# THE SEA CORPORATION

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*Over the past two centuries the corporation has emerged from obscurity to become the dominant form of business organization in the United States, accounting for more productive assets than all other business forms combined. Yet the corporation is relatively young for a legal institution of such economic importance. As late as the middle of the nineteenth century, most business was still conducted through partnerships, with corporations active only in a handful of industries. Only in the ensuing decades did the corporation eclipse the partnership and secure its economic dominance.*

*Commentators widely attribute the corporation's success to a set of features thought to be unique to the corporation, including legal personality, limited liability, transferable shares, centralized management, and entity shielding. Indeed, the consensus among economic and legal historians is that these essential corporate features created a unique economic entity that rapidly displaced the obsolete partnership.*

*This Article argues that these economic features were not unique to the corporation, nor did they first develop in the business corporation. Over many centuries, maritime law developed a sophisticated system of business organization around the entity of the merchant ship, creating a framework of legal principles that operated as a proto-corporate law. Like modern corporate law, this maritime organizational law gave legal personality to the ship, limited liability, transferable shares, centralized management, and entity shielding. The resulting "sea corporations" were the closest to a modern corporation that was available continuously from the seventeenth through early nineteenth century first in Europe and then in the United States.*

*The fact that maritime law developed all the most important features of corporate law offers important lessons for business organizational law itself. The parallel development of the same characteristics, with different and independent*

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*mechanisms, is strong evidence of the economic importance of the features of the modern corporation. The maritime law employed a unique device—the maritime lien—to achieve the same economic results as the nascent corporation. The key turn was the use of property law, rather than the contract mechanisms of partnership law, to implement the in-rem attributes associated with the corporation. The vessel is property come to life in the eyes of the law, developing a form of legal personhood. Viewed in this broader context, the corporation is not a novel or unique institutional solution to recurrent economic problems; it was a convenient vehicle for expanding and generalizing a set of existing economic solutions.*

*This entity theory of maritime law provides potentially important lessons for both maritime law and business organizations law. First, the theory provides a guiding principle for otherwise disorganized features of maritime law. It suggests that courts should explicitly interpret maritime law as a form of business entity law, keeping maritime law's distinctive purposes but drawing from the rich theoretical insights of law of other business associations to inform its unique institutions. At the same time, the long history of maritime law as business organization law provides hints for enduring challenges in corporate law, particularly the externalities of limited liability on involuntary creditors, such as tort creditors. Here, maritime law provides time-tested solutions, offering a system that provides priority for such creditors over contract creditors, solving one of corporate law's most difficult problems.*

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## Introduction

The corporation is one of the most pervasive legal structures in the modern economy, eclipsing in economic importance all other forms of business organization combined. Over time, the corporation has drawn the lion's share of all productive assets into its vortex.[1] This wasn't always the case; indeed, a mere few centuries ago the partnership was the primary form of organization, and the business corporation was almost nonexistent.[2] Over time, however, the corporate form displaced

1 The prediction that the corporation would dominate economic activity was most famously made by Berle and Means. *See, e.g.*, Adolph A. Berle Jr. & Gardiner C. Means, The Modern Corporation and Private Property 2, 9 (1932) (describing how the "corporation is a means by which the wealth of innumerable individuals has been concentrated into huge aggregates" and that the "corporate system" was becoming "all-embracing"). Today, this aspect of the prediction has proved accurate, as corporations account for the vast majority of business receipts in the United States, with a smaller amount from LLCs and only a sliver from traditional forms such sole proprietorships or general partnerships. IRS data indicate that 81% of business receipts come from corporations, with another 9% coming from LLCs, with only about 5% coming from traditional forms such sole proprietorships or general partnerships. The data comes from 2015, the most recent IRS data available.

2 *See* Robert Charles Clark, Corporate Law 1 (1986).

more traditional forms of organization, in a move that is credited with transforming economic life over the last two centuries and laying the foundations for modern economic prosperity.[3] Some have gone so far as to describe the corporation and these unique features as the "greatest single discovery of modern times."[4]

The rise of the corporation has stimulated an extensive literature in law, economics, and history, aimed at uncovering the essential elements that accounted for the corporation's success. The standard explanation is that the corporation provided a set of features, such as legal personality, transferable shares, and limited liability that made it possible to assemble large numbers of passive investors to invest capital intensive industries, especially railroads and manufacturing.[5] In addition to these standard features, more modern economic literature has emphasized the "entity shielding" aspects of the corporation that protect the assets of the corporation. In most of this literature, the conventional wisdom is that the corporation was a unique institutional innovation;[6] one that enabled the transformation into a modern economy—an account of corporate exceptionalism.

Explanations based on the uniqueness of the corporation have missed one important detail—the corporation was not unique or even first in delivering these important attributes.

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3 *See* JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA, at xiv–xv (2003) ("The most important organization in the world is the company: the basis of prosperity of the West and the best hope for the future of the rest of the world."); STEPHEN M. BAINBRIDGE & TODD HENDERSON, LIMITED LIABILITY: A LEGAL AND ECONOMIC ANALYSIS 2 (2016) (arguing that the corporation is the single greatest means ever discovered for creating goods and services for the most people).

4 NICHOLAS MURRAY BUTLER, WHY SHOULD WE CHANGE OUR FORM OF GOVERNMENT 82 (1912). For a similar panegyric, see Ronald J. Gilson, *The Nordic Model of Corporate Governance: The Role of Ownership*, *in* THE NORDIC CORPORATE GOVERNANCE MODEL, 94–95 (Per Lekvall ed., 2014) (citing a 1926 article from *The Economist*, stating "[t]he economic historian of the future . . . may be inclined to assign to the nameless inventor of the principle of limited liability, as applied to trading corporations, a place of honour with Watt and Stephenson, and other pioneers of the Industrial Revolution").

5 *See, e.g.*, CLARK, *supra* note 2, at 2–4 (1986) (laying out the characteristics of the corporation and arguing they account for the corporation's success as a form of organization);*see also* NATHAN ROSENBERG & L. E. BIRDZELL, JR., HOW THE WEST GREW RICH: THE ECONOMIC TRANSFORMATION OF THE INDUSTRIAL WORLD 191 (2008) (The corporation "set the stage for the revolution in economic organization which took place in the period from 1895 to 1914.").

6 *See, e.g.*, JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970, at 21 (1970) (arguing that although private contract could secure some of the characteristics of the corporation, only the corporation could secure others).

These features developed earlier in an unrelated organizational form—the co-ownership of merchant ships. For centuries, maritime law developed a theory of the ship as a legal person, one the law progressively endowed with all the most important aspects of a corporate structure.[7] These "sea corporations"[8] replicated the corporation for the investors in merchant ships, including limited liability, corporation-like legal personality, and transferable shares, as well as entity shielding. It developed each of these features independently and earlier than the business corporation, and mostly organically through private ordering, rather than by legislative act. By the mid-nineteenth century all of the features coalesced in their most developed form in American maritime law, though all of them had individually emerged earlier—even centuries earlier.

This evolution of the sea corporation as an organizational form emerged from a different legal wellspring from that of the partnerships that preceded it. Although partnerships spring from the law of contract, the sea corporation evolved from the law of property.[9] At the center was the ship itself, the object of ownership as property, and the maritime law built a law of business organization around co-ownership of the vessel. Thus, the sea corporation arose neither as a state concession or a contract, the two alternative conceptions typically applied to the corporate entity.[10] This Article argues that the sea corporation evolved from in rem rights of property, an essential feature of the corporation that would only be recognized much later. The ship is property come to life in the eyes of the law, developing a form of legal personhood that anticipated the corporation. This fact has gone largely unnoticed in both admiralty scholarship and organizational scholarship.

The sea corporation, built from property law rather than contract law, compels a rethinking of the uniqueness of the institution of the corporation in economic and legal history. The standard historical account has overlooked this entity, generally agreeing that the attributes of the

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7 *See infra* Part I.A.1.

8 Although modern legal terminology in the United States would restrict the term "corporation" to those entities denominated as "corporations" in statute, originally the term "referred to any organization that had legal personality separate form that of its individual members." *See* Paul G. Mahoney, *Contract or Concession—An Essay on the History of Corporate Law*, 34 GA. L. REV. 873, 874 (2000). In this sense, the sea corporation was very much a "corporation."

9 *See infra* Part II.

10 *See id.* at 882–92 (describing the historically alternating views of the corporate-like entities as "contracts" or "concessions").

modern corporation were not widely available until the late nineteenth century.[11] Even at the mid-nineteenth century, the choices for business organizations were limited, as the partnership had serious limitations and the corporation had not fully shed its restrictions.[12] Thus, a point in time when the modern corporation developed, and prior to that time, the law supplied no form of business organization that had all the essential attributes. By the middle of the nineteenth century, the maritime law provided a form of proto-corporate law that was more advanced in many respects than the available alternative—partnership law.[13]

This Article builds on this economic history of the sea corporation to articulate a theory of maritime law as business entity law. The history on the evolution of the corporate form has not identified this astonishing convergent evolution of the admiralty entity theory. The ship served as a substitute for the corporation during the long period when corporations were unavailable for general business purposes. The similarities are not superficial or coincidental. They reflect the convergent evolution of two business forms in response to the economic needs of increasing scale and global interconnectedness of economic activity. The maritime law independently developed analogous features to all the important features of corporation law. This enabled parties to accomplish what they could not accomplish through contract alone—specifically affirmative asset partitioning (also called "entity shielding").[14] In the economic sense, the organizational law constructed around the ship was indeed a "modern corporation."[15]

The ship did not evolve into a general purpose business organization as did the corporation, and there is no evidence that the business corporation was a direct descendant of the sea corporation. Although it would be interesting if there were a link, the fact that corporations did not descend directly from the sea corporations is more economically consequential.

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11 Indeed, some features such as limited liability were not universally available until well into the twentieth century. *See infra* Part III.B.

12 *See* Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1387 (2006).

13 *See infra* Part I–II.

14 *See infra* Part I.

15 *See, e.g.*, Taisu Zhang & John D. Morley, *The Modern State and the Rise of the Business Corporation*, YALE L. J. (forthcoming 2023), available at https://ssrn.com/abstract=4037726 [https://perma.cc/NP8Z-BUAV] (arguing that an organizational arrangement with the usual legal features of the corporation plus a large number of owners disconnected from one another is a "modern corporation").

The convergent evolution of two independent organizations demonstrates the enduring significance of their common economic features. This is a strong endorsement for the view that corporate law features evolved because they are efficient, not because of a path-dependent process. The fact that both maritime law and corporate law apparently evolved from a similar set of economic problems suggests that each can draw insights from the experience of the other. Yet there has been almost no conscious awareness of the parallels among the two fields, opening possibilities for fruitful cross-pollination.

This Article argues that admiralty and maritime law—often viewed as a haphazard collection of special rules for maritime torts and contracts—should be interpreted explicitly as a remarkably coherent system of organizational law. Maritime law developed as a way of dealing with business organizational issues before there were business organizations capable of serving in that function. The distinctive features of maritime law, in particular the maritime lien, personification of the vessel, and limited liability, are often regarded as antiquated relics of jurisdictional squabbles among English courts. Although some of them may owe their origins to such turf wars, the resultant set of legal principles survived because they were the forerunners of modern organizational law. Viewing maritime law as fundamentally a form of organizational law rationalizes several admiralty rules that otherwise seem anomalous or vestigial. In many cases, doctrines of admiralty that appear outdated actually anticipated later legal developments, when seen through the lens of business organization law.

This Article also identifies several points where admiralty has developed rules that are more efficient (enlightened, even) than those in corporate law, and may serve as a model for future development of the latter. Historically, the main point of comparison for the corporation has been the general partnership, which is laden with numerous problematic features for large-scale business. But the sea corporation offers the same economic features as the corporation with possibly more efficient adaptations that reduce externalities of limited liability. In particular, admiralty's centuries old rules that favor involuntary creditors such as employees and tort victims anticipated many of the modern concerns articulated in corporate law scholarship.[16]

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16 *See infra* Part III.B.

The Article proceeds by describing the sea corporation and its evolution, as well as its implications for both corporate law and maritime law. Part I begins by introducing the features commonly associated with the modern corporation, demonstrating the existence of the same features in maritime law. The maritime law used a unique property-like feature—the maritime lien—to enable the sea corporation to replicate the core features of the modern business corporation, arguably much earlier than the business corporation did, and certainly much earlier than the time general incorporation statutes were widespread.

Part II traces the evolution and development of this maritime organizational law, from its origins in medieval sea laws, through its fullest development in late nineteenth century America. The history shows that the vessel evolved in law as a business organization independently and alongside the corporation, but that it developed each of the features earlier. This Part examines how the economic features of the sea corporation fostered that development, even as the corporation retained vestigial limitations that hampered its use.

Part III sketches some of the important implications of the entity theory for maritime law and corporate law. In particular, the entity theory brings order to otherwise confused and seemingly ad hoc features of maritime law. The entity theory also suggests opportunities to draw on centuries of experience with the sea corporations for development of a more enlightened and efficient corporate law.

## I
## Maritime Law as Business Organizational Law

The courts of England and the United States, together with continental codes, developed a business organizational law around the ship that exhibited the essential elements of a modern corporation. To illustrate the parallels, this Part begins with the modern business corporation, introducing each of the textbook attributes. This Part then shows how the co-ownership of ships developed these attributes, through a combination of private ordering and judicial dynamics. The second section uses the modern economic theory of organizational law to describe the purportedly unique role played by the corporation—entity shielding—which contract and terrestrial property law could not accomplish. The second section then shows how maritime law supplied this piece missing from contract law, creating modern organization law without a concession from the sovereign.

### A. The Essential Attributes of the Sea Corporation

The superiority of the corporation over other forms of economic organization has led to many scholarly attempts to trace its historical evolution and identify its essential economic elements.[17] Over time, the literature has converged on a set of characteristics that distinguish the modern corporation from other business forms. These characteristics are: (1) legal personality with indefinite duration, (2) limited liability, (3) free transferability of shares, (4) centralized management, (5) management appointed by investor owners, (6) capital lock-in or entity shielding.[18] The combination of these features allows the corporation to operate more efficiently than prior forms such as the partnership. In fact, prominent texts on corporate law often explain the dominance of the corporation in terms of its distinction from partnership.[19]

Although many of these attributes are often thought to have uniquely arisen in the corporation,[20] the co-ownership of merchant ships developed each of these attributes, and the international set of rules that governed them coalesced into a relatively coherent body of law in nineteenth century American maritime law. This section examines the maritime organizational law in comparison to modern corporate law, finding that maritime law developed all the same principles, and earlier in most cases. Following the writers on corporate law, this section examines each of these attributes, comparing maritime law with partnership law and modern corporate law. In each instance, maritime law developed the features of modern corporate law, sidestepping the infirmities of partnership law that held back capital formation. The overall structure of these

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17 *See generally* Oscar Handlin & Mary F. Handlin, *The Revolutionary Origins of the American Business Corporation*, 5 J. ECON. HIST. 1 (1945).

18 *See, e.g.*, JOHN C. COFFEE, JR., RONALD J. GILSON & BRIAN JM QUINN, CASES AND MATERIALS ON CORPORATIONS 1 (9th ed. 2021); WILLIAM T. ALLEN, REINIER KRAAKMAN & VIKRAMADITYA S. KHANNA, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 93 (6th ed. 2021). Capital lock-in or entity shielding is sometimes thought of as an element of legal personality. *See* JOHN ARMOUR ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 56 (2009).

19 *See* CLARK, *supra* note 2, at 24 (explaining the dominance of the corporation by contrasting each of its attributes with the corresponding attributes of partnership).

20 *See, e.g.*, HURST, *supra* note 6, at 19 (arguing that "only corporate status conferred assured immunity of investors for debts of an enterprise; only corporate status offered a ready means of obtaining group capacity to sue or be sued as one").

entity-like features of maritime law largely persists today, with relatively minor changes.

### 1. *Legal Personality*

One of the most notable aspects of the corporation is the fact that the law endows the corporation with legal personality, with an indefinite duration. The corporation has capacity to enter into contracts and to commit torts, and it can sue and be sued in its own name. The corporation can have agents who act on its behalf, and its owners are not necessarily its agents. The corporation's personality is not tied to the individual personalities of its owners, which means the corporation's personality can be perpetual, unlike that of many partnerships.[21] This doctrine of corporate personality has a long history in Anglo-American law.[22]

The sea corporation organized around the ship also has a legal personality. Like the corporation, as a legal personality, the ship can be liable on contracts and commit torts.[23] The personification is to such an extent that the ship can be liable even when the owner is not, such as when the ship is under the control of a charterer, as "the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of anyone who is lawfully in possession of her, whether as owner or charterer."[24] The ship can sue in the name of its owners, and be sued in its own name.[25] The ship

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[21] *See* Hansmann, Kraakman & Squire, *supra* note 12, at 5–8. Partnerships up to and through the Uniform Partnership Act (1914) were viewed as aggregates of individuals, rather than entities. As a result, the partnership form was fragile, with any partner's departure or death generally leading to a dissolution. Although courts and later the Revised Uniform Partnership Act moved away from the aggregate approach and toward an entity approach, the partnership is still closely tied to the identities of the partners in a way the corporation is not.

