

The Sea Corporation

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Abstract

Over the two centuries the corporation has become the dominant form of business organization, 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 few industries. Only in the ensuing decades did restrictions ease allowing the corporation to secure its economic dominance.

Commentators widely attribute the corporation's success to a set of features thought to be unique to the corporation, including 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, the 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 throughout the 17th through early 19th centuries in Europe and 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 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 a property mechanism, rather than the contract mechanisms of partnership law, to implement in rem attributes. The vessel as property came to life in the eyes of the law, developing a form of legal personhood. Viewed in this broader context, the corporation is not a unique institutional solution to recurrent economic problems; it was a convenient vehicle for expanding and generalizing a set of economic solutions.

This new organizational 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, such as externalities of limited liability on involuntary creditors, such as tort creditors.

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Here, maritime law provides time-tested solutions, providing a system that provides priority for such creditors over contract creditors, solving one of corporate law's most vexing 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 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

¹ The prediction was most famously made by Berle and Means. *See, e.g.,* ADOLPH A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 4, 10 (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 revenues in the United States, with a smaller amount from LLCs and only a sliver from traditional forms such as sole proprietorships or general partnerships. IRS data indicate that 81% of business revenues come from corporations, with another 9% coming from LLCs, with only about 5% coming from traditional forms such as sole proprietorships or general partnerships. The data come from 2015, the most recent IRS data available. *See SOI Tax Stats—Integrated Business Data*, IRS, Table 3: Selected Financial Data on Businesses, available at <https://www.irs.gov/statistics/soi-tax-stats-integrated-business-data>.

² *See* ROBERT CHARLES CLARK, *CORPORATE LAW* 1 (1986).

³ *See* JOHN MICKLETHWAIT, & ADRIAN WOOLDRIDGE *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* xiv-xv ("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."); *See* STEPHEN M. BAINBRIDGE AND 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* *ECONOMIST*, Dec. 18, 1926, at 1053 ("The 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, 2-24 (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., JR. BIRDZELL, *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.")

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. 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. These “sea corporations”⁷ 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 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, 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. 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.⁸ 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. 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 modern corporation were not widely available until the late nineteenth century.⁹ 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.¹⁰ 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 19th century, the maritime law provided a form of proto-corporate law that was more advanced in many respects than the available alternative—partnership law.

⁶ See, e.g., JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970* 20 (1970) (arguing that although private contract could secure some of the characteristics of the corporation, only the corporation could secure some of them).

⁷ 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 from 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.”

⁸ See *id.*, at 882-892 (describing the historically alternating views of the corporate-like entities as “contracts” or “concessions”).

⁹ Indeed, some features such as limited liability were not universally available until well into the twentieth century. See *infra* Part III.B.

¹⁰ See Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1387 (2006).

This Article builds on this economic history of the sea corporation to articulate a theory of maritime law as business organizational 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 where 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 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”). In a sense, the organizational law constructed around the ship was indeed a “modern corporation.”¹¹

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. 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 here 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 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 and 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 tort victims anticipated many of the modern concerns articulated in corporate law scholarship.¹²

¹¹ See, e.g., Taisu Zhang & John Morley, *The Modern State and the Rise of the Business Corporation* 5 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4037726) (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”).

¹² 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, and 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 eighteenth 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 organizational theory for maritime law and corporate law. In particular, the organizational theory brings order to otherwise confused and seemingly ad hoc features of maritime law. The maritime 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 missing 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. 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.¹³ The combination of these features allows the corporation to operate more efficiently than prior forms such as the partnership. In fact, prominent texts

¹³ 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). The last item, “capital lock in or entity shielding” is sometimes thought of as an element of legal personality. See Anatomy of Corporate Law 5-8.

on corporate law often explain the dominance of the corporation in terms of its distinction from partnership.¹⁴

Although many these attributes are often thought unique to the corporation,¹⁵ 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 the maritime law with partnership law and modern corporate law. In each instance, the maritime law developed the features of modern corporate law, sidestepping the infirmities of in partnership law that held back capital formation.

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.¹⁶

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 can commit torts.¹⁷ The personification is to such an extent that the ship is liable even when 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."¹⁸ The ship can sue in the name of its owners, and be sued in its own name.¹⁹ The ship can have its own agents, who are not necessarily those of the owners.²⁰

¹⁴ See CLARK, *supra* note 6, at 2-24 (explaining the dominance of the corporation by contrasting each of its attributes with the corresponding attributes of partnership).

¹⁵ See, e.g., HURST, at 19-20 (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.")

¹⁶ 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.

¹⁷ *Tucker v. Alexandroff*, 183 US 424, 438 (1902) (the ship "She acquires a personality of her own; becomes competent to contract... She is capable, too, of committing a tort, and is responsible in damages therefor.").

¹⁸ *The Barnstable*, 181 U.S. 464 467 (1901).

¹⁹ *Id.* (the ship "and 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. 237, 9 Wall. 237 (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 date as to lawsuits by and against the partners, as to which concepts similar to partnership continued to prevail. See JOSEPH STORY, *STORY ON PARTNERSHIP*, 636-653 (1841).

²⁰ See *id.* ("Her owner's agents may not be her agents, and her agents may not be her owner's agents")

The ship can have an indefinite or perpetual duration, that outlives its owners and which lasts so long as its identity is preserved.²¹ Importantly, unlike the partnerships of the day, the ship's personality is independent of those who happen 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 had a rudimentary form of property ownership through the maritime 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.²²

The legal personality of the ship received its most memorable articulation by the Supreme Court in *Tucker v. Alexandroff*, in which Justice Brown captured the transformation of the ship from personal property into a person, writing "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."²³

The personality of the ship contrasts sharply with the "aggregate" view of partnerships that prevailed at the time. Historically, partnerships generally couldn't sue or be sued in their own names, but required all the partners to be joined,²⁴ which wasn't definitively resolved until the 1997 Revised Uniform Partnership Act.²⁵ 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 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.²⁶ Without limited liability, investors would need to engage in extensive monitoring of corporate activities, which of course limits the ability of large numbers of strangers to invest passively. This 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.²⁷

²¹ *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 group that owns it.

²² See, e.g., *Gowen Inc. v. F/V Quality One*, 244 F. 3d 64 (1st Cir. 2001)

²³ *Tucker v. Alexandroff*, 183 US 424, 438 (1902).

²⁴ JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP 343-347 (1841)

²⁵ See REVISED UNIF. P'SHIP ACT § 307 & CMT. (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1997) (amended 2013)

²⁶ See Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 262 (1967).

²⁷ More recent scholarship has recognized, however, that affirmative asset partitioning is at least as important as limited liability. See *infra* Part ____.

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 are liable only for the value of the ship, even if the ship has been damaged or destroyed.²⁸ This was a feature of maritime law of “almost all shipowning countries,” recognized later in England, and formalized by statute in the United States in 1851.²⁹ 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.”³⁰ 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.³¹ Further, ship owners can be liable on contracts where the creditor is looking to the owner’s creditworthiness under the “personal contract” exception in maritime law. 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.³² 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 rule in partnerships.³³ 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

²⁸ See GILMORE & BLACK, *supra* note __, at 818.

²⁹ See *id.* at 818-819.

³⁰ 222 U.S. 96, 106 (1911).

