protecting their area of expertise from encroachment by others in order to obtain economic and social advantage (MacDonald 1988, 100–22; Abbott 1988, 247–80). In this context, the ethical claims of nineteenth-century lawyers look like efforts to control access to a political and economic domain rather than genuine ethical precepts.[42] Historians focused on nineteenth-century lawyers' in-court work have seemed to confirm this view, arguing that lawyers acted instrumentally to benefit the "active and powerful" (Horwitz 1977, 108; Sellers 1991, 48).

We do not deny that lawyers sometimes took advantage of the discretion and judgment delegated to them by their clients. Indeed, even the leaders of the bar admitted that pettifoggers and dishonest lawyers threatened the reputation of their profession. Nor do we deny that lawyers benefited from presenting themselves as ethical, reliable professionals and from establishing close relationships with commercial clients. We suggest, however, that commercial lawyers as a profession followed fiduciary norms enough of the time, and that these norms were reinforced by the courts often enough, to build the necessary trust that encouraged clients to rely on lawyers and to participate in markets they would otherwise shun. Lawyers actively promulgated these norms as part of a professional identity that emphasized their ability to facilitate market exchange while remaining above the fray of a risky market.

VIII. CONCLUSION

In this article, we build on the work of Justin Simard, who argues that lawyers, as a group, had a more important and immediate role in economic exchange than is generally recognized in the historical and economic literature (Simard 2016a). We make three contributions to the literature on economic development in the nineteenth century. First, we give a detailed account of the structure of norms of trust by linking them to the specific legal norms of fiduciary duty that came to be defined during this time. We suggest that the law of equity helped structure norms of loyalty and trust outside of the courtroom. Second, we examine the practices and aspirations of elite lawyers. We suggest that the way in which lawyers adapted fiduciary norms to inform their conduct allowed them to serve as trusted agents in the early nineteenth-century American economy. This leads us to claim that lawyers served as a conduit and disseminator of fiduciary norms. Third, we argue that fiduciary norms of non-self-interested conduct played an important role in creating a professional identity for lawyers. This enabled the legal profession to adopt a role-specific ethic of client service that would come to define the emerging law of lawyers.

41. For an overview of the sociological literature on the professions see MacDonald (1988, 1–64).
42. Other scholars are less skeptical of the professional project (Brante 1988, 127–40).

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We argue that the rise of fiduciary law was much more important to the development of capitalism in the United States than has been recognized. We expect further investigation to provide evidence for the broader importance of fiduciary principles for economic development in the legal profession and beyond. Some of that work has already been done. Studies of wealthy Boston merchants suggest a connection between the development of fiduciary law in Massachusetts in the 1820s and 1830s and the values of Boston's commercial elite. As Paul Goodman has noted, "fiduciary relationships" were central to the ethic of elite Boston merchants (1966, 447). These relationships, he argues, helped encourage a "deep sense of individual responsibility" (448). Noam Maggor has shown how legal developments that increased the discretionary authority of trustees allowed them to function as effective managers, turning them into "key financial intermediaries" (Maggor 2017, 100–03). Alfred Konefsky connects these two developments, suggesting that expansion of fiduciary culture and legal changes might be linked (Konefsky 1987, 1146). Trust-like principles in corporate law were also central to capital formation and the rise of large business organizations in the United States (Berle and Means 1932, 219). Other scholars have charted the growth of professional culture in the nineteenth century more generally. Alfred Chandler, for example, has pointed to the rise of professional managers as a critical development in industrial organization in the United States—a development that distinguished the US corporate ownership structures from those in other countries like Germany (Chandler 1977, 1990). Bringing such studies into conversation with the theoretical frameworks of institutional economics has the potential to improve our understanding of economic development in the nineteenth century.

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