[22] *See, e.g.*, Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 253–257 (1911). For a treatment of the history of corporate legal personality and the purposes it serves, see Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 36, (2013).

[23] Tucker v. Alexandroff, 183 U.S. 424, 438 (1902) ("[The ship] acquires a personality of her own; becomes competent to contract . . . . She is capable, too, of committing a tort, and is responsible in damages therefor.") (internal citations omitted).

[24] The Barnstable, 181 U.S. 464, 467 (1901).

[25] *Tucker*, 183 U.S. at 438 ("[The ship] is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name"). However, the courts have never gone so far as to personify the vessel to the extent of allowing it to sue in its own name. *See* Steamboat Burns, 76 U.S. (9 Wall.) 237, 237 (1869) (denying the ability of a steamboat to bring a writ of error). Thus, the personality of the ship was less advanced than corporate law at an early

can have its own agents, who are not necessarily those of the owners.[26] The legal personality of the vessel was laid down by Chief Justice Marshall in the early years of the United States,[27] and the doctrine that continues to this day.

The ship can have an indefinite or perpetual duration, that outlives its owners and which lasts so long as its identity is preserved.[28] Indeed, the ship's identity itself is therefore relevant, with the law holding that the ship's identity is preserved even if each of its pieces has been replaced one by one.[29] Importantly, unlike the partnerships of the day, the ship's personality was (and is) independent of those who happened to own it, and like the corporation the trading of the underlying shares of the ship do not affect its legal status.

The ship even developed a rudimentary form of property ownership through the doctrine of "appurtenances," where even intangible rights such as a fishing permit can "belong" to the ship and be subject to a maritime lien for the debts of the ship.[30] Similarly, even some intangible rights in a sense "belonged" to the ship; for example, the freight (money paid for shipping services) in a sense becomes the ship's property in the sense that it is subject to a maritime lien of the ship's creditors.[31]

The legal personality of the ship received its most memorable articulation by the Supreme Court in *Tucker v. Alexandroff*, in

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date as to lawsuits by and against the partners, as to which concepts similar to partnership continued to prevail. *See* JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP, AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW 636–53 (1841).

26 *See Tucker*, 183 U.S. at 438. ("Her owner's agents may not be her agents, and her agents may not be her owner's agents.").

27 *See* The Little Charles, 26 F. Cas. 979 (C.C.D. Va. 1818) (No. 15,612).

28 *Id.* ("A ship is born when she is launched, and lives so long as her identity is preserved."). The vessel's perpetual existence is theoretical only because virtually all vessels will eventually be destroyed or dismantled. But the corporation's perpetual existence is also perpetual only in theory for the same reasons, so the distinction is perhaps not sharp. The most important part is the fact that neither the vessel nor the corporation is tied to the identity of the individual or individuals that own it.

29 *See* ERATSUS C. BENEDICT, THE AMERICAN ADMIRALTY: ITS JURISDICTION AND PRACTICE WITH PRACTICAL FORMS AND DIRECTIONS, at §60 (1894) ("A ship is always the same ship, although the original materials of which it was composed may, by successive repairs and alterations, have been in the course of time entirely changed . . . .")

30 *See, e.g.*, Gowen Inc. v. F/V Quality One, 244 F.3d 64, 65 (1st Cir. 2001).

31 *See* GILMORE, GRANT, AND CHARLES LUND BLACK, THE LAW OF ADMIRALTY, 624 (2d ed. 1975) (explaining that the judgment in rem extended to the ship and its freight).

which Justice Brown captured the transformation of the ship from personal property into a person:

> A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron — an ordinary piece of personal property . . . . In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction.[32]

The personality of the ship contrasts sharply with the "aggregate" view of partnerships that prevailed at the time.[33] Historically, partnerships generally could not sue or be sued in their own names but required all the partners to be joined, which wasn't definitively resolved until the 1997 Revised Uniform Partnership Act.[34] The result of this was fragility of the partnership as a business form and uncertainty for creditors who extended credit to the partnership.

The unique legal personality of the sea corporation also had indefinite duration. The partnership was an aggregate of the partners, and personal to them following a logic of contract law. The vessel, in contrast, was decoupled from the lives of the owners, and instead is based in the property in the vessel. Thus, the organization was unaffected by the death, bankruptcy, or departure of an owner. The corporation and the vessel therefore shared the incident of legal personality, which is an indispensable part of the other features of organizational law described below.

### 2. *Limited Liability*

The limited liability of the corporation means that the investors in the corporation are liable only for what they invested and not otherwise for the debts of the corporation. The attribute of limited liability is often credited with making it possible for corporations to raise capital from many investors and allowing investors to purchase shares in many enterprises and diversify their holdings.[35] Without limited liability, investors would need

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[32] *Tucker*, 183 U.S. at 438.

[33] A. Ladru Jensen, *Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?*, 16 VAND. L. REV. 377, 377–81 (1963).

[34] *See* NAT'L CONF. OF COMM'RS ON UNIF. STATE L., REVISED UNIF. P'SHIP ACT § 307 & CMT. (1997) (amended 2013) (citing STORY, *supra* note 25, at 343–47).

[35] *See* Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 262 (1967).

to engage in extensive monitoring of corporate activities, which of course limits the ability of large numbers of strangers to invest passively. Limited liability is one of the defining features of the corporation, and scholars have historically credited this feature, often above all others, with the unique success of the corporation.[36]

Limited liability is not unique to the corporation, however. Ship ownership has long provided limitation of liability for owners of the ship, of a form quite similar to that of the corporation. In actions where the ship is liable, the owners of the ship may limit liability to the value of the ship, even if the ship has been damaged or destroyed.[37] Thus, the creditors of the ship itself, including both tort creditors injured by the ship and contract creditors who had rendered services to the ship, in a real sense looked to the credit of the ship for their satisfaction.

This limited liability of ships was a feature of maritime law of "almost all ship-owning countries," recognized later in England and formalized by statute in the United States in 1851.[38] The owner's risk is limited to his "interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime but leaves him liable for his own fault, neglect and contracts."[39] This is clearly aimed at limiting liability to investment in the vessel, reversing respondeat superior liability, while retaining liability for the owner's own contracts and torts, just as in the case of the modern corporation.

The similarity to limited liability in the modern corporation extends beyond these basic attributes, even to the exceptions. For example, despite the limitation of liability, owners can be held liable for debts contracted with their "knowledge and privity," loosely paralleling concepts of piercing the corporate veil. There is even a nascent form of enterprise liability in the form of the "flotilla doctrine" exception to limited liability, pursuant to which vessels working together can have the liability limits aggregated.[40] Further, ship owners can be liable

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36 More recent scholarship has recognized, however, that affirmative asset partitioning is at least as important as limited liability. *See infra* Part I.A.6.

37 *See* GRANT GILMORE & CHARLES BLACK, THE LAW OF ADMIRALTY 818 (2d ed. 1975).

38 *See id.* at 818–19.

39 Richardson v. Harmon, 222 U.S. 96, 106 (1911).

40 The idea of including multiple vessels together has a long history. *See, e.g.*, T.H.M., *Construction of the Limited Liability Act* 8 VA. L. REV. 127, 127–30 (1921) (describing cases examining whether the limitation of liability under the

on contracts where the creditor is looking to the owner's creditworthiness under the "personal contract" exception in maritime law.[41] Thus, the maritime law not only developed broadly applicable limited liability but also some of the modern exceptions in advance of the corporation.

### 3. *Transferable Shares*

A third feature truly characteristic of the corporation among modern business entities is the free transferability of shares. Unlike interests in partnerships, the corporation's shares are fully transferable. The transfer of shares entitles the purchaser to full rights as an owner and does not change the status of the corporation. Because the corporation has legal personality of its own, it is possible for ownership to change without affecting the identity of the corporation itself. Transferability makes it possible to exit the ownership of the business without the need to liquidate it or buy out the owner. In this sense, transferability is the "flipside" of the fact that capital is "locked into" the corporation, protecting the corporation's perpetual existence.[42] Thus, transferability is a concomitant of the notion of the business as a perpetual personality with locked in capital.

The maritime law developed the concept of full transferability from an early date, on both sides of the Atlantic. Partnership treatises of the early nineteenth century in England noted that shares in ships could be freely transferred, contrasting that with the default rule in partnerships.[43] Later in the United States, Theophilus Parsons, a noted authority on both partnership and maritime law, contrasted the transfer rules explicitly:

> "A copartner may transfer his interest in the copartnership effects to any one; but he cannot introduce any other person into the firm as a partner, either by transfer to him, or in any other way, without the consent of the other partners. But a part-owner may transfer his share of a ship to any person, and the transferee acquires at once all the rights and powers, as well as all the interest which the transferrer possessed."[44]

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act should be limited to the offending vessel or "the value of the whole flotilla engaged in the joint enterprise").

41 *See infra* Part III.A.2.

42 *See infra* Part I.A.5.

43 For English authorities, see WILLIAM WATSON, A TREATISE OF THE LAW OF PARTNERSHIP 54–55 (1807). For American authorities, see STORY, *supra* note 25, at 630.

44 1 THEOPHILUS PARSONS, A TREATISE ON MARITIME LAW, 84 (1859).

Justice Joseph Story was in agreement that the shares of ship were transferable.[45]

The transferability of shares made it possible for many passive investors to own shares of ships, and was made possible by the fact that the ship, like the corporation, had legal personality. The identity of the ship remained the same when shares changed hands, which differed from the available business entity of the time—the partnership. Thus, as with corporations, the ship had the potential to lock in capital (at least during the voyage and often longer), that partnerships couldn't achieve.

As with many of the corporation-like attributes of the sea corporation, transferability and passive ownership in part resulted from the ship's status as "property," which status brings with it the free alienability not present in contract law.[46] Partnerships were (and to a large extent still are) creatures of contract, while the shares in ships were co-ownership of property. The same concept influenced corporate law in America, in distinction from England's company law that more naturally accepted limits on transfer.[47]

### 4. *Centralized Management*

The corporation features delegated management, in which a governing body, such as a board of directors, manages or directs the management of the business and affairs of the corporation.[48] The corporation's delegated management means that unlike the partnership, the corporation is managed by managers rather than by the owners directly. In addition to management rights, agency power is wielded by those authorized by the governing body, not by individual owners as in the partnership. The main function of centralized management enables a specialization of roles.[49] The centralization of authority is widely viewed as one of the most important features of the corporation, as it discards partnership principles not suited to larger organizations.[50]

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45 *See* STORY, *supra* note 25, at 630.

46 *See infra* Part II.A.

47 L. C. B. Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369, 1377–78 (1956) (explaining the English conception of a share as a chose in action, to which limits on transfer could naturally apply, as opposed to the property view in America).

48 An example of the canonical modern citation is DEL. CODE ANN. tit. 8, § 141.

49 CLARK, *supra* note 2, at 23 (1986).

50 Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 626 (2006) ("The chief economic virtue of the public corporation

The ship also has centralized management, separate from its owners, with its own agents. While at sea, the ship managed by the captain, who in maritime terms is referred to as the master. The master manages all aspects of the ship at sea, with inferior officers and the crew reporting to the master. The master has the authority to bind the ship in foreign ports, and even to sell the ship in certain limited circumstances. The delegated management was not merely an attribute of the ship at sea, however. While in port, from an early date it was common for the owners to delegate to an agent, often called a ship's husband, the role of managing the ship.[51] Thus, the maritime law recognized the efficiency of management of the organization through centralized officers, rather than directly by the co-owners.

In the sea corporation, the agency of the co-owners of ships depended on the context. The co-owners were not necessarily agents of the ship or of each other, without further appointment as an agent or unless the acts are specifically authorized.[52] The owners generally could not bind the ship itself to an implied maritime lien, which is the equivalent of binding the ship as an entity, as shown below. The master is the one who can create implied maritime liens, even when the owner could not, under early case law.[53] It was doubtful that part-owners could bind other part owners by implied authority.[54]

The maritime law therefore developed the beginnings of a corporation-like delegation, where the master, like the officers of a corporation, held an agency not shared even with the shipowners, like corporate shareholders. Thus, in terms of agency, the ship was more like the corporation than the partnership. In partnerships, each partner, whether active or passive, was the agent of the others and could bind them

is . . . that it provides a hierarchical decision making structure well-suited to the problem of operating a large business enterprise with numerous employees, managers, shareholders, creditors, and other inputs.").

51 STORY, *supra* note 25, at 588.

52 *Id.* at 635–36.

53 The St. Jago de Cuba, 22 U.S. 409, 416 (1824) ("It is not in the power of anyone but the shipmaster, not the owner himself, to give these implied liens on the vessel, and in every case the last lien given will supersede the preceding.").

54 *See* PARSONS, *supra* note 44, at 98–99 (1869). Parsons notes that Abbot was to the contrary as to repairs, but on a closer examination of the cited cases shows they involved cases of partnership or where the part-owner was also the ship's husband or master. *Id.* at 98 n.2.

personally.[55] This is a concept inconsistent with the nature of the corporate entity, where shareholders have no agency qua shareholders.[56] The agency was not so well developed as that in the modern corporation, to be sure, but it was far beyond the technology of partnerships of the time.

#### 5. *Management Appointed by Investor Owners*

The ownership of the business corporation is commonly attributed to two "key elements," which are "the right to control the firm, and the right to receive the firm's net earnings."[57] An essential element of delegated management is that this management is elected by the owners.[58] In the partnership, the default rule was that the majority of persons would control, not the majority in interest or investment.[59] Each partner had the right to "equal voice," and it was the majority of those voices that have the authority, "however unequal the shares of the respective partners may be."[60] This was not only true of partnerships but of early corporations in England and the United States.[61]

The modern corporation overcame this obstacle of the partnership, with a centralized management appointed by shareholders. The modern corporation accomplishes this by annual elections of directors, and the voting rights are in proportion to number of shares held, not per capita. The shareholders also have the right to remove directors, again by a majority vote of shares. These attributes ensure that management is appointed by the investor owners, in proportion to their ownership stakes.

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55 *See* JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 31 (8th ed.1866).

56 *See id.* at 31 n.4 ("One of the greatest distinctions, in contemplation of law, between partnership and corporate companies, is that, in the first the law looks to the individuals of whom the partnership is composed, and knows the partnership no otherwise than as being such a number of individuals; while in the second, it sees only the creature of the charter, the body corporate, and knows not the individuals.") (internal citations omitted).

57 ARMOUR, *supra* note 18, at 13.

58 *See* John Armour, Henry Hansmann & Reinier Kraakman, *The Essential Elements of Corporate Law*, EUR. CORP. GOVERNANCE INST. sec.1.2.4 (2009).

59 STORY, *supra* note 25, at 598.

60 *Id.* at 182.

61 *See* Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 77 n.74 (1993) (explaining that "early English profit-seeking corporations such as the East India Company allowed all shareholders single votes" and that this continued in the early 19th century in the United States).

Again, the sea corporation has long had the attribute of management appointed by investor owners. The sea corporation overcame the partnership per capita approach early on, if it ever existed at all. In ships the owners exercised control according to their "value" or "interest" in the ship.[62] The ship's master and husband, who managed the affairs of the ship, were appointed by the owners of shares of the ships. The ship's owners had the right to appoint the master and officers of the ship, as well as to remove them.[63]

### 6. *Capital Lock-In and Entity Shielding*

The final attributes of the corporation, capital lock-in and entity shielding, are "perhaps the most fundamental features of organizational law."[64] These two features prevent the owners of the organization (or their creditors or successors) from forcing the liquidation of the organization's assets. The first paper theorizing the importance of these features was the influential work of Hansmann and Kraakman, in which they argued that asset partitioning (later referred to as entity shielding) was the "essential role of all forms of organizational law."[65] Another related aspect of entity shielding was developed by Blair, who argued that capital lock-in was "the critical advantage of the corporate form."[66]

The entity shielding aspect of the corporation is fundamental to its ability to raise capital from creditors, because it completes the separation of the entity's assets from those of the owners. Entity shielding and capital lock-in prevent the owners of the corporation or the creditors of those owners from liquidating a business and removing the assets.[67] In a sense, entity shielding is the reverse of limited liability, in that limited liability protects owners from debts of the corporation, while entity shielding

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62 Story, *supra* note 25, at 598. Story draws an explicit contrast between partnerships and ship ownership in this portion of the book. *Id.*

63 *Id.* at 606.

64 John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 Columb. L. Rev. 2145, 2167 (2016).

65 Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 Yale L.J. 387, 390 (2000).

66 Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 53 UCLA L. Rev. 387, 389–90 (2003).

67 *See* Blair, *supra* note 66, at 389, 392; Hansmann et al., *supra* note 12, at 434.

protects the entity from the debts of the owners.[68] But entity shielding is at least as fundamental, and probably more so. Indeed, these concepts have been identified as the beginning of the modern firm.[69]

The maritime law also developed entity shielding, although using an entirely different and indirect mechanism. The sea corporation incurs obligations in its own name through the maritime lien, a unique institutional feature that allows the ship to function as a nexus of contracts like a corporation. The maritime lien ensures that the creditors of the ship can have priority over the creditors of the owners for all the obligations of the ship. Importantly, this priority also extends to other property that constituted appurtenances of the ship, including intangible rights such as rights to payment (primarily freight). Thus, creditors of the owners of the ship cannot access the value of the ship itself because the creditors of the ship have priority.