³¹ The idea of including multiple vessels together has a long history. See, e.g., Note, 8 Va. L. Rev. 127 (1921) (describing cases examining whether the limitation of liability under the act should be limited to the offending vessel or “the value of the whole flotilla engaged in the joint enterprise.”)

³² See *infra* Part I.A.5.

³³ For English authorities, see, e.g., WILLIAM WATSON, A TREATISE OF THE LAW OF PARTNERSHIP 54-55 (1807). For American, see STORY, *supra* note __, at 630.

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.”³⁴ Story is in agreement that the shares of ship were transferable.³⁵

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 legal limits restraints on alienation. 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.³⁶

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.³⁷ 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.³⁸ 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.³⁹

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 obligate 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

³⁴ THEOPHILUS PARSONS, *A TREATISE ON MARITIME LAW*, book 1, p. 84 (1859).

³⁵ See STORY ON PARTNERSHIP, *supra* note __, at 630.

³⁶ L. C. B. Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369, 1377-1378 (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).

³⁷ The canonical modern citation is Delaware Section 141.

³⁸ Robert Charles Clark, 23 (1986)

³⁹ Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 621, 626, (2006) (“The chief economic virtue of the public corporation is ... that it provides a hierarchical decisionmaking structure well-suited to the problem of operating a large business enterprise with numerous employees, managers, shareholders, creditors, and other inputs.”)

husband, the role of managing the ship.⁴⁰ Thus, the maritime law recognized the efficiency of management of the organization through centralized officers, rather than directly by the co-owners.

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 personally.⁴¹ This is a concept inconsistent with the nature of the corporate entity, where shareholders have no agency qua shareholders.⁴²

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.⁴³ The owners generally could not bind the ship itself to a maritime lien, which is the equivalent of binding the ship as an entity, as shown below. The master is the one who can create maritime liens, even when the owner could not, under early case law.⁴⁴ It was doubtful that part-owners could bind other part owners by implied authority.⁴⁵ The maritime law therefore developed the beginnings of a fully corporation-like delegation, where the master, like the officers, has an agency not shared even with the shipowners, like corporate shareholders. 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 comprises two “key elements,” which are “the right to control the firm, and the right to receive the firm’s net earnings.”⁴⁶ An essential element of delegated management is that this management is elected by the owners.⁴⁷ In the partnership, the default rule was that the majority of persons would control, not the majority in interest or investment.⁴⁸ 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”.⁴⁹ This was not only true of partnerships but of early corporations in England and the United States.⁵⁰

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

⁴⁰ Story on Partnership, at 588.

⁴¹ See Angell and Ames 31 (1866).

⁴² See Angell and Ames 31 n. 4 (1866) (“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.”)

⁴³ Story on Partnership at 635-636.

⁴⁴ 22 U.S. 409, 416 (“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.”)

⁴⁵ Parsons 97-99 (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.* fn. 2.

⁴⁶ Anatomy chapter.

⁴⁷ See Essential Elements of Corporate Law 1.2.4.

⁴⁸ Story on Partnerships at 598 (1841).

⁴⁹ Story on Partnerships at 182.

⁵⁰ See See Pauline Maier, 50 William and Mary Quarterly 51, 77-78 & 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).

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. These attributes ensure that management is appointed by the investor owners, in proportion to their ownership stakes.

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 contrast, in ships the owners exercised control according to their “value” or “interest” in the ship.⁵¹ 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.⁵² The partnerships of the day lacked most of these features, which further limited their usefulness for larger-scale enterprises.

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.”⁵³ 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 Kraakaman, in which they argued that asset partitioning (later referred to as entity shielding) was the “essential role of all forms of organizational law.”⁵⁴ Another important aspect of entity shielding was developed by Blair, argued that capital lock-in was “the critical advantage of the corporate form.”⁵⁵

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. 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 protects the entity from the debts of the owners.⁵⁶ 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.⁵⁷

The maritime law also developed entity shielding, although using an entirely different mechanism. The sea corporation was able to incur obligations in its own name through the maritime lien, a unique institutional feature that made it possible for the ship to function as a nexus of contracts like a corporation. The maritime lien ensured that the creditors of the ship would have priority over the creditors of the owners for all the obligations of the ship. Thus, creditors of the owners of the ship could not access the value of the ship itself, because the creditors of the ship had priority. It was also necessary to ensure

⁵¹ Story on Partnership at 598-599. Story draws an explicit contrast between partnerships and ship ownership in this portion of the book. *Id.*

⁵² Story on Partnership, at 605-606.

⁵³ Morley, at 2167.

⁵⁴ Hansmann and Kraakman at 390.

⁵⁵ Blair, *Locking In Capital* at 389-390.

⁵⁶ Morley at 2167-2168.

⁵⁷ Morley at 2167 (speaking of entity shielding and capital lock in saying “Indeed, to identify their appearance is to discover the rise of the modern firm.”)

that creditors could not force a liquidation of the shipping venture, and that was accomplished through the lock-in features of co-ownership law.

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) provides 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 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 default rules. Instead, they craft detailed and customized contracts to order their relations.⁵⁸ Why do businesses continue to use the corporation—a standard-form entity provided by a governmental concession—with limited customizations through contract?⁵⁹

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. 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.⁶⁰ 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.⁶¹ The law should approximate the terms that parties would bargain for to avoid imposing additional transaction costs of bargaining around them.⁶²

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 writing down the terms could easily be economized by using standard forms created by private parties or organizations. Presumably private parties would do better at creating forms for use than would a corporate code. Other

⁵⁸ As a very close analogy, consider the partnership law, which is not necessary to create a partnership and essentially “fills in the blanks of the parties’ agreements.” Robert Charles Clark 5 (1986). Yet parties do not rely on these statutory defaults; instead they use lengthy partnership agreements.

⁵⁹ 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).

⁶⁰ See, e.g., Easterbrook and Fischel 34.

⁶¹ See Posner, 43 U. Chi. L. Rev. 499, 506 (“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.”)

⁶² See Posner, 43 U. Chi. L. Rev. 499, 507. But [note penalty defaults].

scholars responded that perhaps network effects could explain why the statutorily enacted default provides a focal point.⁶³ 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.⁶⁴ 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 them to question how important limited liability was, as well as whether it really couldn't be replicated by contracts. 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 Kraakman found that some of the most important features provided by corporate law couldn't be assembled by contract.⁶⁵ 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.

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. 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

⁶³ Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 826-829 (1995) (explaining how defaults, even suboptimal defaults, might be preferable in the presence of network externalities).

⁶⁴ See, e.g., Manne, *Our Two Corporation Systems: Law and Economics*, 53 Va. L. Rev. 259, 262-264 (1967) (arguing that limited liability is an "essential aspect of a larger corporate system with widespread public participation"). See Bainbridge and Henderson, at 2 ("The key feature of the corporation that makes it such an attractive form for human cooperation and collaboration is limited liability.")

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

corporation. Contract alone could not feasibly prevent third parties from liquidating the corporation and satisfying judgments. 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—in rem features that prevent third party creditors of the owners from satisfying debts with the assets of the entity.

There are two parts to affirmative asset partitioning. The first is priority. This is what they call "weak entity shielding," where "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."⁶⁶ 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."⁶⁷ The creditor can force liquidation only if a majority of the shareholders agree.⁶⁸ This second feature is what is missing in the partnership, where creditors of the partner can compel liquidation of the partnership.⁶⁹ In later work, the authors term this "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."⁷⁰

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."⁷¹ Indeed, the emergence of these features are the key to the emergence of the modern business organization.⁷² 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.