It was also necessary to ensure that creditors could not force a liquidation of the shipping venture, and that was accomplished through the lock-in features of co-ownership law. Like the corporation, the majoritarian rules of maritime law (voting by shares in the ship), distinguished control over the ship's assets from cotenancy rules applicable to other property.

The entity shielding of the sea corporation shows that that corporate form was not the exclusive source of asset partitioning and capital lock-in. The sea corporation accomplished these features independently of the corporation. The implementation of capital lock-in and entity shielding is complex and the core of maritime law, and therefore is treated separately in the next section.

### B. The Essential Organizational Law and the Maritime Lien

The literature on corporate law largely agrees that the attributes listed above (or some combination of them) provide an efficient pattern of economic relations that accounts for the corporation's dominance. But until relatively recently, the literature struggled to identify truly unique features of corporate law that could account for its dominance over pure contracting (such as the partnership). This Part discusses the puzzle that

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68 Morley, *supra* note 64, at 2167–68.

69 *Id.* at 2167 (speaking of entity shielding and capital lock-in saying "[i]ndeed, to identify their appearance is to discover the rise of the modern firm") (internal citations omitted).

stimulated the recent work on the theory of organizational law, discusses the development of that literature in corporate law, then shows how the same attributes developed centuries earlier in maritime law.

The puzzle that motivated this more recent work on the theory of organizational law is why has the corporation, a state-created entity made up of which default rules set out by statute and case law, achieved such dominance in economic organization? In other commercial areas, transacting parties generally don't rely on state-supplied default rules. Instead, they craft detailed and customized contracts to order their relations.[70] Why do businesses continue to use the corporation—a standard-form entity provided by a governmental concession—with limited customizations through contract?[71]

One answer rooted firmly within the contractarian perspective is the "nexus of contracts" theory. In this approach, corporate law is simply off-the-rack contracts.[72] The state supplies rules that most corporation participants would have bargained for had they thought of them, but leave participants free to modify them, reducing the cost of writing contracts.[73] From this perspective, one major advantage of corporate law is off-the-rack terms, that reduce the costs of parties bargaining over and writing down the terms themselves.[74] The law should approximate the terms that parties would bargain for to avoid imposing additional transaction costs of bargaining around them.[75]

The pure nexus-of-contracts approach raises the question: If corporate law is simply just off-the-rack contracts, why not just use contracts to assemble the organization? The cost of

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[70] As a very close analogy, consider the partnership law, the existence of which is not necessary to create a partnership and essentially "fills in the blanks of the parties' agreements." CLARK, *supra* note 2, at 5. Yet parties do not rely on these statutory defaults; instead, they use lengthy partnership agreements.

[71] Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. L. 779, 784 (2006) (noting that parties don't introduce much variation into their corporate charters).

[72] Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & ECON. 395, 401 (1983) (describing corporate law as "off-the-rack principles").

[73] *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 34 (1996).

[74] *See* Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 506 (1975) (stating that "the primary utility of corporation law lies in providing a set of standard, implied contract terms, for example, governing credit, so that business firms do not have to stipulate these terms anew every time they transact, although they could do so if necessary").

[75] *See id.* at 507.

writing down the terms could easily be economized by using standard forms created by private parties or organizations.[76] Presumably, private parties would do better at creating forms for use than would a corporate code.[77] Other scholars responded that perhaps network effects could explain why the statutorily enacted default provides a focal point.[78] But at least in negotiations among sophisticated business parties, it's not clear why such a statutory focal point would be necessary. Still, all of these perspectives are still firmly within the contractarian paradigm, that organizations are, at bottom, just contracts.

The more recent literature has shown that the pure contractarian model has missed something about the pattern of creditors' rights. The persistence of the state concession over contractual private ordering is puzzling for the nexus of contracts theory of the corporation. As suggested above, the continued use of the state-supplied corporate charter suggests that contract alone is incapable of solving certain types of problems vis-a-vis creditors. The in personam nature of contracts limits their ability to bind third parties, which restricts the patterns of creditors' rights that can be achieved by contract. The corporate form, in contrast, supplies certain features that couldn't be created through contract—in particular the in rem features typically associated with property, rather than contract. What feature does the corporation provide that is unavailable through private law of contracts and property? Which features are the "essential" ones that could not be replicated by other law?

One obvious answer is limited liability with respect to involuntary creditors, such as tort creditors. Indeed, scholarship has long attributed the dominance of the corporation, at least in large part, to limited liability.[79] The limited liability aspect has been the focus of innumerable works in law and economics as well as legal history. However, economic history has suggested that important periods of industrial development happened without limited liability, leading scholars to question

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76 William W. Bratton Jr., *Nexus of Contracts Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 444–45 (1989).

77 *Id.*

78 Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 826–29 (1995) (explaining how defaults, even suboptimal defaults, might be preferable in the presence of network externalities).

79 *See, e.g.*, Manne, *supra* note 35, at 262–64 (1967) (arguing that limited liability is an "essential aspect of a larger corporate system with widespread public participation"). *See* BAINBRIDGE & HENDERSON, *supra* note 2, at 2 ("The key feature of the corporation that makes it such an attractive form for human cooperation and collaboration is limited liability.").

how important limited liability was, as well as whether it really couldn't be replicated by contracts. In contrast, recent scholarship has shown that it is entity shielding that is the truly unique feature of modern organizations.[80] The scholarship over the last quarter century has elucidated the features of the corporation that contract couldn't replicate.

### 1. *Entity Shielding as Essential Organizational Law*

The newer scholarship examining the reasons for the corporation's dominance has focused on identifying the features of corporate law that couldn't be replicated by contracts. In a landmark article, Hansmann and Kraaakman found that some of the most important features provided by corporate law couldn't be assembled by contract.[81] They argued that limited liability by itself fails to supply the essential attributes of a durable business organization. In particular, even with limited liability the assets of the business are not protected from creditors of the asset owners or the owners and their successors themselves. Thus, even with limited liability, the economic attributes of a business organization would still be tied to the identity of its owners.[82]

The Hansmann and Kraakman work reached this result by examining whether and how one could construct the features of a business organization with contract law concepts. Although much of the corporation could be created by contract, one feature is notably ill-suited to the in personam nature of contracts—the ability to bind third parties.[83] The third parties at issue are the creditors of the owners of the corporation who, in order to satisfy claims against the owners, might want to access the assets of the corporation. Contract alone could not feasibly prevent third parties from liquidating the corporation and satisfying judgments.[84] As a result, the corporation's ability to borrow for its own account might depend on the personal attributes of its owners, potentially changing every time shares changed hands. Hansmann and Kraakman conclude that the "essential" missing component in these constructions is affirmative asset partitioning (later called entity shielding)—in

80 *See* Hansmann, Kraakman & Squire, *supra* note 12, at 1337-38.

81 Hansmann & Kraakman, *supra* note 65, at 387.

82 *Id.* at 393–96.

83 *Id.* at 422.

84 *Id.* at 410–11.

rem features that prevent third-party creditors of the owners from satisfying debts with the assets of the entity.[85]

There are two parts to affirmative asset partitioning. The first is priority.[86] Also called "weak entity shielding," this "'grants firm creditors priority over personal creditors in the division of firm assets, meaning that the personal creditors of owners may levy on firm assets, but only if the firm creditors have first been paid in full."[87] The second is "liquidation protection," which means that "the shareholder's personal creditors cannot force liquidation of corporate assets to satisfy their claims upon exhausting the shareholder's personal assets."[88] The creditor can force liquidation only if a majority of the shareholders agree.[89] This second feature is what is missing in the partnership, where creditors of the partner can compel liquidation of the partnership.[90] In later work, the authors term the combination of these elements "strong entity shielding," when there is liquidation protection that "restricts the ability of both firm owners and their personal creditors to force the payout of an owner's share of the firm's net assets."[91]

This new perspective has shifted the focus of corporate legal history toward asset partitioning. The combination of entity shielding and capital lock-in are now viewed as "perhaps the most fundamental features of organizational law."[92] The corporation's assets are its own, and not those of the owners or the managers.[93] Indeed, the emergence of these features are the key to the emergence of the modern business organization.[94] This very insight of asset partitioning as the unique aspect of the corporation offers a new perspective for examining the history of corporate law. The next section shows how the sea corporation replicated priority and entity shielding centuries earlier, through the use of the distinctive maritime lien.

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85 *Id.* at 390.

86 *See id.* at 394.

87 Hansmann, Kraakman & Squire, *supra* note 12, at 1337–38

88 Hansmann & Kraakman, *supra* note 65, at 394.

89 *Id.*

90 *Id.*

91 Hansmann, Kraakman & Squire, *supra* note 12, at 1338.

92 Morley, *supra* note 64, at 2167.

93 A key contribution with respect to managers is recent work showing that agency law also performs an asset partitioning function. *See* Gabriel Rauterberg, *The Essential Roles of Agency Law*, 118 MICH. L. REV. 609, 612 (2020).

94 *Id.*

### 2. *Priority and the Maritime Lien*

The maritime lien is the institutional feature that implements the priority aspect of entity shielding, effectively creating the same economic result as a business entity. The maritime lien is a unique maritime mechanism that has only superficial similarities to land-based liens used elsewhere in the law.[95] The maritime lien is at the very core of maritime law, constituting "one of the most striking peculiarities of Admiralty law."[96] In a superficial sense, a maritime lien resembles ordinary liens, in the sense that it is a form of priority interest in property (the ship). However, as shown below, the maritime lien is best thought of as a way of creating an entity with legal personality, without the intervention of any sovereign.

The textbook definition of a maritime lien is (1) a privileged claim, (2) upon maritime property (3) for service done to it or injury caused by it, (4) accruing from the moment when the claim attaches, (5) traveling with the property unconditionally, and (6) enforced by means of an action in rem.[97] The maritime lien is a priority right of a creditor of the vessel, on a claim where the vessel itself is liable. However, a maritime lien is an *interest in a vessel itself* (as opposed to a mere priority interest in a vessel) that attaches when the vessel itself is liable for certain types of torts and contracts. In other words, maritime liens arise when the vessel itself is the defendant in a tort or contract action. It *binds* the vessel.

The maritime lien is independent of possession, in the sense that it continues to adhere to the hull of the vessel, traveling with the vessel into whoever's hands the vessel comes.[98] The lien also persists after sale, even a sale to a bona fide purchaser.[99] The lien does not need to be filed or public notice given to perfect it, leading some to refer to it as a "secret lien."[100] No common law court can extinguish a maritime lien; it can only be extinguished in an in rem proceeding in federal admiralty

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95 *See* GILMORE & BLACK, *supra* note 37, at 586–89 (explaining that a maritime lien is not really a "lien" in the common law sense of the term and enumerating the differences between maritime liens and "dry land liens").

96 GRIFFITH PRICE, THE LAW OF MARITIME LIENS 1 (1940).

97 *Id.*

98 *See* GUSTAVUS H. ROBINSON, HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES 363 (1939).

99 *Id.*

100 *See* Thomas S. Rue, *The Uniqueness of Admiralty and Maritime Law*, 79 TUL. L. REV. 1227, 1233 (2005).

court.[101] Furthermore, the maritime lien takes precedence over all land-based liens on the ship, and importantly, it follows a "last in time first in right" priority that is the opposite of most security interests in the common law.

The nature of the maritime lien as linked to the entity nature of the ship is most clearly revealed in its enforcement. In U.S. law, the maritime lien goes together with the in rem action—that is, actions in which the ship itself is the defendant in federal admiralty court. As a result, "[t]he lien and the proceeding in rem are, therefore, correlative—where one exists, the other can be taken, and not otherwise."[102] The distinctive feature of the in rem action is that the vessel itself is the defendant answering for its own contracts and torts. Thus, the maritime lien is made possible by, and perfects, the legal or "juridical" personhood of the vessel.[103]

These legal rules demonstrate that the maritime lien is based on the personality of the ship, and in fact, is the mechanism by which the ship is "property come to life." The lien can exist on the ship even when the owners of the ship are not liable.[104] And when the owner is liable, the owner's creditors will be subordinate to all maritime liens in enforcing judgment against the ship. The fact that the maritime lien results when the ship is the defendant illustrates clearly that the lien has the effect of treating the ship as an entity, capable of bearing liabilities itself apart from its owners. Indeed, no one or more of the owners can oblige the other owners to contribute to expenses or repairs without their consent.[105] Instead, owners who so contribute will have a lien on the ship,[106] which further shows the entity character rather than personal character.

The relevance of these features of the maritime lien is that they allow it to recreate the legal attributes of an entity, such as a corporation, in a way that land-based security interests could not. In one sense, the maritime lien is similar to a security interest, and in terms of practical effect, it is often seen that way—as security for an in rem action. But the maritime lien has the other features described above that are not present in land-based security interests. It is these additional features

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101 *Id.*

102 The Rock Island Bridge, 73 U.S. (6 Wall.) 213, 214 (1867).

103 ROBINSON, *supra* note 98, at 363–64.

104 *Id.* at 364.

105 STORY, *supra* note 25, at 598.

106 *Id.* at 623–28.

that make the maritime lien unique in being able to replicate an entity like the corporation. Recent scholarship on corporate law has recognized the idea that a security-interest type priority right could, at least in theory, play a similar role to an entity. The problem with translating this theory into practice is that Uniform Commercial Code's Article 9 doesn't allow "floating secured parties," instead requiring a new filing with each creditor, an infeasible solution.[107] Thus, the land-based security interest alone cannot replicate the attributes of an entity such as the corporation. Because the maritime lien is a "secret lien" in the sense that no filing is necessary to perfect it, it overcomes this limitation.

In a recent paper, Eldar and Verstein go deeper into this analysis to determine what exactly prevents security interests from replicating entities.[108] In their view, the key missing piece that differentiates security interests from entities is the "floating priority" offered by entities.[109] Without an entity, a borrower cannot create subsequent security interests that rank equal to (or prior to) previous security interests. Subsequent security interests will rank junior to the existing one (absent contrary agreement), limiting the ability of the borrower to secure additional funding.

The law of organizations solves this problem with full legal personality. The entity's creditors have priority against the entity's assets, and this is true equally for later creditors as for earlier creditors.[110] An entity can enter into obligations, and those obligations rank equal with prior obligations, absent a contrary agreement.[111] The economic theory suggests that this is the truly unique feature of organizational law, not found elsewhere. The maritime lien has established this floating priority for hundreds of years. The fact that subsequent maritime liens can rank equally with (or even prior to) previous maritime liens is what allows this mechanism to convert the vessel into an entity with its own obligations. In Eldar and Verstein's terms, the maritime lien accomplishes the "floating priority" that's consistent with the idea of an entity as a "managed going concern" rather than "mere interests in assets."[112] The vessel

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[107] Hansmann & Kraakman, *supra* note 65, at 418–19.

[108] *See generally* Ofer Eldar & Andrew Verstein, *The Enduring Distinction Between Business Entities and Security Interests*, 92 S. CA. L. REV. 213 (2019)

[109] *Id.* at 224–32.

[110] *Id.* at 217–18.

[111] *Id.* at 218.

[112] *Id.*

also outlives its owners, so it has an existence that, although perpetual only in theory, is independent of those who own it.[113] This is an essential feature of the corporation.

The maritime lien is therefore a mechanism for creating a legal entity out of the ship without the recognition of a sovereign. This is clearly seen in that when the vessel is liable, the owners of the vessel *may* also be liable in personam, but the maritime lien can exist without personal liability of the owner of the vessel.[114] Thus, the owners may be liable, or the vessel may be liable, or both, depending on the situation, which is what it means to respect the vessel as a legal person. In this sense, the vessel itself can serve a function like the "nexus of contracts" in corporate law theory.

The maritime lien is the solution to the problem of creating asset partitions by contract alone, identified by Hansmann and Kraakman. The mechanism of the lien allows the vessel itself to constitute an entity, in the entity shielding sense. However, to achieve the "strong entity shielding" of Hansmann and Kraakman, a second element of liquidation protection is necessary. This liquidation protection aspect is discussed next.

### 3. *Liquidation Protection*

The priority of creditors of the business is accomplished both through an entity and through the maritime lien, but that is only half of what is needed for strong entity shielding. Protection against liquidation is also necessary. Otherwise, with priority alone there remains the risk that owners or their creditors could force liquidation of the firm and thereby threaten its going concern value.[115] Hansmann and Kraakman described the combination of priority and liquidation protection as the elements necessary for true "affirmative asset partitioning" or "strong entity shielding" of the type found in the corporation and no other persistent business organizations in history.

The importance of liquidation protection was further developed by Margaret Blair in an important article, where she refers to it as "lock-in" of capital.[116] Blair argues that the

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[113] The vessel's perpetual existence is theoretical only because virtually all vessels will eventually be destroyed or dismantled. But the corporation's perpetual existence is also perpetual only in theory for the same reasons, so the distinction is perhaps not sharp. The most important part is the fact that neither the vessel nor the corporation is tied to the identity of the group that owns it.

[114] *See*, *e.g.*, The China, 74 U.S. (7 Wall.) 53, 53 (1868).

[115] Hansmann & Kraakman, *supra* note 65, at 403–04.

[116] Blair, *supra* note 66, at 387–89.

key feature of corporate law that made corporations rise from obscurity to becoming the preferred way of organizing business over the course of the nineteenth century was this "lock-in" or "resource commitment," by which incorporation prevented the *shareholders themselves* or their heirs from liquidating or dissolving the corporation to pull out the capital invested.[117] The fact that capital could be locked in protected all types of investors in the entity, both financial and nonfinancial.[118] The corporation's features, including lock-in, "uniquely facilitated the establishment of lasting enterprises that could accumulate substantial enterprise-specific physical assets, and for extensive specialized organizational structures."[119]

The maritime law also developed strong entity shielding with liquidation protection and capital lock-in, although the maritime lien by itself wasn't enough to implement this feature. Instead, the lock-in developed partly as a result of the natural condition of the ship (the ship literally partitioned the assets within its hull) and partly from a specialized organizational law that developed around the ship. The importance of locked-in capital in the maritime law (although in different terms) was readily apparent in the case law in England and the United States long before it was recognized in organizational law more generally.

The question of whether investors (or their creditors) could withdraw capital from the ship arose frequently in the context of disagreements over how to employ the vessel. Justice Story in *The Steamboat Orleans* articulated early on that "[t]he majority of the owners have the right to employ the ship in such voyages as they may please."[120] Although seemingly a statement about majority control, this actually relates to liquidation protection. This is because the individual owners of the vessel cannot demand a sale unless they have equally divided interests in the vessel.[121] Thus, owners are not able to use disagreement over use of the vessel as a pretext to demand liquidation or sale.

The number of cases and pages discussing the doctrine of liquidation of the ship in nineteenth century England and

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117 *Id.* at 392.

118 *Id.* at 392–93.

119 *Id.* at 413.

120 36 U.S. 175, 183 (1837). He articulated the same sentiment in his treatise. *See* STORY, *supra* note 19, at 599–600; THEOPHILUS PARSONS, TREATIES ON THE LAW OF PARTNERSHIP, 579–80 (1870). *See also* WILLIAM THEOPHILUS BRANTLY, PRINCIPLES OF THE LAW OF PERSONAL PROPERTY 176 (1890).

121 36 U.S. 175, 183 (1837).

America attest to its centrality. Although in England the jurisdiction of the courts of admiralty had been taken away from declaring any sale, even when interests are evenly divided, Story says the American law (and that of other commercial nations) was to the contrary.[122] The American courts differed from the English courts in holding that a compulsory sale was possible.[123] But that sale would only be forced in the case of equal division of interests.[124]

Moreover, although the maritime organizational law reached its most developed and uniform status in nineteenth century America, the concept of liquidation protection was present for (at least) hundreds of years in maritime law. Indeed, one can see capital lock-in provisions early on, with Malynes describing that part-owners of vessels don't have a right to be bought out, or generally to cause the vessel to be sold, except in certain circumstances.[125] This seventeenth century reference draws upon the medieval sea codes.

As mentioned above, there was often an exception allowing sale of the ship and liquidation in the case of equally divided owners who disagreed about how to use the ship. In reality, this exception actually proves the rule. First, the ship was governed by majority rule of its investors, an attribute that later would develop in corporations. In the 50-50 split case, there would be no majority, but merely deadlock. In other words, it applies only when "the maritime law has furnished no means of deciding between the part owners."[126] In most cases, the maritime law did have such a means, through majority voting as discussed above. In other words, the compulsory ship sale "is therefore only to be exercised when the part owners are equally divided in regard to the employment to which they shall devote their ship, or in regard to some other matter which must be decided before the ship can be employed."[127]

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122 STORY, *supra* note 19, at 613–19.

123 A.C. FREEMAN, COTENANCY AND PARTITION 454–56 (1874).

124 STORY, *supra* note 19, at 613–19. *See also* PARSONS, *supra* note 120, at 581. Both treatises acknowledge a tiebreaker in favor of one party who wants to employ the ship and one who wants it to remain idle. *Id.*

125 GERARD DE MALYNES, CONSUETUDO, VEL LEX MERCATORIA, OR THE ANTIENT LAW-MERCHANT 169 (1629). Malynes attributes this to the Laws of Oleron, although the concepts seem to be drawn more from the Consulate of the Sea. Modern English law will apparently entertain the possibility of a sale at the instance of a minority interest, but will order a sale only reluctantly even on the application of a half-interest. *See* CHRISTOPHER HILL, MARITIME LAW 5–6 (2d ed. 1985).

126 A.C. FREEMAN, COTENANCY AND PARTITION 496 (1874).

127 *Id.*

The liquidation for 50-50 deadlock, somewhat remarkably, anticipated much later developments in corporate law. For example, in today's corporate law such a condition justifies judicial dissolution of the modern corporation.[128] The exception for 50-50 deadlock is, in effect, more an affirmation of the capital lock-in under majority investor rule than a repudiation of it. Similarly, later, the Supreme Court would explain that "[t]he reasoning in all the cases appears to have been that majority control of the ship's operations was in the public interest and admiralty should interfere only to protect minority interests by such special indemnities or bonds as the court might require of the controlling minority."[129] The latter refers to the fact that there was even a form of dissenters' rights for the minority when disagreements about policy arose.[130] This is yet another case of the maritime law anticipating features that would develop in corporate law and persist to this day.

## II
## The Convergent Evolution of Organization

The features of the sea corporation, an organizational law centered on co-ownership of the vessel, replicates many of the most important features of the modern corporation. The development of these features of the modern corporation in the ship compels a reexamination of the history of organizational law in the United States and elsewhere. Although detailed examinations of the history of the corporation uncovered scattered features of these corporate attributes in various institutions back to antiquity, none of those institutions persisted through time, or even clearly led to later developments. Most simply vanished. The ship is the one place where business organizational law developed and retained these features over many centuries, through the Industrial Revolution and beyond.

This Part traces the evolution of the sea corporation in England and America against the background of both the

128 *See* MBCA § 14.30 (providing for judicial dissolution in the case of a deadlock of directors and shareholders, in the case of irreparable injury to the corporation and inability to conduct the business and affairs of the corporation); *see also* Del. Gen. Corp. L. § 273 (providing for a judicial dissolution when two stockholders are engaged in a 50-50 joint venture and unable to agree on continuing the venture). In the case of deadlock of equal interests, it may be thought of as the owners wishing to retain partnership-like veto powers by establishing 50-50 shares, rather than subjecting capital to lock-in with majority control.

129 Madruga v. Superior Court, 346 U.S. 556, 559 (1954).

130 Story, *supra* note 19 at 599–601.

corporation and the partnership. In the earlier period of this evolution, the available technology was the partnership—a fragile business form seen as more of an aggregate than an entity.[131] Courts generally regarded the partnership as an aggregate of the partners and not as an entity at all.[132] The ship was an "entity" and a legal person to a much greater degree than the partnership throughout the period. Only the corporation could rival the ship as an entity. This history has likely been overlooked because writers wrongly assumed that co-ownership of vessels was a partnership, when in fact it was a (highly specialized) property law cotenancy.

In later periods, the sea corporation developed the characteristics of modern corporations in America, while the maritime law in England reversed course. In the United States, the device of the maritime lien allowed contracting parties to accomplish the same economic results (affirmative asset partitioning) that modern parties use a corporation to accomplish. Although American law built upon English precedent, the English maritime law diverged in the late nineteenth century. Despite the twists and turns, maritime law is the longest unbroken chain leading to modern organizational law. In this sense, maritime law might be viewed as an origin of modern organizational law.

### A. The Origins of the Sea Corporation: Partnership versus Part-Ownership

The emergence of the sea corporation is easily overlooked in the historical record, especially by a modern commentator. When several investors contributed money to purchase and operate a ship, the modern lawyer would likely view their association as a partnership. In fact, however, coownership rather than partnership was the "usual form of ownership of a ship" and indeed the law presumed that part-owners of a ship were not partners.[133] Joseph Story, in his commentary on partnership and maritime law, drew the "clear and settled" distinction between partnership in a ship and part-ownership

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131 *See, e.g.*, Margaret M. Blair, *Reforming Corporate Governance: What History Can Teach Us*, 1 BERKELEY BUS. L.J. 5–11 2004) (describing the fragility of partnerships and joint-stock companies for long-lived ventures).

132 *See, e.g.*, Harwell Wells, at 1840–41 (explaining the agreement among the major commentators, Kent, Lindley, and Story, as to the "aggregate" view of the partnership).

133 PARSONS, *supra* note 44, at 84.

in a ship.[134] Indeed, Story and other treatise writers routinely contained as separate section on part-ownership of ships, as distinct from partnership.[135] Thus, the well-established distinction between the two was understood to commentators, even if it has generally eluded analysis in legal history.

The consequences of partnership are very different from those of co-ownership of a vessel, something recognized by many legal writers of the time,[136] but this is often glossed over by non-legal writers, who often falsely attribute the unique maritime rules of part ownership to partnership. Kent says "the general relation between ship owners" is part ownership, while partnership "requires to be specifically shown."[137] In a sense, these sea corporations almost certainly would have been classified as partnerships. The fact that the law drew a distinction between sea corporations and partnerships was a deliberate decision to prune off the stem of contract and to nourish the stem of property.

The consequences of overlooking that ships were held as co-ownership is that the unique nature of this organizational structure is easy to miss. Although some partnerships had created a centralized management through contract, partnerships did not have limited liability, transferable shares, or entity shielding (in the liquidation protection sense). The sea corporation had developed each of those and coalesced all of them into a single entity by the mid nineteenth century.

If one looks beyond the "partnership" label and its trappings in common law England, it is apparent that earlier writers noticed the sea corporation as early as the middle ages. An early twentieth century commentator, looking back,

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134 STORY, *supra* note 19, at 585–87; 589; 635. JAMES KENT, COMMENTARIES ON AMERICAN LAW 117 (1828) ("The cases recognize the clear and settled distinction between part owners and partners. Part ownership is but a tenancy in common, and a person who has only a part interest in a ship, is generally a part owners, and not a partner").

135 Notably, Joseph Story's Partnership treatise included a separate section on "partowners" who are not partners, and the section focused on part-ownership of ships. *See* STORY, *supra* note 19, at 579–655. Theophilus Parsons included a separate section at the end entirely about "part-owners of ships." PARSONS, *supra* note 120 at 568-93. This followed on the English tradition. *See, e.g.*, WATSON, *supra* note 43, at 88–129. The debt to the civil law is evident as well, as Story cites Pothier along with the English writers as the inspiration for the separate treatment. *See* PARSONS, *supra* note 120, at 577–78.

136 *See* DANIEL Y. OVERTON, A TREATISE ON THE LAW OF LIENS 721–22 (1883) (explaining that ships can be owned as part owners or in partnership, with different legal results).

137 KENT, *supra* note 135, at 214.

described a "maritime partnership" that was a "near-corporate organization," in which the "ship itself constituted the capital. . .the shares were assignable. . .routine matters were determined by the majority, and liability was limited."[138] Such an organization bears no resemblance to a partnership in the legal sense, and in fact is likely the early sea corporation also described by the German writers.

The unique attributes of the sea corporation are often missed because historical writers confuse "partnerships" that owned shares in ships and "shares in a ship."[139] This probably led those tracing the history to attribute the corporate attributes to the partnerships, when in fact they were the shares in ships. However, writers who explicitly acknowledge this distinction attribute these innovations to the maritime law. Thaller, for example, clearly attributes the idea of limited liability, personal liability of the ship, and transferability of shares in ships as the origin of the "societé par actions"—the corporation.[140]

Thus, in the economic environment of the eighteenth and nineteenth centuries, where the partnership was the only widely available business form, the sea corporation developed in maritime law. The maritime organizational law evolved the constellation of corporation-like features from a web of sea laws and court decisions, scattered across multiple countries and time periods. The evolution reached its most developed form in the late nineteenth century American federal courts. But as observed above, the basics were in place long before that, even if courts hadn't formalized them in one coherent theory as in nineteenth century America.

The broader observation from the distinction between partnership and part-ownership of ships is that property law was able to accomplish what contract could not. Though partnership and part-ownership of ships both constitute business organizations, they flow from different wellsprings of law, with important consequences. Partnership law evolved from contract law, as partnership is fundamentally a contractual

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138 ARTHUR KLINE KUHN, A COMPARATIVE STUDY OF THE LAW OF CORPORATIONS 34–35 (1912).

139 *See, e.g.*, WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW BOOK IV 207 (speaking of both partnerships owning shares of ships and shares of ships themselves interchangeably).

140 E. Thaller, *Les sociétés par actions dans l'ancienne France*, ANNALES DE DROIT COMMERCIAL 185, 196–97 (1901).

relationship.[141] Partnership law was able to fairly early develop virtually all of the in personam, contract-like features of the modern corporation, including capital divided into shares, the centralization of management in directors and officers, and the like.[142]

The maritime organizational law, in contrast, developed from co-ownership of property. As will be developed below, the law of property makes possible the in rem (or, good-against-the-world) features of organizations that are necessary to implement the modern organizational law. The law of partnership followed one path, that of contract. The law of co-ownership another. The law of corporations followed a third. The next section sketches the history of these three institutions.

### B. The Evolutionary Process

This section examines the historical evolution of the maritime organizational law, side-by-side with the available business organizational forms—the partnership and later the corporation. The maritime law traces its origins to the sea laws of the Middle Ages, but the modern development is a nineteenth century phenomenon that moved from England to the United States.[143] It was in the United States that maritime law developed most fully into an organizational law in the mid-to-late nineteenth century, while English maritime organizational law receded. In this period, U.S. federal courts drew upon the continental sea laws of the middle ages to fill the gaps. The history shows the sea corporation in England (and later the United States) converged with the corporation and diverged from the partnership.

One important thesis of this Part is that the maritime organizational features likely arose from evolution, not design, and that this process has substantive economic implications. First, the "demand side"[144] need for corporation-like legal technology was great, as early as the seventeenth century.

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141 *See* NEIL GOW, A PRACTICAL TREATISE ON THE LAW OF PARTNERSHIP 1–2 (1830) ("Partnership, therefore, in its extended and complete sense, is a voluntary contract"). *See also* ANGELL & AMES, *supra* note 55, at 21–24 (distinguishing between partnerships as mere contracts and corporations that require a charter).

142 *See, e.g.*, WATSON, *supra* note 43, at 3.

143 See PRICE, *supra* note 96, at 1–16. The maritime lien is often traced earlier than that, but it is difficult to show direct transmission from ancient laws to modern ones. See *id.*

144 Zhang and Morley develop this term as an explanation for organizational law. *See* Zhang & Morley, *supra* note 15, at 6.

Ships were some of the largest employers until the Industrial Revolution. In colonial times, few businesses had more than a dozen employees.[145] Yet even a century earlier, a merchant ship would typically have a crew of at least dozens, and in some cases close to 90.[146] Ships could have many investors, who often did not know one another and were geographically dispersed. A business organization of that size and complexity required organizational law.

This Section focuses on the evolution of three of the most important features of the modern corporation—transferability, limited liability, and entity shielding—as they developed in the sea corporation and other business forms. The discussion focuses on the historical evolution of these three features in the sea corporation, juxtaposed against the contemporaneous versions of partnership and corporation. In each case, we see the maritime law evolving away from the partnership form and toward what would become modern corporate law.

### 1. *Transferability*

One of the clearest indications that ships had anticipated modern corporate law was the fact that ship ownership was divided into transferable "shares." For centuries, ships attracted many investors, including passive investors, who traded the shares of the ship. Indeed, the shares in ships even traded in a sort of stock market early in England. The majority of ships in eighteenth century England were not owned by a single owner, but multiple owners, although single ownership increased into the eighteenth century.[147] The vast majority of these owners were individuals, with less than 10 percent being partnerships and very few joint stock companies.[148]

In part, the trading in shares of ships was the result of restrictions on the trading in other forms of investments, such as joint stock companies. In the eighteenth century "there were few outlets for the small investor. . . industrial investment was curtailed by the 'Bubble' Act of 1719."[149] In this respect, shipping was exceptional because trading could

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145 CLARK, *supra* note 2, at 2.

146 RALPH DAVIS, THE RISE OF THE ENGLISH SHIPPING INDUSTRY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 105–06 (2012).

147 Simon Ville, *The Growth of Specialization in English Shipowning, 1750-1850*, 46 ECON. HIST. REV. 702, 707–08 (1993).

148 *Id.* at 702, 709.

149 SIMON P. VILLE, ENGLISH SHIPOWNING DURING THE INDUSTRIAL REVOLUTION 2 (1987).

continue, and yet investing was suitable even for the small investor because vessels were divided into sixty-four shares.[150] Share owners were "free to buy and sell their shares without reference to other owners."[151] The investors could even buy one one-sixty-fourths of many ships and thereby diversify their investments, something otherwise difficult to accomplish at the time.