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 claims on an entity. The maritime lien is a unique maritime mechanism that has only superficial similarities to land-based liens used elsewhere in the law.⁷³ The maritime lien is at the very core of maritime law, constituting "one of the most striking peculiarities of Admiralty law."⁷⁴ In a superficial sense, a maritime lien resembles ordinary liens, in the sense that it is a form of security 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.

⁶⁶ 119 Harv. L. Rev. 1333, 1337-1338

⁶⁷ 110 Yale L.J. 387, 394.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ 119 Harv. L. Rev. 1333, 1338.

⁷¹ Morley at 2167.

⁷² Id.

⁷³ See GILMORE & BLACK, *supra* note __, at 586-589 (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").

⁷⁴ Griffith Price, at 1.

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.⁷⁵ 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.

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.⁷⁶ The lien also persists after sale, even a sale to a bona fide purchaser.⁷⁷ 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."⁷⁸ No common law court can extinguish a maritime lien; it can only be extinguished in an in rem proceeding in federal admiralty court.⁷⁹ 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. 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. "The lien and the proceeding in rem are, therefore, correlative — where one exists, the other can be taken, and not otherwise."⁸⁰ 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.⁸¹

These facts 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.⁸² 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.⁸³ Instead, owners who so contribute will have a lien on the ship,⁸⁴ 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

⁷⁵ *Id.*

⁷⁶ See Robinson at 363.

⁷⁷ *Id.*

⁷⁸ See Raymond P. Hayden & Kipp C. Leland, *The Uniqueness of Admiralty and Maritime Law: The Unique Nature of Maritime Liens*, 79 TUL. L. REV. 1227, 1233 (2005).

⁷⁹ *Id.*

⁸⁰ The Rock Island Bridge at 214.

⁸¹ Robinson, 363-364.

⁸² Robinson at 364.

⁸³ Story on Partnership, at 598.

⁸⁴ Story on Partnership at 623-628.

that are not present in land-based security interests. It is these additional features 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 has emerged. The problem with translating this theory into practice is that Article 9 doesn't allow "floating secured parties," instead requiring a new filing with each creditor, an infeasible solution.⁸⁵ Thus, the land based security interest alone cannot replicate the attributes of an entity such as the corporation. As mentioned above, however, the maritime lien is a "secret lien" in the sense that no filing is necessary to perfect it. Thus, it overcomes this objection.

In a recent paper Eldar and Verstein go deeper into this analysis to determine what exactly prevents security interests from replicating entities. In their view, the key missing piece that differentiates security interests from entities as the "floating priority" offered by entities.⁸⁶ 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. An entity allows this very thing. The entity's creditors have priority against the entity's assets, and this is true equally for later creditors as for earlier creditors. An entity can enter into obligations and those obligations rank equal with prior obligations, absent a contrary agreement. 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."⁸⁷ The vessel also outlives its owners, so it has an existence that, although perpetual only in theory, is independent of those who own it.⁸⁸ This is an essential feature of the corporation.

The maritime lien is truly 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.⁸⁹ 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 problems 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.

⁸⁵ Hansmann and Kraakman, at 418-419.

⁸⁶ Eldar & Verstein, *supra* note __, at 224-232.

⁸⁷ Eldar and Verstein at 218.

⁸⁸ 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.

⁸⁹ See, e.g., *The China*.

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 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.⁹⁰ 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 liquidation protection was further developed by Margaret Blair in an important article, where she refers to it as “lock-in” of capital.⁹¹ Blair argues that the key feature of corporate law that made corporations rise from obscurity to becoming the preferred way of organizing business over the course of the 19th 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.⁹² The fact that capital could be locked in protected all types of investors in the entity, both financial and nonfinancial.⁹³ 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.”⁹⁴

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 (it couldn’t be sold off in pieces) 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.”⁹⁵ 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.⁹⁶ 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 the nineteenth century England and 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

⁹⁰ Hansmann and Kraakman at 403-404.

⁹¹ Blair at 51 *UCLA L. Rev.* 387, 388-389 (2003).

⁹² Blair at 51 *UCLA* at 392.

⁹³ Blair 51 *UCLA* 392-393.

⁹⁴ 51 *UCLA* at 413.

⁹⁵ 36 U.S. 175, 183. He articulated the same sentiment in his treatise, *Story on Partnership* at 599-600. As did Parsons on Partnership, at 579-580 (1870). See also William Theophilus Brantly, *Principles of the Law of Personal Property* 176 (1890).

⁹⁶ 36 U.S. 175, 183.

says the American law (and that of other commercial nations) was to the contrary.⁹⁷ The American courts differed from the English courts in holding a compulsory sale was possible.⁹⁸ But that sale will only be forced in the case of equal division of interests.⁹⁹

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.¹⁰⁰ 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."¹⁰¹ 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."¹⁰²

The liquidation for 50-50 deadlock, somewhat remarkably, anticipated much later developments in corporate law. For example, in modern corporate law such a condition justifies judicial dissolution of the modern corporation, even today.¹⁰³ 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."¹⁰⁴ The latter refers to the fact that there was even a form of dissenters' rights for the minority

⁹⁷ Story on Partnership at 613-619.

⁹⁸ A.C Freeman, COTENANCY AND PARTITION 454-456 (1874).

⁹⁹ Story on Partnership at 613-619. Same, Parsons on Partnership 581 (1870). 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.*

¹⁰⁰ Gerard de Malynes, *Consuetudo, Vel Lex Mercatoria, Or the Antient Law-Merchant* 169 ch. XXX (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).

¹⁰¹ A.C Freeman, COTENANCY AND PARTITION 456 (1874).

¹⁰² A.C FREEMAN, COTENANCY AND PARTITION 456 (1874).

¹⁰³ 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 Delaware General Corporation Law § 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.

¹⁰⁴ Madrugá, at 559.

when disagreements about policy arose.¹⁰⁵ 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 the 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 corporation and the partnership. In the earlier period of this evolution, the available technology was the partnership. Courts regarded the partnership as an aggregate of the partners and not as an entity at all.¹⁰⁶ 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 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 was the “usual form of ownership of a ship” and indeed the law presumed that part-owners of a ship were not partners.¹⁰⁷ Joseph Story, in his commentary on partnership and maritime law, drew the “clear and

¹⁰⁵ Story on Partnership at 599-601.

¹⁰⁶ See, e.g. Harwell Wells, at 1840-1841 (explaining the agreement among the major commentators, Kent, Lindley, and Story, as to the “aggregate” view of the partnership).

¹⁰⁷ Parsons 93 (1869)

settled” distinction between partnership in a ship and part-ownership in a ship.¹⁰⁸ Indeed, Story and other treatise writers routinely contained as separate section on part-ownership of ships, as distinct from partnership.¹⁰⁹ 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,¹¹⁰ 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.”¹¹¹ 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. Partnerships did not have limited liability, transferable shares, centralized management, or entity shielding. 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, 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.”¹¹² Such an organization bears no resemblance to a partnership, 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.”¹¹³ 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 “société par actions”—the corporation.¹¹⁴

¹⁰⁸ Story, Commentaries on the Law of Partnership 585-587; 589; 635. Kent 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.”)