The development of a thriving market for the shares of ships was facilitated by a widely held understanding that shares in ships had the attributes that would later be associated with corporations. By 1690, it could be said "[t]hus the degree of limited liability which in fact existed, together with the liquidity given by the legal simplicity of transfer and the existence of an extensive market for shares in ships in major ports, made parts of ships attractive as investments to people both inside and outside the world of commerce."[152] The historical scholarship on shipowning seems to have seen this more clearly than the scholarship on corporations. As one notable historical work put it: "Admiralty law which was centered not on the person but on the ship. The effect was to create a corporation based on each vessel. By this means there was a degree of limited liability and shares were freely transferable by the use of a bill of sale."[153]

The active market for shares of ships contrasted with the starts and stops of an overall stagnant corporate law of the period. The joint stock companies, both incorporated and without charters, proliferated in the late seventeenth and early eighteenth century, without much clarity as to the boundaries between them or substantive law applicable, prompting parliament to pass the Bubble Act in 1720.[154] That enactment prohibited acting as a joint stock company with transferable stock without an Act of Parliament or a charter.[155] Although there is debate about the extent of the Act's impact, it arguably made the cost of forming joint stock companies prohibitive, essentially stamping out their development for a century until its repeal in 1825.[156] As a result the corporation was essentially stagnant in England in its development for a century after the

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150 *Id.*

151 *Id.*

152 DAVIS, *supra* note 122, at 98.

153 VILLE, *supra* note 150, at 2.

154 HOLDSWORTH, *supra* note 140, at 214–20.

155 *Id.* at 220.

156 *Id.* at 221.

Bubble Act, and instead the partnership was the vehicle for business during the period.[157]

The partnership, however, did not by default have transferable ownership interests, and this constituted a major limitation on its ability to scale and attract investment from dispersed investors. This arose from the inherently contractual, in personam, nature of the partnership, which didn't lend itself to free alienability. The sea corporation, on the other hand, because it arose from the law of property, with its in rem nature, had an inherent preference toward transferability. This attribute of the transferability of shares in ships, which is facilitated by the limited liability discussed next, has led some earlier commentators to give ships themselves as the origin of the stock company.[158] Thus, during this period of interruption in the development of the corporate form, and reliance on the contractual partnership, the corporate attributes of co-ownership of ships continued unabated.

### 2. *Limited Liability*

The previous section described the transferability of interests in ships. Although the sea corporation's source in property law propelled this transferability, there was one more development that would make it proliferate—limited liability. Without limited liability, transferability might be possible, but widespread trading would pose serious challenges. In part, this is because the identity of the persons buying and selling the shares matter, because the entity's ability to borrow would depend on the creditworthiness of the owners. The ability of the ship to borrow was absolutely essential to its operation, and this imperative probably greatly shaped the limited liability that developed for owners of vessels.

The origins of the limited liability of ship owners are difficult to trace, in part because of its antiquity. One commentator described shipowners' limited liability as "[a] principle as old as the law itself."[159] The principle and rationale were clearly

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157 *See* Maier, *supra* note 61, at 51.

158 Thaller *supra* note 141, at 185, 197. Holdsworth concurs in this, describing ship ownership as giving rise to freely transferable shares and limited liability, "almost a distinct legal person, and to make the lawyers regard it as an entity not very different from a corporation." HOLDSWORTH, *supra* note 140, at 207.

159 Wharton Poor, *A Shipowner's Right to Limit Liability in Cases of Personal Contracts*, 31 YALE L.J. 505, 505 (1922).

articulated by Grotius.[160] Pothier noted in the mid-eighteenth century that "[t]here is a remarkable peculiarity relative to ship-owners. All other principals are held indefinitely for the obligations which their agent has contracted relative to the concerns of his commission; whereas ship-owners are held . . .only to the amount of their interest in the ship."[161] The celebrated 1681 Ordonnance of Louis XIV allowed owners to be discharged from liabilities by abandoning the ship and freight. The limitation was well established on the continent. England had lagged behind in explicitly providing for limited liability,[162] but a de facto limited liability was already in place even in the 1700s in England.[163]

The limited liability of shipowners was statutorily codified in the United States in 1851 in the Limitation of Liability Act. The Limitation Act incorporated the principle of limited liability from the sea codes that already existed. Indeed, the concept underlying the Limitation Act was already effectively the prevailing maritime law, and had been for centuries.[164] The Supreme Court recognized as much, confirming that the law as adopted by Congress is the same as that under the general maritime law of the middle ages.[165] Thus, the limitation of liability in the United States, at least from that point forward,

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160 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE: INCLUDING THE LAW OF NATURE AND OF NATURE AND OF NATIONS 2 (1814) (Archibald Colin Campbell translation) ("From the preceding arguments, it is easy to understand how far owners of ships are answerable for the acts of the masters employed by them in those vessels, or merchants for the conduct of their factors. For natural equity will qualify the actions brought against them, according to the instructions and powers which they give. So that we may justly condemn the rigour of the Roman law, in making the owners of ships absolutely bound by all the acts of the masters employed. For this is neither consonant to natural equity, which holds it sufficient for reach party to be answerable in proportion to his share, nor is it conducive to the public good. For men would be deterred from employing ships, if they lay under the perpetual fear of being answerable for the acts of their masters to an unlimited extent. And therefore, in Holland, a country where trade has flourished with the greatest vigour, the Roman law has never been observed either now or at any former period. On the contrary, it is an established rule that no action can be maintained against the owner for any greater sum than the value of the ship and cargo").

161 ROBERT JOSEPH POTHIER, TREATISE ON MARITIME CONTRACTS 28–29 (1821).

162 *See* The Rebecca, 20 F. Cas. 370 (1883).

163 *See* Davis, *supra* note 147, at 96–97 (explaining that limited liability prevailed as a practical matter, although legal theory had perhaps not developed the reasons why).

164 Norwich Co. v. Wright, 80 U.S. 104, 119 (1871) (explaining that the 1851 Act effectively codified the law already prevailing in the maritime law).

165 The Supreme Court later argued that limitation of liability was not part of American maritime law "upon any inherent force of the maritime law," but rather by statute when Act was enacted. The Scotland, 105 U.S. 24, 28–29 (1881).

was governed by the statute, rather than the general maritime law.[166]

During the same period, the dominant business organization—the partnership—had no limited liability. Even the corporation, which today is often seen as the quintessential limited liability entity, did not have clearly established limited liability in England until later in the eighteenth century.[167] In the United States, states enacted statutes providing for limited liability until, by 1839, all New England states but Rhode Island had enacted them.[168] Some states even went back and forth between limited and unlimited liability in the mid-1800s.[169] Shareholder liability continued in California until 1931.[170] As a result, the doctrines of limited liability "were thus not present at the birth of the American business corporation."[171] This has led scholars to question the commonly-held belief that limited liability drove the successful proliferation of the corporation.[172]

The less commonly observed fact is that the closer analogue to the corporate limited liability was shares in vessels themselves, not ownership interests in specialized partnerships. Only a few accounts clearly note this. One, following German legal historians, traces the notion of limited liability directly to part owners of ships, noting that the concept appeared in the Middle Ages in multiple places apparently without coordination.[173] The rationale is simple; when the ship appears in a distant port, the owners are often unknown, unreachable, and cannot be the source of credit; instead, credit is predicated on the ship and its cargo.[174]

At the same time, the maritime law was developing a robust organizational law, the land-based corporation was

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However, as the Rebecca more persuasively argued earlier, that statement is overly broad.

166 *See* The Scotland, 105 U.S. 24, 28–29 (1881).

167 Oscar Handlin & Mary F. Handlin, *The Revolutionary Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 3, 8–17 (1945). Some authorities give earlier dates, indeed much earlier, as discussed in Phillip Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 578–81 (1986).

168 *Id.* at 594.

169 *See id.* at 595.

170 *Id.* at 597–99.

171 Handlin & Handlin, *supra* note 168, at 22.

172 *See, e.g.*, HURST, *supra* note 6, at 27–28 (1970) (explaining that the fact that limited liability was not well established until later casts doubt on the traditional claim that it primarily explained the rapid adoption of the corporate form).

173 Thaller, *supra* note 141, at 185, 196–97.

174 *Id.*

"all-but-moribund institution in late eighteenth-century England."[175] It wasn't until the Companies Act of 1844 and the arrival of limited liability after 1855 that modern forms started to become common in England.[176] This process culminated in the 1862 Companies Act. The "ultimate triumph" of limited liability came to England after it arrived in the United States and even then in the context of a joint stock association that has more in common with partnership rather than a corporate personality created by incorporation by grant from the government.[177] The American corporation owed much less to its English forebears than might be thought.[178]

In America, it was the corporation rather than the unincorporated joint stock association of England, that predominated from the outset.[179] Angell and Ames say the American corporations were closer to the Roman institutional arrangements than to joint stock companies.[180] In a sense, there was a "Dark Age" of corporate law in England in which America revived Roman notions of corporation. Little legal development of the joint stock company during that period because of the Bubble Act, preventing the joint stock company from evolving modern corporate features.[181] "All that the American colonists took with them from England was an embryonic law of corporations—municipal and governmental rather than business corporations—and an embryonic law of partnership."[182]

The existing business forms, such as proprietorships, partnerships, and joint-stock companies all lacked important features of the corporation.[183] In the early American republic,

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175 Maier, *supra* note 61, at 51–52 n.2. Adam Smith saw the "excusive privileges" of corporations as an obstacle to free market economic growth. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 54 (1776).

176 Handlin & Handlin, *supra* note 168, at 3. The same was true in France, where corporations did not progress any faster, with business remaining in partnership form. Maier, *supra* note 61, at 3.

177 *See* Blumberg, *supra* note 168, at 585; *see also* Gower, *supra* note 167, at 1371–72 (stating that "[t]he modern English business corporation has evolved from the unincorporated partnership, based on mutual agreement, rather than from the corporation, based on a grant from the state, and owes more to partnership principles than to rules based on corporate personality").

178 *See* Maier, *supra* note 61, at 83.

179 *See* Blumberg, *supra* note 168, at 587.

180 ANGELL & AMES, *supra* note 55, at 28.

181 Mahoney, *supra* note 8, at 888–90.

182 Gower, *supra* note 47, at 1369, 1370.

183 Blair, *supra* note 116, at 404–23.

the corporation was only available for very specific purposes.[184] Although American businesses had a rapid specialization in the first half of the nineteenth century, until the 1840s the organizational forms remained the same traditional ones that had operated for hundreds of years.[185] Even as business corporations developed most often uses of the business corporation continued for these specific public purposes such as public utilities, banks, transportation, insurance companies, etc. until the mid-1800s.[186] Indeed, it was not until the 1850s that a majority of the states had general incorporation laws[187] and the need for special charters didn't wane fully until the 1870s and 1880s.[188] Thus, even in the states that did have clearly established limited liability for corporations, the corporate form wasn't always available for general business purposes.

This history shows that the sea corporation developed the features of the modern corporation at least as early as the general-purpose business corporation itself developed them. In particular, the broad outlines of limited liability for shipowners emerged in the Middle Ages and continued in Anglo-American and continental shipping, albeit unevenly, until codified in England and later in the United States. Thus, the roots of maritime law as a business association reach deeper than those of the corporation, but both reached their full expression around the same time, in the middle to late nineteenth century.

The discussion above has thus far left to the side one recurring theme in the literature on the economic history of limited liability. The concept of limited liability in business is often traced to the medieval contract called the commenda. The commenda involved a passive investor and an active manager, and incorporated elements of limited liability and asset shielding. The element of risk in the commenda allowed the lender to escape usury laws, and the very same element allowed bottomry and insurance to escape those laws.[189]

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184 *Id.* at 423 (listing "chartered trading companies" chartered in England, "eleemosynary institutions, municipalities, or chartered banks and insurance companies," and "corporations chartered to carry out some public works project").

185 *See* ALFRED D. CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 15–16 (1977).

186 HURST, *supra* note 6, at 17–18.

187 Blair, *supra* note 116, at 426.

188 HURST, *supra* note 6, at 18.

189 HOLDSWORTH, *supra* note 140, at 104.

The commenda is seen as an early form of limited partnership, in which an active partner had full liability and a passive partner (investor) had liability limited to their investment. This structure had a limit in that it didn't offer limited liability to all owners holding equal interests.[190] In a sense it did offer entity shielding, however, when taken in its historical context (i.e., disregarding modern notions of tort liabilities).[191] The commenda was common in the middle ages throughout Europe, and had some presence in England.[192] It was the ancestor of the *societe en commandite* in France[193] and the limited partnership elsewhere.[194]

Interestingly, this predecessor and the limited partnership never really established themselves in England.[195] Modern forms of English limited liability probably cannot be traced to the commenda, as it left "no direct descendant there."[196] The more traditional partnerships never developed personality in England.[197] In the seventeenth century the joint stock company began to develop, together with corporate personality and (eventually) limited liability.[198] Thus, there was a gap in the evolution between the commenda and the corporation, which may have been filled in part by the trust from the early eighteenth century, as to limited liability.[199] In the United States, the limited partnership was largely adapted from the French Code de Commerce, thus bypassing England.[200]

The historical literature debates the significance of the commenda, which was based in contract, but in any event it was entirely distinct from the sea corporation, which was based on property. The connection between the maritime law and limited liability is likely not based on the commenda. Instead, it's more

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190 Thaller, *supra* note 141, at 185, 196.

191 Mahoney, *supra* note 8, at 880–82.

192 HOLDSWORTH, *supra* note 140, at 196–97.

193 *Id.* at 196.

194 *Id.* at 104.

195 *Id.* at 196.

196 *Id.* at 197.

197 *Id.* at 196–99.

198 *Id.* at 202–05. Holdsworth explains that ultimately it was agreements among the shareholders not to pursue levitations that were necessary to establish the full limited liability. *Id.* at 203–05.

199 See Morley, *supra* note 64, at 2174–183.

200 *See* KENT, *supra* note 135, at 34–36. Kent describes this as "the first instance in the history of the legislation of New-York, that the statute law of any other country than that of Great Britain, has been closely imitated and adopted." *Id.* at 36.

likely a coincidental connection based on the pervasiveness of sea commerce in business and the value of limited liability for investment. As discussed below, the demands of maritime commerce in particular made it particularly likely that forms of business organization would develop that served those economic functions. It is unlikely that the commenda is an ancestor of the corporation or the sea corporation. Instead, its evolution went to the continent in the form of the societe en commandite and eventually to the United States as the limited partnership.

Many scholars who have traced the descent of the commenda have come to the conclusion that it was not an ancestor of the corporation. But this has likely led them to overlook the maritime origins of the same concepts that developed from the law of property, rather than from commenda contracts.

### 3. *The Maritime Lien and Entity Shielding*

The basic building block for the maritime entity law was the maritime lien, which itself is the distinctive feature of maritime law. The origins of the maritime lien are "shrouded in obscurity,"[201] and it doesn't clearly and permanently arrive on the scene at any particular moment. Holdsworth sees the origins of maritime liens as different depending on whether the claim is rooted in contractual/quasi-contractual claims or tort claims. The contractual or quasi contractual liens he sees the origins in the Roman law of hypothec.[202] The vessel has a lien on the cargo and not the vessel. In the classic phraseology, "Le Batel est oblige a la merchandise, et la merchandise au batel."[203] Although these concepts show the antiquity of the maritime lien, they do not clearly reveal its origin.

The origin of liens for tort damages is even more obscure. Holmes famously suggested that liens for tort found their source in the law of deodand but other commentators believe it's more likely procedural in origin.[204] But it's worth noting the lien for torts was not well established in England until the mid-nineteenth century.[205] In reality, whatever its origins,

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[201] Paul Macarius Hebert, *The Origin and Nature of Maritime Liens*, 4 TUL. L. REV. 381, 382 (1930).

[202] HOLDSWORTH, *supra* note 140, at 271.

[203] ESTIENNE CLEIRAC, LES US ET COUTUMES DE LA MER, DIVISÉES EN TROIS PARTIES 597 (1661).

[204] HOLDSWORTH, *supra* note 140, at 271–73.

[205] *Id.* at 272.

the maritime lien, far from being an institution sustained by superstition and irrationality, is a form of property that allows parties to achieve in rem asset partitioning. The maritime lien is closely connected to the personification of the vessel. "The underlying theory of all maritime liens rests upon the quasi-personality of the ship and upon benefits received and wrongs done by her as a legal entity, independent of her owner."[206]

The distinctive aspects of ship personality and the maritime lien have attracted criticism that they did not have the legal pedigree suggested by the Supreme Court. Gilmore and Black assert that "Anglo-American lien law is a nineteenth century creation."[207] In a sense they are correct that maritime law was not handed over in complete form from England, and is not part of any consistent development from ancient practices. Instead, it emerged from the kaleidoscopic traditions of the sea borrowed from various times and places, as theorized in U.S. law in the nineteenth century. The development of maritime organizational law over many centuries occurred primarily in admiralty courts in England and the United States but drew upon sea codes from the continent.

What Gilmore and Black failed to see is that although it is true that American law developed ship personality and the maritime lien further than anywhere else during the nineteenth century, the concept underlying the maritime lien is probably as old as shipping itself. In fact, if not in law, the recourse of creditors of the ship has probably always been against the ship, and the ship alone. The ship is a valuable asset capable of seizure, and the owners are distant, unknown, perhaps unknowable. If the ship is worth more than the judgment, the owners appear and defend the ship. Otherwise, they abandon it, and it is the limit of liability. The maritime lien law arguably merely codified the practical and workable reality of the situation.[208]

The oversimplification of Gilmore and Black notwithstanding, the maritime lien did reach its most developed form in American law in the mid- to late-1800s. The U.S. Supreme Court fully

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206 George L. Canfield, *The Ship Mortgage Act of 1920*, 22 MICH. L. REV. 10, 11 (1923).

207 GILMORE & BLACK, *supra* note 37, at 590. Gilmore and Black rely on the fact that the English law as inherited by the United States had restricted admiralty jurisdiction so much that any chain was broken, and new lien law was American in origin.

208 The argument in this paragraph was described in Bryant Smith, *Legal Personality*, 37 YALE L.J. 283, 287–89 (1928).

embraced a "personification theory" of the maritime lien, whereby the ship was treated as a party that could be liable for contracts or torts. The Supreme Court in *The China* traced this personality of the ship to the misty recesses of history, explaining that in the context of tort, "[o]riginally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors."[209]

Ultimately, the origin of the lien tells less about its success than does its economic function, which was to enable an organizational law based on the ship as a juridical entity. The historical accounts of the maritime lien rarely delve deeply into these functions served by the personification theory of the maritime lien. Commentators occasionally advert to the fact that commercial structures of the sea are somehow relevant to the development of modern business.[210] There is an awareness that admiralty law in some way inspired limited liability and opened the investment to smaller shareholders.[211] But commentators have been unable to perceive the role of the maritime lien in accomplishing asset partitions that would facilitate debt and equity finance. The idea that there was a need for many people to cooperate to accomplish long-distance trade was the "demand side" driver for the development of organizational law.[212]

The maritime lien fits neatly into an evolutionary account for several reasons. The maritime law may have ironically benefitted from the turf wars of common law courts that attempted to disrupt it. Klerman explains that during the period up to 1799 judges were compensated in large measure by fees based on caseload.[213] Because plaintiffs were largely in

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[209] The China, 74 U.S. (7 Wall.) 53, 68 (1868).

[210] *See, e.g.*, WILLIAM A. TETLEY, MARITIME LIENS AND CLAIMS 9 (1989) (noting that "the first company law owes its origins in maritime law," as respects rights among co-owners for payment of expenses).

[211] VILLE, *supra* note 150, at 11.

[212] *See, e.g.*, RON HARRIS, GOING THE DISTANCE: EURASIAN TRADE AND THE RISE OF THE BUSINESS CORPORATION, 1400–1700 at 52 (2020) (explaining that economists and economic historians have come to agree that expansion of markets and technology drives the creation of new institutions); Zhang & Morley, *supra* note 64, at 12 (describing this as a "demand side" explanation).

[213] Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1179–80 (2007).

control of where cases were brought, that arguably created an incentive for courts to compete with pro-plaintiff rules (subject to Parliamentary constraint).[214] Klerman presents evidence that when an 1800 statute took those fees away, the courts became more pro-defendant.[215]

The common law courts may have inadvertently provided the mechanism for an organizational law to develop within the admiralty courts. In the seventeenth and eighteenth centuries the English courts of admiralty could generally only exercise jurisdiction in rem, and not in personam, as a result of the common law court prohibitions.[216] Because the maritime lien is a plaintiff-friendly mechanism, the plaintiffs may have preferred courts that recognized these liens. At the same time, the limitation to in rem actions effectively created a form of limited liability.[217] This was the mechanism by which the lien developed into a personification of the vessel.

The organizational maritime law reached its most developed form in America in the second half of the nineteenth century, but this largely through a process or reciprocal incorporation between England and America of various features of maritime law from other nations (and historical eras). In particular, the decision of the Privy Council in The Bold Buccleugh[218] adopted the personification theory of the maritime lien over the procedural theory, relying in part on the United States precedent.[219] But the English law took a turn away from personification in *The Dictator*.[220] This began a process of retreat in England from the personification theory of the maritime lien toward a procedural one, where the maritime lien is merely a procedural device to compel the appearance of the owner.

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214 *Id.* at 1179–81.

215 *Id.* at 1204–14. Unfortunately, Klerman didn't model the Admiralty court as part of the analysis.

216 HOLDSWORTH, *supra* note 140, at 272. *See also* HILL, *supra* note 125, at 93 ("Before 1852 in England at common law all actions were by way of proceedings in personam.").

217 The connection between these procedural limitations and the concept of limited liability in the corporate context was noted in Rebecca Emily Rapp, *Uncommon Preservation: Common Law Recognition of Admiralty Jurisdiction in Seamen's Wage and Hypothecation Cases*, 67 U. CHI. L. REV. 1409, 1417 (2000).

218 The Bold Buccleugh 7 Moo. P.C. 267, 274 (P.C.) (1851).

219 *Id.* at 277 (citing The Nestor, 18 Fed. Cas. 9, 1 Sumn. 73 (C.C. ME, 1831)).

220 P. 304 (1892).

This change in perspective drove a wedge between English and American maritime law that endures to this day.[221]

The maritime lien is often said to serve as a form of security for claims against the owners. It can serve that function vis-à-vis other creditors in the vessel. But the more important role is that it is security in roughly the same sense that a corporation's assets are security to the creditors of the corporation. A more accurate view is that the maritime lien is a device for personifying the ship, thereby facilitating asset partitioning and lending. Although many writers have recognized the connection between personification and the maritime lien,[222] the causality is often from personification to lien. In some ways, the causality is the other way; the lien is what creates vessel personality.

The entity theory approach to maritime law requires rethinking the identification of the "personification theory" with Holmes's assertion that the maritime lien is a descendant of deodand.[223] In the case of deodand, if there is a wrongdoer, the wrongdoer is available to be punished and yet a physical item is destroyed instead, which is what makes the deodand metaphysical. The maritime lien and personification of the ship is pure practicality; that is what is available to compensate creditors, and that is all that is available.[224] Thus, the idea that the ship is liable and only the ship (asset partitioning and limited liability) are two sides of the same coin that has largely eluded the literature on maritime law.

#### 4. *Summary: A Story of Convergent Evolution*

The story of business organization, therefore, is one of convergent evolution, with the corporation and maritime law converging on similar economic attributes, around the same time. The "core functional features" of the corporate form converged around the end of the nineteenth century.[225] One prevalent perspective is the evolutionary argument that the

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221 See FRANK L. WISWALL, THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800 at 155–212 (1970). Wiswall persuasively argues that *The Dictator* was a departure from English precedent and that the American personification theory was more faithful to the development of the law in England and the United States. *See id.*

222 See GILMORE AND BLACK, *supra* note 37, at 589–94 and literature cited therein.

223 *See* OLIVER W. HOLMES, THE COMMON LAW 24–30 (arguing that the English tradition of deodand explains the notion of the ship's liability).

224 See Smith, *supra* note 209, at 287–289.

225 Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2000).

corporation prevailed because "the corporation had greater fitness for the environment in which it developed."[226] The sea corporation developed earlier but reached its most complete exposition around the same time, and for the same reasons. As discussed, the attributes of asset partitioning and limited liability served the needs of creditors and other financiers in ways that the partnership and other organizational law of the time did not.

Incredibly, all of the pieces for this analysis, if not necessarily the full economic rationale, were in place in the remarkable opinion of Judge Ware in *The Rebecca*, decided in 1831.[227] In this case, Judge Ware developed the deep connection between the lien and the limitation of liability, anticipating decades of subsequent development of the organizational law long before it happened. Judge Ware even ventured a law-and-economics-style analysis of the underlying reasons for the rules of limited liability and maritime liens, explaining that they were to encourage the investment of "dormant capital."[228] Amazingly, *The Rebecca* was almost unnoticed until decades after the Limitation Act, receiving almost no citations until the 1880s.

The features of both types of entities evolved apparently without any conscious awareness of the parallel between them. Corporation law developed most rapidly from the 1830s-1850s,[229] the same time period as the maritime law. How did this happen? There is a strong current of evolutionary metaphor in law-and-economics explanations of the common law, that what survives the common law process is efficient.[230] Although the decades that followed saw a number of important works that undermined the seeming certainty of the efficient evolution result,[231] the trajectory of maritime law seems especially suited for this metaphor, drawing ideas as it does from so many sources all over the world, where contracting parties have extensive freedom to choose the legal doctrines (and the judicial forums) that work best.

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226 CLARK, *supra* note 2, at 4 (1986).

227 1 Ware 187, 20 F.Cas. 373 (D. Maine 1831).

228 *Id.* at 378–80.

229 *See, e.g.*, HURST, *supra* note 6, at 29 (1970).

230 *See, e.g.*, Mark J. Roe, *Chaos and Evolution*, 109 HARV. L. REV. 641, 641 (1996) (referring to this as the "classical evolutionary paradigm").

231 *See, e.g.*, Ben Depoorter & Paul H. Rubin, *Judge Made Law and the Common Law Process*, 3 OXFORD HANDBOOK OF L. & ECON. 129, 129–37 (2017) (describing several works refining and questioning the basic result of efficient evolution).

This judicial development suggests the potential explanation, given in evolutionary accounts of law, that common law tends toward efficiency in a way that statute law does not.[232] Posner argued that the institution of common law tends over time toward efficiency.[233] The subsequent literature has explored mechanisms, with one important stream looking at evolutionary processes.[234] The maritime law is perhaps uniquely suited to this metaphor, drawing as it does many sources from private international law, coupled with the inherent ability of shipping companies (and also plaintiffs) to move toward jurisdictions with favorable judicial regimes. The fact of the convergent evolution of multiple seemingly independent streams of organizational law into the same sets of solutions further supports the evolutionary interpretation.

Another evolutionary interpretation of law might better explain the emergence of the maritime organizational law prior to land-based corporation law, one that precedes the theory above.[235] Harold Demsetz famously set forth the thesis that the purpose of property rights is to internalize externalities, and that property rights develop when changes in the economic environment make the benefits of internalizing externalities outweigh the costs.[236] On this theory, the emergence of sea-based commerce and long-range trade had a demand for organizational law that simply wasn't yet widely needed in the artisanal land-based industries of the time. Not until the Industrial Revolution, railroads, and the like would the land-based industries need the same types of property rights of the organizational law.

Whichever theory better describes their emergence, the features of modern corporate law appear to have first developed a durable, lasting presence in the maritime law of ship co-ownership. But that is not the only context in which they may have evolved. In addition to the modern corporation, there are many organizational forms that could be said to be the first corporate-like entities. The property law aspect is the defining

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232 A common starting place is RICHARD A. POSNER, THE ECONOMIC ANALYSIS OF LAW ch. 13 & 19 (1977).

233 *Id.* Posner specifically included Admiralty in "common law" for this purpose. *See id.*

234 *See, e.g.*, Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205, 205–06 (1982).

235 I owe the ideas in this paragraph to Paul Mahoney.

236 *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348–50 (1967).

feature of the durability of maritime law as organizational law. Although there is not strong evidence that the maritime law was the progenitor of the corporation, in the sense of a direct ancestral relationship, the maritime law has a strong claim as the first lasting and durable instance of the organizational law later found in the corporation.

In spite of the strong evidence that maritime law is, at its core, a form of organizational law, there is almost no scholarly literature connecting the maritime lien to asset partitioning and entity shielding, either in the literature on corporate law or in the literature on maritime law. Only one article has previously connected the maritime lien to asset partitioning, recognizing the connection between the maritime lien and organizational law.[237] Indeed, that piece explicitly notes that "admiralty law can be seen as an early form of organizational law with rules that facilitated asset partitioning."[238]

The sea corporation thus carved out a "third way" of creating a corporation, a hybrid of the contractual joint stock companies of England and the "concessions" of the United States. In U.S. corporate law, the practice of incorporation by special statute and its limited purposes put "our corporations in an official frame of reference, in contrast to the emphasis on private agreement and invention in the contemporary English development of joint stock companies created under deeds of settlement."[239] The corporation required a "concession," or charter from the king, parliament, or a state legislature, or other authority.[240] The view was that only the act of the sovereign (here, the legislatures) could create a corporation, and then almost always for public-facing purposes.[241] That charter was

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[237] *See* Mahoney, *supra* note 8.

[238] *Id.* at 882. Mahoney didn't take the analysis further, perhaps because the unit of analysis there was the "voyage," which he correctly notes is not a legal person, *see id.* at 883, and not the ship, which is a legal person.

[239] HURST, *supra* note 6, at 15–17.

[240] Indeed, this is, in a sense, the enduring holding of *Dartmouth College*. *See* Margaret M. Blair, *How Trustees of* Dartmouth College v. Woodward *Clarified Corporate Law* 7, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3830603. *Dartmouth College* is often cited for the proposition that the corporation is contractual, but Blair argues persuasively that its lasting contribution was the necessity of a governmental charter to have the "special privileges" of corporateness. *See id.* Mahoney attributes this "concession" idea to English governmental unease with the idea of corporate bodies created by contract. *See* Mahoney, *supra* note 8, at 893.

[241] HURST, *supra* note 6, at 14–15, 17–18.

originally only for very narrow sets of purposes—especially charitable and municipal—not business in general.[242]

The ship, in contrast, never required such a charter to partition assets, nor did it rest purely on the contractual, partnership-like joint stock principle that prevailed in England. Much like the modern corporation, the sea corporation was built upon the "proprietary foundation" of property law, with a "contractarian superstructure" constructed over the top.[243] This proprietary foundation of the corporation and the sea corporation alike builds upon the growing recognition that the modern corporation is built upon property law, rather than the pure nexus of contracts.[244] The sea corporation should be thought of as a highly specialized set of rules built upon property law concepts of coownership, designed to solve the problems of asset partitioning and entity shielding in a world with no modern corporations.

### C. The Economic Function of Maritime Law

The previous two Parts trace the history of how the organizational maritime law emerged through a process resembling an evolutionary dynamic as an efficient solution to a set of recurrent economic problems. The maritime organizational law, and in particular the maritime lien, provided an in-rem mechanism for partitioning assets that could not be created by contract. This mechanism is virtually identical to the entity shielding role of organizational law articulated in modern economic theory.

This section examines the underlying economic role of the maritime lien through the lens of this economic approach previously deployed to analyze the purported uniqueness of the corporation as a form of business organization. The sea corporation had addressed many problems analogous to modern corporate law questions, such as priority, asset partitioning, protection of non-adjusting creditors, and even leveraged recapitalizations, long before corporate and commercial law addressed them.

The lifeblood of the merchant vessel was credit, because the vessel required provisioning in distant ports where

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242 *See* Blair *supra* note 241, at 8, 13.

243 *See* John Armour & Michael J. Whincop, *The Proprietary Foundations of Corporate Law*, 27 OXFORD J. LEGAL STUD. 429, 449 (2007).

244 *See generally* Robert Anderson, *A Property Theory of Corporate Law*, COLUM. BUS. L. REV. 1 (2020).

communication was impractical.[245] The vessel couldn't carry currency or coinage sufficient to supply its needs in distant ports, and therefore relied on its own value as short-term credit.[246] The maritime lien performs the same function as the business organization. It allows shipowners to create efficient patterns of creditors' rights that allow the ship to operate. In particular, asset partitioning reduces monitoring costs.[247] Lending entails ex-ante costs of credit investigation, and transaction costs, both of which are reduced by partitioning assets into bundles that lenders can more easily evaluate.[248]

The origins and original purposes of the maritime lien are largely lost, but the modern rationale is incentive-based. As the Supreme Court memorably expressed, "The vessel must get on: this is the consideration which controls every other."[249] This was the Court's rationale as to why subsequent liens prevail over earlier ones.[250] This is clearly a rationale rooted in the belief that the credit of the ship is essential to its continued activity, and that the credit of the ship requires the ability to offer a lender an unencumbered asset. If a lender, ship supplier, or ship repairer needed to investigate the credit of the ship or its owners prior to lending, commerce would have ground to a halt. The partitioning of the assets of the ship created the conditions in which credit could flow freely to ships and keep them moving.

Thus, although maritime liens are often viewed as a form of security for creditors, they function in the same way that a legal entity provides security for creditors of the entity. That is, they enable the combination of priority and liquidation protection that allows financiers to extend credit on a known, clearly demarcated asset (in this case, the ship), that reduces the ex-ante costs of investigation and the ex-post costs of monitoring. The true function of the maritime lien is to provide asset partitioning in the vessel entity, which enhances the opportunity for lenders to extend credit to the ship.

To explain how this works, it is necessary to briefly introduce the outlines of the economic work in this area. Creditors face two main risks: the risk of default, which the creditor must

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245 Piedmont & Georges Co. v. Seaboard Fisheries Co., 254 U.S. 1, 8–9 (1920).

246 *Id.*

247 *See* Hansmann & Kraakman, *supra* note 65, at 399–405.

248 Richard Squire, *The Case for Symmetry in Creditors' Rights*, 118 Yale L.J. 806, 814–819 (2009).

249 The St. Jago de Cuba, 22 U.S. 409, 416 (1824).

250 *Id.*

guard against by investigating the borrower, and the risk that the borrower will take actions that increase the risk of the loan, which the creditor must guard against.[251] The borrower can opportunistically increase the risk of default by, for example, taking on additional debt not subordinated to the original debt.[252] Posner divides these up into the costs of investigation and the cost of supervision.[253] The latter could also be called the cost of monitoring. These investigation expenses and contractual requirements increase the cost of transacting and decrease efficiency.[254] Therefore, it is desirable to craft rules that economize in the broad range of commercial transactions.