¹⁰⁹ 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, Partnership, 579-655 (1841). Theophilus Parsons included a separate section at the end entirely about “part-owners of ships.” Parsons Partnership 568-593 (2d ed 1870). This followed on the English tradition. See, e.g. William Watson, A Treatise on the Law of Partnership 88-129 (1794). 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 Story Commentaries Partnership 577-578 (1841).

¹¹⁰ See Daniel Y. Overton, A Treatise on the Law of Liens 721-722 (explaining that ships can be owned as part owners or in partnership, with different legal results).

¹¹¹ 3 Kent’s Commentaries 154-155.

¹¹² Arthur Kline Kuhn, A Comparative Study of the Law of Corporations 34-35 (1912).

¹¹³ See, e.g., Holdsworth at 207 (speaking of both partnerships owning shares of ships and shares of ships themselves interchangeably).

¹¹⁴ E. Thaller, Societes par Actions dans l’Ancienne France, Les, 15 Annales Dr. Com. & Indus. Francais, Etranger & Int’l 185, 196-197 (1901)

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 as the constellation of corporation-like features emerge 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. The 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 relationship.¹¹⁵ 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 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.¹¹⁶ It was in the United States that maritime law developed most fully into an organizational law in the mid-nineteenth century, while English maritime organizational law receded. 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”¹¹⁷ need for corporation-like legal technology was great, as early as the seventeenth century. Ships were some of the largest employers until the Industrial Revolution. In colonial times, few businesses had more than a dozen employees.¹¹⁸ Yet even a century earlier, a merchant ship would typically have a crew of at least dozens, and in some cases close to 90.¹¹⁹ 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

¹¹⁵ See Neil Gow, *A Practical Treatise on the Law of Partnership* 6-7 (1830) (“Partnership, therefore, in its extended and complete sense, is a voluntary contract”). See also Angell and Ames 21-24 (1832) (distinguishing between partnerships as mere contracts and corporations that require a charter).

¹¹⁶ Often traced earlier than that, but difficult to show direct transmission.

¹¹⁷ Zhang and Morley develop this term as an explanation for organizational law.

¹¹⁸ Robert Clark at 2.

¹¹⁹ Davis at 105-106.

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 England were not owned by a single owner, but multiple owners, although single ownership increased into the 18th century.¹²⁰ The vast majority of these owners were individuals, with less than 10% being partnerships and very few joint stock companies.¹²¹

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 18th century “there were few outlets for the small investor...industrial investment was curtailed by the ‘Bubble’ Act of 1719.”¹²² In this respect, shipping was exceptional because trading could continue, and yet investing was suitable even for the small investor because vessels were divided into 64 shares.¹²³ Share owners were “free to buy and sell their shares without reference to other owners.”¹²⁴ The investors could even buy 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 “Thus 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.”¹²⁵ 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.”¹²⁶

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 17th and early 18th century, without much clarity as to the boundaries between them or substantive law applicable, prompting parliament to pass the Bubble Act in 1720.¹²⁷ That enactment

¹²⁰120 Simon Ville, *The Growth of Specialization in English Shipowning, 1750-1850*, 46 *The Economic History Review* 702, 707-708 (1993).

¹²¹ Simon Ville, *The Growth of Specialization in English Shipowning, 1750-1850*, 46 *The Economic History Review* 702, 709 (1993).

¹²² Simon P. Ville, *English Shipowning During the Industrial Revolution* 2.

¹²³ Simon P. Ville, *English Shipowning During the Industrial Revolution* 2.

¹²⁴ Simon P. Ville, *English Shipowning During the Industrial Revolution* 2.

¹²⁵ Ralph Davis, at 98.

¹²⁶ Simon P. Ville, *English Shipowning During the Industrial Revolution* 2.

¹²⁷ Holdsworth 214-220.

prohibited acting as a joint stock company with transferable stock without an Act of Parliament or a charter.¹²⁸ Although there is debate about the extent of the Act's impact, it made the cost of forming joint stock companies prohibitive, essentially stamping out their development for a century until its repeal in 1825.¹²⁹ As a result the corporation was essentially stagnant in England in its development for a century after the Bubble Act, and instead the partnership was the vehicle for business during the period.¹³⁰

The partnership, however, did not 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.¹³¹ 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 thing necessary to 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 that. 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 is difficult to trace, in part because of its antiquity. One commentator described shipowners' limited liability as "[a] principle as old as the law itself."¹³² The principle and rationale were clearly articulated by Grotius.¹³³ Pothier noted in the mid 18th

¹²⁸ Holdsworth 220.

¹²⁹ Holdsworth 221.

¹³⁰ See Pauline Maier, 50 William and Mary Quarterly 51, 51 (1993).

¹³¹ E. Thaller, *Societes par Actions dans l'Ancienne France*, Les, 15 Annales Dr. Com. & Indus. Francais, Etranger & Int'l 185, 197 (1901). Holdsworth concurs in this, describing ship ownership as giving rise to freely transferable shares and limited liability, "almost adistinct legal person, and to make the lawyers regard it as an entity not very different from a corporation." *Id.* at 207.

¹³² Wharton Poor, *A Shipowner's Right to Limit Liability in Cases of Personal Contracts*, 31 YALE L.J. 505, 505 (1922).

¹³³ Hugo Grotius, *The Rights of War and Peace*, Archibald Colin Campbell, ed. 1814) 2, ch 11 Section 13 (1625) "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 each 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

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.”¹³⁴ The celebrated 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,¹³⁵ but a de facto limited liability was already in place even in the 1700s in England.¹³⁶

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.¹³⁷ 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.¹³⁸ Thus, the limitation of liability in the United States, at least from that point forward, was governed by the statute, rather than the general maritime law.¹³⁹

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 18th century.¹⁴⁰ In the United States, states enacted statutes providing for limited liability until, by 1839, all New England states but Rhode Island had enacted them.¹⁴¹ Some states even went back and forth between limited and unlimited liability in the mid-1800s.¹⁴² Shareholder liability continued in California until 1931.¹⁴³ As a result, the doctrines of limited liability “were thus not present at the birth of the American business corporation.”¹⁴⁴ This has led scholars to question the commonly-held belief that limited liability drove the successful proliferation of the corporation.¹⁴⁵

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

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.”

¹³⁴ Robert Joseph Pothier, *Treatise on Maritime Contracts* translated by Caleb Cushing 28-29 (1821).

¹³⁵ See *The Rebecca*

¹³⁶ See Davis, at 96-97 (explaining that limited liability prevailed as a practical matter, although legal theory had perhaps not developed the reasons why).

¹³⁷ 80 U.S. 104, where the Court argues that the 1851 Act effectively codified the law already prevailing in the maritime law.

¹³⁸ 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* 28-29. However, as the *Rebecca* more persuasively argued earlier, that statement is overly broad.

¹³⁹ See *The Scotland*, 105 U.S. 24, 28-29.

¹⁴⁰ Handlin and Handlin 8-17. Some authorities give earlier dates, indeed much earlier, as discussed in Blumberg, *Limited Liability and Corporate Groups*, at 578-581.

¹⁴¹ Blumberg 594.

¹⁴² See Blumberg 595.

¹⁴³ Blumberg at 597-599.

¹⁴⁴ Handlin and Handlin 22.

¹⁴⁵ See, e.g., JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970* 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).