The land-based lending rationale for secured credit focuses on the legal rules. The security interest "allows a debtor to assure a creditor that it will not later create debt that is superior to or on par with preexisting debt."[255] This prevents the situation where "an unsecured creditor would suffer the risk that subsequent debt will dilute the value of earlier debt. In the absence of such a commitment, unsecured creditors would have to forecast the extent of later debt and charge interest based on that forecast."[256]

In the maritime lien situation, this is exactly the scenario the creditor is faced with, because subsequent liens can prevail over earlier ones. The fact that later maritime liens can be on a parity or even rank higher than earlier ones means that lenders will treat every extension of credit as an unsecured loan.[257] Thus, the parties fail to capture the efficiencies of secured lending, as the lender must forecast the likely future debt and the interest rate is adjusted higher.[258] The line between debt and equity is blurred in the admiralty context. The lien holders are considered "co-owners" in a sense. Indeed, this makes some economic sense.[259] As the liabilities of the vessel

251 *See* Posner, *supra* note 74, at 507–09.

252 *See id.* at 504.

253 *See id.* at 507–09.

254 *See id.*

255 Randal C. Picker, *Security Interests, Misbehavior, and Common Pools*, 59 U. CHI. L. REV. 645, 652–53 (1992).

256 *Id.*

257 Thomas H. Jackson & Anthony T. Kronman, *Securing Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1161–64 (1979) (explaining why in a system that deviated from "first in time, first in right," secured creditors would be forced to treat their loans as effectively unsecured).

258 *Id.*

259 It is worth noting, however, that Congress perceived the fact that later liens could trump ship mortgages or bottomry loans as a bug rather than a feature. It

exceed its liquidation value, the earliest holders of maritime liens (those who have the lowest priority) have the incentives of equity holders. They would favor the taking of risk, such as by incurring more debt to keep it operating.

Today, the same economic results as those provided by the sea corporation can be achieved with modern corporations. In fact, one-ship holding-company structures are common in the maritime industry, for a variety of reasons, some old and some (relatively) new.[260] As a result, limitation of liability and other corporation attributes are less important than they once were.[261] However, far from undermining the entity theory of maritime law, this practice strongly supports it. The fact that sophisticated parties, with modern tools available, use those modern tools to (largely) replicate what was imperfectly available in a centuries-old maritime organizational law, shows the uncanny logic of a seemingly haphazard system of maritime rules.

At a minimum, given that the features of modern corporations developed independently in similar forms suggests it is futile to search for a single origin of the business association, because they have many origins at different times. But the co-ownership of ships was the longest continuous lineage of business organizations that developed these features, and they developed them at least as early as corporations did. This history, almost unknown in the literature on corporations or maritime law, suggests a rethinking of some of the underpinnings of both.

### D. Innovation by Necessity

The maritime law developed these features largely from the felicitous combination of opportunity and necessity. The vessel required substantial upfront investments of capital, on a larger scale than most businesses of the time. The vessel also separated, by necessity, ownership from control, as the owners rarely navigated the ship themselves and often could not easily communicate with it. Monitoring was nearly impossible, and without limited liability, extensive monitoring is necessary. Such monitoring would have been essentially impossible for a ship sailing the globe in an age before communication

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was one of the motivations for enacting the Ship Mortgage Act, which created the preferred ship mortgage. See GILMORE & BLACK, supra note 37, at 688–90.

[260] *See* Martin Davies, *The Future of Ship Arrest*, in THE ARREST CONVENTIONS: INTERNATIONAL ENFORCEMENT OF MARITIME CLAIMS 1–27 (ed. P. Myburgh, Hart Publishing, 2019).

[261] *See* GILMORE & BLACK, *supra* note 37, at 818.

technology. The merchant ship was a business organization, managed by a master and far out of range of communication. It was autonomous by necessity, and it required credit to continue operations. Thus, the efficient patterning of credit was essential to maritime law.

Not only was separation of ownership from control necessary, but the ship supplied a physical model for the corporation. As Holmes put it, "[a] ship is the most living of inanimate things,"[262] making it easy to conceive of the ship as a "person." The vessel was self-contained and mobile, further facilitating the law in viewing it as a legal person. Finally, the ship could be arrested (seized) and sold to pay off debts, which made the maritime lien workable. The maritime lien, in turn, made it possible to view the ship itself as a defendant, capable of incurring obligations. The combination of these features is perhaps what made it possible for the sea corporation to develop "corporate" law through the law merchant without the modern state. In a recent paper, Zhang and Morley make the argument that the law merchant was not able to achieve these rules in entities with large numbers of investors without the state.[263] The ship literally partitioned its assets within its hull, making the abstract asset partitioning concept tangible for a less developed legal system.

The maritime lien and the itinerant vessel may have supplied the technology necessary in the absence of the modern state that Zhang and Morley describe. The maritime lien may well have served as an adaptation to an environment in which the capabilities of the modern state weren't present. Of course, the law could have just given vessels capacity to contract. But those contracts couldn't easily be enforced without in rem procedure against itinerant vessel. This is perhaps support for the Zhang and Morley thesis, as well as the reason the maritime lien succeeded where early organizational law did not.

Thus, even if the ship achieved the features of modern corporate law without the state, that fact does not detract from the central thesis of Zhang and Morley. The very opportunity presented by the ship probably was what limited it from expanding to a general-purpose business organization. The fortuitous circumstance that the business is physically contained within the ship, a movable, made the part-owners tenants in common, meaning the rules of tenants in common

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262 HOLMES, *supra* note 194, at 26.

263 *See generally* Zhang & Morley, *supra* note 15.

rather than the contract rules of partnership applied.[264] The property law foundation made it possible to have transferable interests with passive owners. Yet this very nature of maritime entity law being built around the ship possibly inhibited its development into a general-purpose business entity.

A strong argument can be made that co-ownership of ships is the prototype of the modern business corporation, even if not necessarily the progenitor. The maritime organizational law is, in an evolutionary sense, something of a dead end. The historical record yields no evidence that the designers of corporate law consciously patterned after the sea corporation. And of course, once the versatile corporation was ubiquitous, the attributes of the sea corporation were no longer unique. Yet there is a sense in which the convergent evolution of separate forms to the same features provides a deeper insight than a clean ancestral path would have. The commonalities highlight the essential features of organizational law. They also provide comparative insights that enrich both fields, as explored in the next part.

## III
## IMPLICATIONS

The view of maritime law as a form of entity law offers potential lessons for future directions in both maritime law and entity law. Corporate law, partnership law, and even trust law, have long been seen as forms of business organization, leading to cross-pollination between them. But maritime law has been seen as separate, inhibiting the exchange of ideas between the two fields. The fact that maritime law can explicitly be seen as business organization law charts the course for both bodies of law.

This Part takes the approach that identifying the features that have led to the success of the corporate form may provide leverage on the normative debates in corporate law. The modern entity theory sheds light on centuries of confusion associated with maritime law, especially the nature of the maritime lien.

Having established the economic roles of maritime law, we can now examine the implications that this organization theoretic view provides. Part A discusses implications for maritime law. Part B discusses implications for the future of

264 *See supra* Part II.A.

corporate law. This Part can only sketch the outlines of the theory's implications, which are left for future work.

## A. Implications for Admiralty Law

The maritime law has long lacked a clear organizational principle in terms of what the goals are that the law is trying to achieve. The typical rationales for having a special federal system of admiralty law that potentially preempts state law are "predictability," "uniformity" or "harmony."[265] Closer to the mark are the rationales behind Congressional enactments such as the Limitation Act and the Ship Mortgage Act—to increase investment in vessels.[266] Such rationales still fall short because many rules of maritime law cannot be reconciled with a desire for uniformity or promotion of shipping.

Instead, this Article argues that the overarching function of maritime law is to provide a framework for parties to achieve economic efficiencies not available through contract alone. The entity theory of maritime law supplies a set of principles for interpreting and applying maritime law, especially the law of liens, and has many implications for admiralty practice. This Section takes one paradigmatic example of admiralty exceptionalism—the maritime lien—and shows how the organizational perspective on maritime law can shed light on a set of doctrines that seem ad hoc or disorganized. Once the ship is viewed as a business entity, the logic of these doctrines emerges. This logic, in turn, could provide guidance for decisions in difficult cases.

### 1. *The Role of the Maritime Lien*

The institution of the maritime lien, with its sometimes confused and convoluted case law, has baffled the courts and commentators. Commentators frequently note how different the maritime lien is from land-based liens, and how seemingly elusive the underlying principles are. In particular, a tension is sometimes perceived between the maritime lien and limited liability.

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265 *See generally* Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273 (1999) (critiquing these rationales for admiralty law's federal preemption of state law).

266 *See* Richardson v. Harmon, 222 U.S. 96, 103 ("The avowed purpose of the original [Limitation Act] was to encourage American investments in ships."); The Thomas Barlum, 293 U.S. 21, 48 (1934) (stating that encouraging investment in shipping was "the objective of the Ship Mortgage Act").

The perceived tension between the two doctrines is entirely the result of failing to see them through an entity law lens. Far from being in tension, the maritime lien and limited liability flow from the same source. They are two sides of the same coin, which is the legal personality of the vessel. When treated as an entity with juridical personality, the vessel has the capacity to be an obligor on a contract or to commit a tort, and not necessarily as an instrument of its owners. Like a corporation, however, the vessel benefits from limited liability that enables it to secure investment from dispersed owners without extensive (and practically impossible) monitoring. Far from an anachronism, these are exactly the features associated with legal personality that are thought to underlie the success of modern corporate law.

The personification of the vessel is increasingly disfavored as a fiction rooted in antiquated legal doctrines and playing a minimal role in the law. Gilmore and Black critiqued personification, arguing that it has "never been much more than a literary theme" that "has played a negligible role in the development of maritime lien law."[267] Judge Learned Hand described ship personification as "archaic . . . an animistic survival from remote times."[268] Defenders of the ship personification doctrine often need to rely on somewhat narrow examples of specific situations to illustrate its benefits.[269]

However, the entity theory of maritime law, drawing insights from corporate law scholarship, shows that this "personification theory" of the maritime lien is in fact a highly efficient solution to recurring problems. The concept of legal personality of corporations is not controversial—it's a necessary fiction that allows them to perform an economic function.[270] The entity theory of maritime law shows the same should be true of the ship's legal personality, a necessary fiction that pervades admiralty law.

These types of critiques dismiss personification as antiquated in part because they didn't have the modern economic

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267 GILMORE & BLACK, *supra* note 37, at 615–16.

268 The Carlotta, 48 F.2d 110, 112 (2d Cir. 1931).

269 *See, e.g.*, Martin Davies, *In Defense of Popular Virtues: Personification and Ratification*, 75 TUL. L. REV. 337 (2000) (explaining the benefits of personification for ratification of a bill of lading).

270 Elizabeth Pollman, *Reconceiving Corporate Personhood*, 4 UTAH. L. REV. 1629, 1663 (2011) (explaining that legal personality, a necessary fiction, should not be confused with personhood for the purpose of all constitutional rights). For an explanation of how legal personality facilitates capital "lock-in," see Margaret M. Blair and Lynn A. Stout, *Specific Investment: Explaining Anomalies in "Corporate Law"*, 7 J. CORP. L. 719, 739–740 (2006).

theory to understand its function. The failure to perceive the organizational role of maritime law has led commentators to miss the logic behind partitioning assets to facilitate extension of credit. These commentators couldn't have understood the functions of entity shielding and their effects on cost of credit, as the economic theory explaining these roles came decades later. Only then did the identical fiction in corporation law is viewed (mostly) as a feature. Understanding the economic function of the personification allows a clearer view. On the one hand, personification clearly serves a purpose beyond "animistic survival from remote times." On the other hand, understanding the mechanism performed by personification allows us to avoid stretching the fiction beyond its economic function.

The historical evolution of maritime law reveals that its effect (if not possibly its design) is to provide an organizational law centered on the vessel that enables parties to make efficient contracts they otherwise couldn't. The in rem action and the maritime lien are the unique features of admiralty. Indeed, the in rem maritime lien is, in a sense, the very core of maritime law. This provides a logic for the law that can inform debates that otherwise have no obvious solution.

The entity theory, regarding each ship as a business entity, clarifies many doctrines that otherwise escape persuasive explanation. Contracts can be made on behalf of the entity (creating a maritime lien) on behalf of the owner alone, or on behalf of both jointly (in rem and in personam). Viewed through this lens, the rationale behind seemingly arbitrary doctrines becomes clear through the organizational theory lens. The "personal contract doctrine" considered next, is an example.

### 2. *The "Personal Contract Doctrine"*

As an instructive, even if somewhat narrow, example to illustrate the principles in this section, consider the "personal contract doctrine." This doctrine is an exception to the general principle that shipowner liability is limited to the value of the ship and pending freight. The exception states that a shipowner's liability is not limited when the liability is contractual in nature and "personal" to the owner. The doctrine, which arose from a 1911 Supreme Court case,[271] has given rise to various interpretations.[272]

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271 Richardson v. Harmon, 222 U.S. 96, 106–07 (1911).

272 *See* GILMORE & BLACK, *supra* note 37, at 898–906.

The "personal contract" doctrine has been much criticized for many decades.[273] Its rationale has eluded commentators, and as a result its application has been uncertain and inconsistent. But the rationale of the doctrine is perfectly clear from the entity theory of maritime law. The personal contract is one the parties intended that the owner stand behind, as a primary obligor or as a surety much like a personal guarantee of a corporation's obligation. The personal contract doctrine should not apply when the parties intended that the vessel be solely liable for the obligation. The question is just one of contract interpretation—whether the parties intended the owner to be liable on the contract—no different from when the owner of a corporation makes a contract on behalf of the corporation.[274]

Consequently, the existing approaches to the personal contract doctrine ignore the entity theory of maritime law and create the confusion. The "Making Rule" is based on whether the owner had executed the contract personally. The "Breach Rule," articulated by Learned Hand in the Soerstad,[275] was whether the breach was of a duty that the owner was personally bound to perform. Neither should govern whether the personal contract rule should apply or not. Instead, under the entity theory, the question is what the intention of the parties was as to the identity of the obligor. The preferable rule is one of the parties' intent, whether the credit of the owner was contracted for. This rule brings it full alignment with maritime liens, which again is the question of whether the parties intend the ship to be liable.[276]

### 3. *Choice of Law for Maritime Liens*

The narrow but straightforward example of the personal contract doctrine illustrates the principles necessary to help resolve the broader and more important question of choice of

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[273] *See, e.g.*, John W. Castles III, *The Personal Contract Doctrine: An Anomaly in American Maritime Law*, 62 YALE L.J. 1031, 1036–37 (1953) (lamenting the lack of clear rationale for the personal contract doctrine and resulting ambiguities in its application).

[274] This is, in fact, closely analogous to a common issue in corporate settings, especially in the context of pre-incorporation contracts when the owner of a corporation in the process of organization enters into contracts purportedly for the benefit of the corporation.

[275] 257 F. 130, 131 (S.D.N.Y. 1919).

[276] Oddly, the leading paper on this expressly observes this alignment, yet doesn't make the connection that both doctrines are aligned because they are addressing who are the intended obligors on the contract. *See* Castles, *supra* note 274, at 1036.

law for maritime liens. The recognition of maritime liens and their consequences varies from country to country. Therefore, the question of whose law applies in determining the existence of liens and their consequences is often front and center in maritime litigation. For example, the English law, the pure procedural conception of the maritime lien prevails, leading the Court to rule in *The Halcyon Isle* that an English court should only recognize liens that would be liens under English law.[277] The dissent in that case saw the maritime lien as a right of property, which is more consistent with the general maritime law.[278]

In contrast, the personification theory that prevails in the United States, at least in the organizational sense introduced here, should allow the parties to choose the law that applies to their contract, thereby choosing a jurisdiction that will enforce a maritime lien. The existence of a maritime lien is simply another way of saying the ship is the obligor on the contract; just as with an entity, the parties should be able to specify whether the ship or the owner or both is the obligor on the contract. For the same reasons that jurisdictions respect the entity status of business entities formed abroad, they should respect the entity status of ships. Instead of mandatory rules, the presumptions applied to maritime liens are simply default rules that apply when the parties haven't clearly specified otherwise.

This rule is, in a sense, simply an application of the notion that it is "critically important to a well-functioning system of organizational law" that there be clear answers to whether business creditors can seize owners' assets and whether owners' creditors can seize business assets, and that there be a "varied menu" of all the options for the parties to choose from.[279] The question of whose law should apply is itself a question of the parties' intent. If the parties choose U.S. law, maritime liens will be recognized for some purposes, such as necessaries, where they might not elsewhere.

The deeper question is why the parties should be able to choose a law that creates a maritime lien, as opposed to a law that does not. Fundamentally, the entity theory says the creation of the maritime lien is simply the intent of the owners and the creditor to bind the ship to the obligation, as

277 *See* HILL, *supra* note 125, at 108.