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.¹⁴⁶ The rationale is simple; when the ship appears in a distant port, the owners are unknown and cannot be the source of credit; instead, credit is predicated on the ship and its cargo.¹⁴⁷

At the same time the maritime law was developing a robust organizational law, the land-based corporation was “all-but-moribund institution in late eighteenth-century England.”¹⁴⁸ 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.¹⁴⁹ This process culminated in the 1862 Companies Act. The “ultimate triumph” of limited liability came after the United States and 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.¹⁵⁰ The American corporation owed much less to its English forebears than might be thought.¹⁵¹

In America, it was the corporation rather than the unincorporated joint stock association of England, that predominated from the outset.¹⁵² Angell and Ames say the American corporations were closer to the Roman.¹⁵³ 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.¹⁵⁴ “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.”¹⁵⁵

The existing business forms, such as proprietorships, partnerships, and joint-stock companies all lacked important features of the corporation.¹⁵⁶ In the early American republic, the corporation was only available for very specific purposes.¹⁵⁷ Even as business corporations developed most often uses of the

¹⁴⁶ E. Thaller, *Societes par Actions dans l’Ancienne France*, Les, 15 Annales Dr. Com. & Indus. Francais, Etranger & Int’l 185, 196-197 (1901).

¹⁴⁷ E. Thaller, *Societes par Actions dans l’Ancienne France*, Les, 15 Annales Dr. Com. & Indus. Francais, Etranger & Int’l 185, 196-197 (1901).

¹⁴⁸ See Pauline Maier, 50 William and Mary Quarterly 51, 51-52 & fn. 2 (1993). Adam Smith saw the “exclusive 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).

¹⁴⁹ Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. Econ. Hist. 1, 3 (1945). The same was true in France, where corporations did not progress any faster, business remaining in partnership form. *Id.* at 4.

¹⁵⁰ See Blumberg, 585. See also L. C. B. Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369, 1371-1372 (1956) (“[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.”)

¹⁵¹ See Pauline Maier, 50 William and Mary Quarterly 51, 83 (1993).

¹⁵² See Blumberg 587.

¹⁵³ At 28 (1832).

¹⁵⁴ Mahoney, at 888-890.

¹⁵⁵ L. C. B. Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369, 1370 (1956).

¹⁵⁶ 51 UCLA at 404-423.

¹⁵⁷ 51 UCLA 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”).

business corporation continued for these specific public purposes such as public utilities, banks, transportation, insurance companies, etc. until the mid-1800s.¹⁵⁸ Indeed, it was not until the 1850s that a majority of the states had general incorporation laws¹⁵⁹ and special charters continued didn't wane fully until the 1870s and 1880s.¹⁶⁰ 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 corporation itself developed them. In particular, the broad outlines of limited liability for shipowners emerged in the middle ages, and continued in Anglo-American shipping, albeit inconsistently, until codified in England and later in the United States.

The discussion above has thus far left to the side one recurring theme in the literature on 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.¹⁶¹

The *commenda* is seen as an early form of limited partnership. This structure had a limit in that it didn't offer limited liability to all owners holding equal interests.¹⁶² In a sense it did offer entity shielding, however, when taken in its historical context (i.e. disregarding modern notions of tort liabilities).¹⁶³ The *commenda* was common in the middle ages throughout Europe, and had some presence in England.¹⁶⁴ It was the ancestor of the *societe en commandite* in France¹⁶⁵ and the limited partnership elsewhere.¹⁶⁶

Interestingly, this predecessor and the limited partnership never really established themselves in England.¹⁶⁷ Modern forms of English limited liability probably cannot be traced to the *commenda*, as it left "no direct descendant there."¹⁶⁸ The more traditional partnerships never developed personality in England.¹⁶⁹ In the seventeenth century the joint stock company began to develop, together with corporate personality and limited liability.¹⁷⁰ Thus, there was a gap in the evolution between the *commenda* and the

¹⁵⁸ James Willard Hurst 17-18.

¹⁵⁹ 51 UCLA at 426.

¹⁶⁰ James Willard Hurst 18.

¹⁶¹ Holdsworth at 104.

¹⁶² E. Thaller, *Societes par Actions dans l'Ancienne France*, Les, 15 *Annales Dr. Com. & Indus. Francais, Etranger & Int'l* 185, 196 (1901).

¹⁶³ Mahoney at 880-882.

¹⁶⁴ Holdsworth 196-197.

¹⁶⁵ Holdsworth 196.

¹⁶⁶ Holdsworth at 104.

¹⁶⁷ Holdsworth at 196.

¹⁶⁸ Holdsworth 197.

¹⁶⁹ Holdsworth at 196-199.

¹⁷⁰ Holdsworth 202-205. Holdsworth explains that ultimately it was agreements among the shareholders not to pursue levitations that was necessary to establish the full limited liability. *Id* at 203-205.

corp. In the United States, the limited partnership was largely adapted from the French Code de Commerce, thus bypassing England.¹⁷¹

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 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 organizational law was the maritime lien, which itself is the distinctive feature of maritime law. The origins of the maritime lien are “shrouded in obscurity,”¹⁷² 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 they are contractual/quasi-contractual liens or tort liens. The contractual or quasi contractual liens he sees the origins in the Roman law of hypothec.¹⁷³ The vessel has a lien on the cargo and the cargo no the vessel. In the classic phraseology, “*Le Batel est oblige a la merchandise, et la merchandise au batel.*”¹⁷⁴ 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.¹⁷⁵ But it's worth noting the lien for torts was not well established in England until the mid nineteenth century.¹⁷⁶ In reality, whatever its origins, 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.”¹⁷⁷

¹⁷¹ See 3 Kent Com. 34-36 (1832). 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.

¹⁷² Hebert, at 382.

¹⁷³ Holdsworth vol. VIII 271 (1926).

¹⁷⁴ Cleirac, *Les Us et COustues de La Mer* 597 (1661).

¹⁷⁵ Holdsworth 271-273.

¹⁷⁶ Holdsworth 272.

¹⁷⁷ 22 Mich. L. Rev. 10, 11.

Gilmore and Black assert that “Anglo-American lien law is a 19th century creation.”¹⁷⁸ Gilmore and Black in part are responding to the fact that maritime law was not handed over in complete form from England. Instead, it emerged the kaleidoscopic traditions of the sea borrowed from various times and places. The development of the 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. Although it is true that American law developed this further than anywhere else during that century, 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 the 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.

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 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.”¹⁷⁹

Ultimately, the origin of the lien tells less about its success than its 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. There is an awareness that Admiralty law in some way caused limited liability and opened the investment to smaller shareholders.¹⁸⁰ 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 the need for many people to cooperate to accomplish long-distance trade was the “demand side” driver for the development of organizational law.¹⁸¹

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.¹⁸² Because plaintiffs were largely in control of where cases were brought, that arguably created an incentive for courts to compete with pro-plaintiff rules (subject to Parliamentary

¹⁷⁸ Gilmore and Black 2d 590 (1975). 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.

¹⁷⁹ *The China* at 68.

¹⁸⁰ Simon P. Ville, *English Shipowning During the Industrial Revolution* 2, 11.

¹⁸¹ See, e.g., Harris. See also Zhang, Morley at 12 (describing this as a “demand side” explanation).

¹⁸² Daniel Klerman, 74 U. CHI. L. REV. 1179, 1179-1180 (2007).

constrint).¹⁸³ Klerman presents evidence that when an 1800 statute took those fees away, the courts became more pro-defendant.¹⁸⁴ But by that time, it had transferred to the US.

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.¹⁸⁵ Because the maritime lien is a plaintiff-friendly mechanism, the plaintiffs may have preferred courts that recognized these liens. This was the mechanism by which the lien developed into a personification of the vessel.

The organizational maritime law reached its zenith in America in the second half of the 19th 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*¹⁸⁶ adopted the personification theory of the maritime lien over the procedural theory, relying in part on the United States precedent.¹⁸⁷ But the English law took a turn away from personification in *The Dictator*.¹⁸⁸ This didn't seem to dent English sea dominance very much. But by this time, the corporation was widely available on both sides of the Atlantic, and this is likely the reason it didn't harm English shipowning.

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's security in roughly the same sense that a corporation's assets are security to the creditors of the corporation. A more accurate view is to see the maritime lien as 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, 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 organizational theory approach to maritime law requires a rethinking of the identification of the "personification theory" with Holmes's assertion that the maritime lien is a descendant of deodand.¹⁸⁹ 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's what's available to compensate creditors, and that's all that's available. 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

¹⁸³ Daniel Klerman, 74 U. CHI. L. REV. 1179, 1179-1181 (2007).

¹⁸⁴ Daniel Klerman, 74 U. CHI. L. REV. 1179, 1204-1214 (2007). Unfortunately Klerman didn't model the Admiralty court as part of the analysis.

¹⁸⁵ Holdsworth 272. See also, Christopher Hill, Maritime Law 93 (2d. ed 1985) ("Before 1852 in England at common law all actions were by way of proceedings in personam.")

¹⁸⁶ *The Bold Buccleugh* 7 Moo. P.C. 267, 13 E.R. 884 (P.C.) (1851).

¹⁸⁷ *The Nestor*, 18 Fed. Cas. 9, 1 Sumn. 73 (C.C. ME, 1831).

¹⁸⁸ 1892 P. 304

¹⁸⁹ Holmes, *The Common Law* 24-30 (arguing that the English tradition of deodand explains the notion of the ship's liability).

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.¹⁹⁰ One prevalent perspective is the evolutionary argument that the corporation prevailed because “the corporation had greater fitness for the environment in which it developed.”¹⁹¹ The sea corporation developed earlier but reached its most complete exposition around the same time, and for the same reasons. 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 1831.¹⁹² 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.”¹⁹³ 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,¹⁹⁴ the same time period as the maritime law. How did this happen? There is a strong current of evolutionary metaphor in law & economics explanations of the common law, that what survives the common law process is efficient.¹⁹⁵ Although the decades that followed saw a number of important works that undermined the seeming certainty of the efficient evolution result,¹⁹⁶ 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 that work best.

This judicial development raises the question suggests the potential explanation given in evolutionary accounts of law, that common law tends toward efficiency in a way that statute law does not.¹⁹⁷ Posner argued that the institution of common law tends over time toward efficiency.¹⁹⁸ The subsequent literature has explored mechanisms, with one important stream looking at evolutionary processes.¹⁹⁹ 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 to move toward jurisdictions with favorable judicial regimes. The fact of the convergent evolution of multiple

¹⁹⁰ 89 Geo. L.J. 439, 439.

¹⁹¹ Robert Charles Clark 4 (1986).

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

¹⁹³ Id. at 378-380.

¹⁹⁴ See, e.g., JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970 28 (1970).

¹⁹⁵ See, e.g., Roe Chaos and Evolution, at 641-641 (explaining this as the “classical evolutionary paradigm”).

¹⁹⁶ See, e.g., Ben Depoorter and Paul H. Rubin, Judge Made Law and the Common Law Process, in 3 The Oxford Handbook of Law and Economics, 129-137 (2017) (describing several works refining and questioning the basic result of efficient evolution).

¹⁹⁷ A common starting place is Richard A. Posner, The Economic Analysis of Law ch. 13 & 19 (1977).

¹⁹⁸ Posner, Economic Analysis of Law (1986). Posner specifically included Admiralty in “common law” for this purpose. See Economic Analysis of Law 29 (1986).

¹⁹⁹ See, e.g., Paul H. Rubin, Common Law and Statute Law, 11 J. Legal Stud. 205, 205-206 (1982).

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.²⁰⁰ 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.²⁰¹ 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. From the Mills of Toulouse,²⁰² to the commenda, etc. All were implemented through contract law, and forms of partnership, rather than property law. The property law aspect is the unique feature 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 ancestry 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.²⁰³ Indeed, that piece explicitly notes that “admiralty law can be seen as an early form of organizational law with rules that facilitated asset partitioning.”²⁰⁴

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.”²⁰⁵ The corporation required a “concession,” or charter from the king, parliament, or a state legislature, or other authority.²⁰⁶ The view was that only the act of the sovereign (here the legislatures)

²⁰⁰ I owe the ideas in this paragraph to Paul Mahoney.

²⁰¹ See Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Amer. Econ. Rev.* 347, 348-350 (1967).

²⁰² See Germain Sicard, *The Origins of Corporations: The Miss of Toulouse in the Middle Ages*, translated by Matthew Landry x (2015) (arguing that “the mill companies of Toulouse in the fourteenth century had all of the features that characterize modern corporations”).

²⁰³ Mahoney, *supra* note ____.

²⁰⁴ Mahoney, *supra* note ___, 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 Mahoney at 883, and not the ship, which is.

²⁰⁵ James Willard Hurst, at 15-17.

²⁰⁶ Indeed, this is, in a sense, the enduring holding of *Dartmouth College*. See Blair, *How Trustees of Dartmouth College v. Woodward Clarified Corporate Law*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3830603. Dartmouth College is often cited for the

could create a corporation, and then almost always for public facing purposes.²⁰⁷ That charter was originally only for very narrow sets of purposes especially charitable, municipal, not business in general.²⁰⁸

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 arose “proprietary foundation” of property law, with a “contractarian superstructure” constructed over the top.²⁰⁹ This builds upon the growing recognition that the modern corporation is built upon property law, rather than the pure nexus of contracts.²¹⁰ 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 purportedly 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 communication was impractical. 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. 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.²¹¹ 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.

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

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 at 893.

²⁰⁷ James Willard Hurst at 14-15;17-18.

²⁰⁸ See Blair sssrn paper, at 8-18.

²⁰⁹ See John Armour & Michael J. Whincop, *The Proprietary Foundations of Corporate Law*, 27 OXFORD J. LEGAL STUD. 429, 449 (2007).

²¹⁰ See Robert Anderson, *A Property Theory of Corporate Law*.

²¹¹ Hansmann and Kraakman, at 399-405.

consideration which controls every other.”²¹² This was the court’s rationale as to why subsequent liens prevail over earlier ones.²¹³ 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.