278 *See id.*

279 *See* Mahoney, *supra* note 8, at 876.

opposed to or in addition to the owner. As would be the case with a corporation, the duly authorized agents of the ship should be able to contract for a maritime lien or not, just as the duly authorized agents of a corporation can contract for the corporation to be liable or not.

The proposition that maritime liens should be able to be created by contract does collide with some caselaw in the United States. Because maritime liens potentially implicate the rights of third parties (prior contract creditors), some circuits have held that maritime liens cannot be created by contract, only by operation of law. Indeed, litigants opposing the choice of U.S. law in contracts have occasionally tried the argument that allowing choice of U.S. law permits parties to create a maritime lien by contract, as opposed to by operation of law.[280] Although some circuit courts have held that contracts cannot create maritime liens, the Supreme Court decisions they typically rely on either don't clearly support that proposition,[281] or even support the opposite proposition.[282]

The entity theory reveals the weak rationale underlying a rule against contracting for maritime liens. The courts have long recognized that maritime liens affect the interests of third parties, not just those parties to the contract.[283] The third-party effects are the reason some courts have created a rule that parties can't create maritime liens by contract.[284] Otherwise, the argument goes, the parties could upset the priority expectations of prior lienholders by creating liens for unexpected extensions of credit, increasing the cost of credit. In other words, the court monitoring for "necessaries" that is inherent in the maritime law is one way of reducing the cost of credit. It allows the creditor some assurance that future

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280 Triton Marine Fuels v. M/V Pacific Chukotka, 575 F.3d 409, 416 (4th Cir. 2009).

281 *See* Vandewater v. Mills, 60 U.S. 82, 89 (1856) (indicating that the Court was explaining limits of the "tacit hypothecation," as opposed to an express one by contract).

282 The Bird of Paradise, 72 U.S. 545 (1866) ("Parties, however, may frame their contract of affreightment as they please, and of course may employ words to affirm the existence of the maritime lien, or to extend or modify it, or they may so frame their contract as to exclude it altogether.").

283 *See, e.g.*, Vandewater v. Mills (The Yankee Blade), 60 U.S. (19 How.) 82, 89 (1856) ("[T]his privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice. . .").

284 *See, e.g.*, Bominflot, Inc. v. The M/V HENRICH S, 465 F.3d 144, 147 (4th Cir. 2006).

extensions of credit will go into the collateral, not be absconded with or otherwise wasted.

This is a very similar problem to that faced in the modern context of corporate leveraged recapitalizations and LBOs. Incredibly, centuries before those types of transactions came to the fore, maritime courts had grappled with conceptually similar problems. Borrowing money on the credit of the ship for the use of the owner resembles a fraudulent transfer. In an LBO it is granting a security interest. In the fraudulent transfer context, the question is whether the entity receives "reasonably equivalent value." The latter very much resembles the question of whether the transaction was a "necessary" or for the benefit of the ship. Thus, the very process of the court ensuring that the contract itself is maritime (and therefore that admiralty jurisdiction exists), the court scrutinizes the underlying contract for whether it provides "reasonably equivalent value" to the ship.

The likely reason courts chafe at the idea of creating maritime liens by contract is simply that they rarely have to consider the issue from the perspective of the business entity, which presents many of the same issues. Most maritime claims give rise to maritime liens.[285] As a result, in most cases where parties would try to create a maritime lien by contract where one did not attach by operation of law, there would be no admiralty jurisdiction, providing a natural limit for the contractual creation of maritime liens. In such cases, the entity theory would agree that, regardless of the parties' intent, no maritime lien would be created.

#### 4. *Jurisdictional and Procedural Implications*

The entity theory will not resolve all difficult questions of maritime law. In particular, although the theory provides a lens for resolving certain substantive questions, especially around maritime liens, the entity theory may not have much purchase on the many procedural questions that arise in admiralty. However, the theory may offer some insight into some of the otherwise anomalous doctrine of admiralty jurisdiction.[286]

One of the most surprising and seemingly anomalous doctrines in admiralty jurisdiction is the rule that a contract to

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[285] *See* GILMORE & BLACK, *supra* note 37, at 625.

[286] One oddity under the organizational theory is that flag state jurisdiction does not govern maritime law in the same way that, for example, state of incorporation governs internal affairs in corporate law.

build a ship is non-maritime. This rule almost always surprises students when they are learning Admiralty jurisdiction. What could be more maritime than a contract to build a ship? However, when viewed from the perspective of the entity theory, this rule makes some sense. The ship is not operating as an organization until it is built. It is a structure on land that can be financed according to the creditworthiness of the party ordering the construction. The building of a ship simply does not implicate the need to borrow on the credit of the ship, apart from the owner, as does its operation.[287] Indeed, the Supreme Court has expressed some indirect support for this rationale.[288]

#### 5. *The Priority of Maritime Liens*

Finally, the entity theory might shed some light on how priority should work among maritime liens. Under the general maritime law, maritime liens follow a "last in time, first in right" rule that is the opposite of how most security interests work.[289] This has created confusion in the lower courts in stratifying the priorities of maritime liens created at different times. The Ship Mortgage Act, which modified these priorities, added additional confusion in many regards.

Viewing the ship as a business entity, the experience in corporate law would suggest flattening the temporal priority of maritime liens. Analogizing liens to organizational law may mean liens would all rank equally within each class, regardless of when they are created. Such a priority rule could rationalize the otherwise anomalous result that the interposition of a ship mortgage can invert the priority of maritime liens. The purpose of the Ship Mortgage Act was to make the ship mortgage a maritime lien. If the ship is a business organization, it might make sense to put all maritime liens on a parity within their classes, and perhaps to regard the priority of ship mortgages over non-preferred liens as a sort of security interest on all of the assets of a business entity (the ship). Still, the inverse rule of priority has prevailed (although not strictly) in maritime law for a long time, and it may well provide a structure for

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[287] Even the fact that a contract to sell a ship is non-maritime makes some sense, as this is arguably a non-internal affairs matter.

[288] People's Ferry Company of Boston v. Beers, 61 U.S. 393, 401–02 (1857) (explaining that the presence of the owner in such a transaction makes it not a transaction that should bind a ship).

[289] *See* GILMORE & BLACK, *supra* note 37, at 588.

borrowing that holds efficiencies beyond those appreciated in organizational law more generally.

### B. An Example from Corporate and Commercial Law

The maritime organizational law, having developed asset partitioning in response to similar economic needs that propelled the corporation, may have important insights for corporate law and theory. Corporate law is the subject of one of the most expansive law and economics literatures, both theoretical and empirical. But learning more about why corporate law has become dominant might lead us to conclusions about the normative debates over the corporate form, as well as plausible reforms that have worked in another setting.

The maritime law offers the experience of an alternative system solving the same economic problems with different tools. In maritime law, the law merchant created a law of entities from the bottom up, rather than from the top down. The law coalesced from many court decisions drawing from many international legal sources from various time periods. In such an environment, it is likely that the resulting law reflects evolutionary advantages worth examining. The experience of ship financing offers additional data points on alternative forms of "external" liability, in the presence of high insolvency risk. This experience is what is lacking in corporate law.

One of the most pressing concerns associated with the corporation in general, and limited liability in particular, is the problem of negative externalities. Limited liability has an important function to facilitate credit.[290] But the effect of limited liability is, inevitably, to externalize some costs onto creditors, whether voluntary or involuntary. The limited liability of the corporation means that some creditors won't be paid, including creditors who had no ability to adjust to the insolvency risk. As a result, many commentators worry about the power of the corporation and the costs imposed by limited liability on third parties.[291] Regardless of whether the corporation is seen

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290 *See* Posner, *supra* note 74, at 503 ("Far from externalizing the risks of business ventures, the principle of limited liability in corporation law facilitates a form of transaction advantageous to both investors and creditors; in its absence the supply of investment and the demand for credit might be much Smaller than they are.").

291 *See, e.g.*, Paddy Ireland, *Limited liability, Shareholder Rights and the Problem of Corporate Irresponsibility*, 34 CAMBR. J. ECON. 837, 853–54 (2010) (arguing that the corporation is advantageous for business owners but "bad news for everyone else").

as a beneficial technology or a menace, it is clear that the corporation's limited liability imposes costs on at least some third-party creditors.

Specifically, one of the most difficult problems with limited liability is that of "non-adjusting" creditors—those who are not able to adjust the terms on which they extend credit.[292] First, although some creditors (such as sophisticated contract creditors) can adjust for credit risk, not all creditors can. In particular, tort creditors, who have become part of an "involuntary extension of credit," cannot contract around insolvency risk.[293] In addition, some voluntary creditors, such as trade creditors, would have difficulty assessing creditworthiness and contracting around suboptimal provisions. Even the most ardent defenders of limited liability acknowledge this potential to externalize cost onto involuntary creditors.[294]

The maritime law appears to have anticipated this theory long before it was ever articulated. Maritime law identifies groups of non-adjusting creditors, such as tort victims, certain trade creditors, and the seamen employed by the vessel, and granted them privileged status against the vessel. Not only do these creditors have maritime liens, but they have higher ranking maritime liens than contract creditors (except in special situations). The maritime law created a priority system that favored non-adjusting creditors long before scholarly work would identify the special problems faced by those creditors within a law & economics framework.

The parallels to the corporate context may offer lessons for a more efficient and enlightened version of priorities when corporations are insolvent. The law is "just beginning the task of sorting through . . . the need to protect third-party creditors unaffiliated with the entity itself."[295] These are issues that mainly affect tort creditors and employees but can affect any non-adjusting creditor. The idea of maintaining limited liability while giving tort creditors priority over secured and unsecured contract creditors has long been advanced in influential works on corporate law and limited liability.[296] Admiralty provides an example to see such a regime in operation. Priority for tort

292 L.A. Bebchuk & J.M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L. J. 857, 881–90 (1996).

293 Posner, *supra* note 74, at 506.

294 *Id.* at 519–20.

295 Hansmann, Kraakman & Squire, *supra* note 12, at 1403.

296 *See, e.g.*, David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1643–50 (1991).

creditors is exactly what maritime lien has done for over a century (in the case of tort creditors) and multiple centuries (in the case of seamen).

In this regard, even some of the later developments of corporate bankruptcy law were anticipated by maritime law. As an example, the federal bankruptcy law provided priority for employees' wages starting in 1841.[297] This had been the rule long before in maritime law, where "the seaman's claim for his wages is preferred before all other charges."[298]

The maritime law developed organically, over many centuries and through the interaction of many different legal systems. It is noteworthy that maritime law has solved some of the problems that corporation law now faces. With the recognition that the ship was a proto-corporate business organization, corporate, commercial, and bankruptcy law scholars have the opportunity to learn from the outcomes of experiments that maritime law has undertaken.

### C. The Uniqueness of the Corporation

The legal and economic history accounts have tended to treat the corporation as a unique technology. This perception has contributed to the idea that corporate powers were "in effect parts of a consideration exacted by law for creation of those elements which only the law could give."[299] From this theory, the corporation is not only unique but also requires the official imprimatur of the state for its existence.

Two streams of modern corporate law scholarship have called these ideas into question. First, the research inspired by Hansmann and Kraakman has shown that the pure nexus of contracts theory is an inadequate legal account of the corporation, and that asset partitioning is inherently property-based. Second, and relatedly, recent scholarship has cast doubt on the idea that the corporation was the "exclusive

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[297] *See* Scott Pryor, *The Missing Piece of the Puzzle: Perspectives on the Wage Priority in Bankruptcy*, 16 AM. BANKR. INST. L. REV. 121, 122 (2008).

[298] *See* CHARLES ABBOTT, A TREATISE OF THE LAW RELATIVE TO MERCHANT SHIPS AND SEAMEN 484 (1827). Abbott there cites authorities dating much earlier, such as RENÉ-JOSUÉ VALIN, NOVEAU COMMENTAIRE SUR L'ORDONNANCE DE LA MARINE 362 (1766) (noting that the Marine Ordinance of 1681 preferred seamen's wages above all other claims).

[299] HURST, *supra* note 6, at 21.

source of the legal technologies we have long associated with it."[300]

One recent paper argues that the common law trust had also developed most of the fundamental attributes of the modern corporation, perhaps as early as the late Middle Ages.[301] This argument shows the trust developed many features of modern corporate law, but not all of them. In particular, the trust didn't develop legal personality.[302] The trust couldn't be sued in its own name, although special joinder rules allowed courts to approximate the same result.[303] Other scholars have argued that the private law in the Court of Chancery were able to create effective precursors to corporations without legal personality.[304]

However much these contractual and equitable work-arounds force a rethinking of the corporation's role, the sea corporation forces a more fundamental rethinking. First, trust law was explicitly seen as a substitute for organizational law. Corporate law and trust law have had significant cross-pollination, with corporate law even being described as a form of trust law.[305] The connection was apparent, and that with trusts "[i]n truth and in deed we made corporations without troubling king or parliament though perhaps we said we were doing nothing of the kind."[306] Thus, the parallels there don't necessarily reflect much on the underlying economic mechanisms for development of the corporate form. The maritime law evolved these features independently, by different courts, and apparently without conscious awareness of the parallel. This convergent evolution would suggest that corporation itself is not unique; instead, the efficiency of the underlying economic attributes drove the development of these institutions.

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300 *See* John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2148 (2016).

301 *See id.* at 2146.

302 *Id.* at 2154.

303 *See id.* at 2183–91.

304 *See, e.g.*, Joshua Getzler & Mike Macnair, *The Firm as an Entity Before the Companies Acts*, *in* ADVENTURES OF THE LAW: PROCEEDINGS OF THE SIXTEENTH BRITISH LEGAL HISTORY CONFERENCE 267–88 (P. Brand, K. Costello & W.N. Osborough eds., 2005)).

305 *See, e.g.*, Adolf A. Berle Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931).

306 Frederic William Maitland, *The Unincorporated Body*, *in* 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 283 (H.A.L. Fisher ed., 1911).

Second, the vessel developed legal personality, unlike the trust.[307] This contradicts the common scholarly consensus that a charter was necessary to create legal personality. The ship developed these features without a charter from the state and, in an international environment with overlapping and uncertain jurisdictional status. The vessel is a legal person capable of bearing contractual obligations and incurring tort liability. The vessel could be sued in its own name.[308] This power to bond its assets and shield them from creditors is a "universal characteristic" of modern business entities.[309] Indeed, that is the essence of the in-rem action and the maritime lien, the centerpieces of the argument in this Article.

In the end, it was the property law tenancy in common aspect of vessel ownership that provided the technology for transferable shares and an organizational law like corporate law. This insight was not apparent until the work of Hansmann and Kraakman on the corporation isolated the in-rem property attributes of the corporation, such as entity shielding, as the essential ones. With this perspective, the organizational role of maritime law, which organically developed over hundreds of years, stands out as a unique technology. These corporate attributes probably emerged first in the maritime context because the vessel was a tangible thing, but it was also an organization, and this helped the law visualize organizational personality.

## Conclusion

The literature has long viewed the corporation as a singular innovation in the history of business association law. This Article shows that the key features associated with the corporation developed at least as early in the maritime law. The co-ownership of merchant ships formed the basis for a form of organizational law that paralleled the essential attributes of modern corporate law, including transferable shares, limited liability, and entity shielding under centralized management. This legal institution enabled shipowners to finance shipping

307 *See* Morley, *supra* note 301, at 2154 (explaining that the trust "was never a distinct juridical personality").

308 One might wonder why the ability to be sued is a benefit to the organization. The answer is that if the rule were otherwise, requiring all the owners to be joined (such as in the partnership), creditors would be reluctant to extend credit to the organization or deal with it on its own credit.

309 Hansmann, Kraakman & Squire, *supra* note 12, at 1336.

with investment from many dispersed investors, and to conduct large range trade with the ability to borrow in far-flung ports.

The maritime law has long been thought of as a collection of largely ad hoc rules lacking an organizing principle that explains even the most basic aspects of the overall system. This Article shows that far from lacking guiding principles, the maritime law is an organizational law that developed the most important features of the modern corporation earlier than did corporate law. The independent emergence of this business organization shows that it was external needs driving the development, not any unique technology of the corporation. The corporation was not a unique technological development that enabled economic revolution. The corporation was a more versatile version of what the maritime law had already developed. Instead of the essential features being attributes that happened to attach to a successful technology, the attributes themselves drove the technology's success.

The fact the corporation is not the unique expression of corporate-like attributes does not make those attributes any less remarkable, in fact, quite the contrary. That the same features would evolve in parallel with little conscious interaction (or even awareness of the parallels) between the two is a testament to the intrinsic efficiency of features such as entity shielding. It also supports the notion that the patterning of creditors' rights and asset partitioning was the key feature of entity law, rather than limited liability. Ultimately, the corporation was borrowed as a convenient vehicle to operationalize economic features already present. But the features themselves are all the more remarkable that they emerged in parallel and independently.

The legal origins of the sea corporation also compel an adjustment of the contractarian narrative of corporate law. The sea corporation arose neither out of concession nor out of contract. It arose from the law of property, specifically the co-ownership of personal property. This insight adds to the growing recognition of the property law foundations of modern organizational law.