Thus, although maritime liens are often viewed as a form of security for creditors, they perform it 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 of 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 on this area. Creditors face two main risks: the risk of default, which the creditor must 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.²¹⁴ The borrower can opportunistically increase the risk of default by, for example, taking on additional debt not subordinated to the original debt.²¹⁵ Posner divides these up into the costs of investigation and the cost of supervision.²¹⁶ The latter could also be called the cost of monitoring. These investigation expenses and contractual requirements increase the cost of transacting and decrease efficiency.²¹⁷ Therefore, it’s desirable to craft rules that economize on them 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.”²¹⁸ 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.”²¹⁹

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.²²⁰ Thus, the parties fail to capture the efficiencies of secured lending, as the lender has to forecast the likely future debt and the interest rate is adjusted higher.²²¹ The line between debt and equity is blurred in the admiralty context. The lien holders are considered as “co-owners” in a sense. Indeed, this makes some economic sense.²²² As the liabilities of the vessel exceed its liquidation value, the earliest

²¹² The *St. Jago de Cuba*, 22 U.S. 409, 416 (1824).

²¹³ The *St. Jago de Cuba*, 22 U.S. 409, 416 (1824).

²¹⁴ See Posner, 43 U. Chi. L. Rev. 499, 507-509.

²¹⁵ See Posner, 43 U. Chi. L. Rev. 499, 504.

²¹⁶ See Posner, 43 U. Chi. L. Rev. 499, 507-509.

²¹⁷ See Posner, 43 U. Chi. L. Rev. 499, 507-509.

²¹⁸ 59 U. Chi. L. Rev. 645, 652-653.

²¹⁹ 59 U. Chi. L. Rev. 645, 652-653.

²²⁰ 88 Yale L.J. 1143, 1161-1164 (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).

²²¹ *Id.*

²²² It is worth noting, however, that Congress perceived this as a bug rather than a feature, which was one of the motivations for enacting the Ship Mortgage Act, which created the preferred ship mortgage.

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.

In the modern era, 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.²²³ As a result, limitation of liability and other corporation attributes are less important than they once were.²²⁴ However, far from undermining the organizational 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, the fact that the features of modern corporations developed independently in similar forms suggests it's futile to search for a single origin of the business association, because they have many origins at different times that satisfy to different criteria the attributes of modern economic theory. 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 ownership from control by necessity, as the owners didn't navigate the ship, and the owners couldn't communicate easily with the ship. Monitoring was nearly impossible, and without limited liability extensive monitoring is necessary. That would have been essentially impossible for a ship sailing the globe in an age before communication 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 as a means 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,"²²⁵ 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

²²³ Martin Davies, 'The Future of Ship Arrest', in Paul Myburgh (ed), *The Arrest Conventions: International Enforcement of Maritime Claims* 308-320 (Hart Publishing 2019).

²²⁴ See Gilmore and Black at 818.

²²⁵ Holmes, *The Common Law* 26.

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 without the state.²²⁶

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 for the maritime lien.

Thus, the fact that the ship achieved the features of modern corporate law without the state 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. This probably happened because of the fortuitous circumstance that the business is physically contained within the ship, a movable. This made the part-owners tenants in common, meaning the property rules of tenants in common rather than the contract rules of partnership applied. This is what made it possible to have transferable interests with passive owners. Further evidence of the property nature of corporate organization. Yet this very nature of 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-pollinating 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 organizational 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

²²⁶ See Taisu Zhang and John Morley, *The Modern State and the Rise of the Business Corporation*, __ Yale L.J. __ (2022).

discusses implications for the future of 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 “uniformity” or “harmony.”²²⁷ Closer to the mark are the rationales behind Congressional enactments such as the Limitation Act and the Ship Mortgage Act—that the rationale is to increase investment in vessels. These rationales still fall short, because obviously 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 organizational theory of maritime law supplies a set of principles for interpreting and applying the 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 organization, the logic of these doctrines emerge. 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.

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 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 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. Gilmore and Black critiqued it, 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.”²²⁸ Learned Hand “archaic.. an animistic survival from remote times.”²²⁹ Defenders of the doctrine rely on somewhat narrow examples of specific situations to

²²⁷ 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).

²²⁸ GILMORE & BLACK, *supra* note __, at 615-616.

²²⁹ The *Carlotta*, 48 F.2d 110,112 (2d Cir. 1931).

illustrate its benefits.²³⁰ But the organizational theory of maritime law shows that this “personification theory” of the maritime lien is in fact a highly efficient solution to recurring problems.

The critiques dismissed the personification as antiquated in part because they didn’t have the modern economic theory to understand its function. The failure to perceive the organizational role of maritime law has led commentators to miss this logic. 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 [what was it?]”. 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 purpose is to provide an efficient organizational law of the vessel that enables parties to make efficient contracts they otherwise couldn’t. The in rem action and the maritime lien are the exclusively federal admiralty features. 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 organizational theory, regarding each ship as a business entity, clarifies many doctrines that otherwise muddled. 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. The rules that exist should enable this, not attempt to override them. Viewed through this lens, confusing doctrines are made clear and light is shed on controversies. 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,²³¹ has given rise to various interpretations.²³²

The “personal contract” doctrine has been much criticized for many decades.²³³ Its rationale has eluded the 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

²³⁰ [Davies personality article]

²³¹ *Richardson v. Harmon*, 222 U.S. 96, 107, 32 S.Ct. 27, 30, 56 L.Ed. 110 (1911)

²³² See GILMORE & BLACK, *supra* note __, at [].

²³³ See, e.g., John W. Castles III, *The Personal Contract Doctrine: An Anomaly in American Maritime Law*, 62 Yale L.J. 1031, 1036-1037 (1953) (lamenting the lack of clear rationale for the personal contract doctrine and resulting ambiguities in its application).

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.²³⁴

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*²³⁵ was whether the breach was of a duty the owner was personally bound to perform. Neither should govern whether the personal contract rule should apply or not. Instead, under the organizational theory the question is what was the intention of the parties. The preferable rule is one of the parties’ intent, the credit of the owner. This brings it full alignment with maritime liens, which again is the question of whether the parties intend the ship to be liable.²³⁶

3. Choice of law for maritime liens.

The narrow but straightforward example of the personal contract doctrine illustrates the principles to help resolve the much broader and more important question of choice of 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.²³⁷ The dissent in that case saw the maritime lien as a right of property and this is more consistent with the general maritime law.²³⁸

In contrast, the personification theory that prevails in the United States, at least in the organizational sense introduced here, allows 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. The presumptions applied 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 owners creditors seize business assets, and that there be a “varied menu” of all of the options for the parties to choose from.²³⁹ 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 necessities, where they might not elsewhere.

²³⁴ 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.

²³⁵ 257 F. Supp. 130 (SDNY 1919)

²³⁶ Oddly, the leading paper on this expressly observes this alignment, see Castles, *supra* note __ at 1036, yet doesn’t make the connection that both doctrines are aligned because they are addressing who are the intended obligors on the contract.

²³⁷ See Christopher Hill, *Maritime Law* 108 (2d ed. 1985).

²³⁸ See Christopher Hill, *Maritime Law* 108 (2d ed. 1985).

²³⁹ See Mahoney at 876.

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 doesn't. Fundamentally, the organizational 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 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. 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.²⁴⁰ Although 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,²⁴¹ or even support the opposite proposition.²⁴²

The organizational theory shows what the purpose of that rule was, and why it only should apply in specific cases. Maritime liens affect the interests of third parties, not just those parties to the contract. The rule that parties can't create maritime liens by contract is designed to protect the existing creditor expectations. Otherwise, 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's inherent in the maritime law is important for reducing the cost of credit. It allows the creditor some assurance that future 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's granting a security interest. Question is whether it's "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 in depth. Most maritime claims give rise to maritime liens.²⁴³ 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. In such cases, the organizational theory would agree that, regardless of the parties' intent, no maritime lien would be created.

²⁴⁰ *Triton Marine Fuels v. M/V PACIFIC CHUKOTKA*, 575 F. 3d 409, 416 (4th Circuit 2009).

²⁴¹ *Vandewater v. Mills*, 60 U.S. 82 (1856)

²⁴² *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.")

²⁴³ See *Gilmore and Black*, *supra* note ___, at 625.

4. Jurisdictional and Procedural Implications

The organizational 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, it may not have much purchase on procedural questions. However, the theory may offer some insight into some of the otherwise anomalous doctrine of admiralty jurisdiction.²⁴⁴

One of the most surprising and seemingly anomalous doctrines in admiralty jurisdiction is the rule that a contract to 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 organizational 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 doesn't implicate the need to borrow on the credit of the ship, apart from the owner, as does its operation.²⁴⁵ Indeed, the Supreme Court has expressed some indirect support for this rationale.²⁴⁶

5. The Priority of Maritime Liens

Finally, the organizational 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.²⁴⁷ This has created confusion in the lower courts in stratifying the priorities in maritime liens created at different times. The experience with corporate law would suggest that flattening the temporal priority of maritime liens, so that they all rank equally regardless of when they are created, would be adequate and simpler. This is especially the case considering that the interposition of a ship mortgage can invert the priority of maritime liens, which makes little sense. The purpose of the Ship Mortgage Act was to make the ship mortgage a maritime lien. If the ship is a business organization, it would make sense to put all maritime liens on a parity within their classes, and perhaps to collapse ship mortgages with non-preferred liens.

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.

²⁴⁴ One oddity under the organizational theory is that flag state jurisdiction doesn't govern maritime law in the same way that, for example, state of incorporation governs internal affairs in corporate law.

²⁴⁵ 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.

²⁴⁶ [CHECK OUT 61 US 393, at 401-402, which explains that the presence of the owner in such a transaction makes it not a transaction that should bind a ship]

²⁴⁷ See Gilmore and Black at 588.

The maritime law offers the experience of an alternative system solving the same economic problems with different tools. In maritime law, the commercial law 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 fitness advantages that are 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, which is not merely to externalize costs but to facilitated credit.²⁴⁸ But the effect of limited liability is, inevitably, to externalize some costs. 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 on third parties.²⁴⁹ Regardless of whether the corporation is seen 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.²⁵⁰ First, although some creditors (such as sophisticated contract creditors can adjust), not all creditors can. In particular, tort creditors, which is the “involuntary extension of credit,” and limited liability can’t be contracted around.²⁵¹ Similarly, although banks could do it, trade creditors, in particular, 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.²⁵²

The maritime law appears to have identified 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 parallels to the corporate context may offer lessons for a more efficient and enlightened version of priorities when corporations are insolvent. The law “just beginning the task of sorting throughthe need to protect third-party creditors unaffiliated with the entity itself.”²⁵³ These issues, which 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

²⁴⁸ See Posner, 43 U. Chi. L. Rev. 499, 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.”)

²⁴⁹ See, e.g., Paddy Ireland, Limited liability, shareholder rights and the problem of corporate irresponsibility, 34 Cambridge Journal of Economics 837, 853-854 (2010) (arguing that the corporation is advantageous for business owners but “bad news for everyone else”).

²⁵⁰ L.A. Bebchuk and J.M. Fried, The Uneasy Case for the Priority of Secured Claims in Bankruptcy’, 105 Yale LJ 857 at pp. 881-890. (1996)

²⁵¹ Posner, 43 U. Chi. L. Rev. 499, 506.

²⁵² Posner, 43 U. Chi. L. Rev. 499, 519-520.

²⁵³ Hansmann, Kraakman and Squire at 1403.

creditors has long been advanced in influential works on corporate law and limited liability.²⁵⁴ Admiralty provides an example to see it in operation. This is exactly what the priority system of the 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 the movements corporate bankruptcy law have made in this direction have often been anticipated by maritime law. As an example, the federal bankruptcy law provided priority for employees' wages starting in 1841.²⁵⁵ This had been the rule long before in maritime law, where "the seaman's claim for his wages is preferred before all other charges."²⁵⁶

The maritime law developed organically, over many centuries and through the interaction of many different legal systems. It is not surprising 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."²⁵⁷ 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 source of the legal technologies we have long associated with it."²⁵⁸

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 Middle Ages.²⁵⁹ This argument makes important but potentially limited points, as the trust developed many features of modern corporate law, but not all of them. The trust didn't develop legal personality.²⁶⁰ The trust couldn't be sued in its own name, although special joinder rules allowed courts to approximate the same result.²⁶¹ Other scholars have

²⁵⁴ See, e.g., David W. Leebron, Limited Liability, Tort Victims, and Creditors, 91 Colum. L. Rev. 1565, 1643-1650 (1991).

²⁵⁵ 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).

²⁵⁶ See Abbott, Part IV, Chapter IV, 484 (1827). Abbott there cites authorities dating much earlier, such as Valin, *Nouveau Commentaire Sur L'Ordonnance de la Marine*, 362 (1766) (noting that the Marine Ordinance of 1681 preferred seamen's wages above all other claims).

²⁵⁷ James Willard Hurst at 21.

²⁵⁸ See John Morley, The Common Law Corporation: The Power of the Trust in Anglo-American Business History, 116 Colum. L. Rev. 2145, 2148 (2016).

²⁵⁹ See John Morley, The Common Law Corporation: The Power of the Trust in Anglo-American Business History, 116 Colum. L. Rev. 2145, 2146 (2016).

²⁶⁰ Morley at 2154.

²⁶¹ See Morley, at 2183-2191.

argued that the private law in the Court of Chancery were able to create effective precursors to corporations without legal personality.²⁶²

However much the trust forces a rethinking of the corporations 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.²⁶³ 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.”²⁶⁴ Thus, the parallels there don’t necessarily reflect much about 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. Shows that the corporation itself is not unique; but the convergent shows all the more that the underlying economic attributes are efficient.

Second, the vessel developed legal personality, unlike the trust.²⁶⁵ 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.²⁶⁶ Indeed, that’s 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. The voluminous writing on these corporate alternatives probably missed the parallels because law and economic theory only recently clearly identified the *in rem* property attributes of the corporation, such as entity shielding. The fact that the vessel pioneered these corporate attributes is probably because the vessel was a tangible thing but it was also an organization, and this helped the law visualize organizational personality.

IV. 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

²⁶² See, e.g., Joshua Getzler and Mike Macnair, *The Firm as an Entity before the Companies Acts* [Published in: P. Brand, K. Costello and W.N. Osborough, eds., *Adventures of the Law: Proceedings of the Sixteenth British Legal History Conference*, Dublin, 2003 (Four Courts Press, Dublin, 2005) 267-288.]

²⁶³ See, e.g., Berle, *Corporate Powers as Powers in Trust*.

²⁶⁴ Frederic William Maitland, *The Unincorporated Body*, in 3 *The Collected Papers of Frederic William Maitland* 283 (H.A.L. Fisher ed., 1911).

²⁶⁵ See John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 *Colum. L. Rev.* 2145, 2154 (2016) (explaining that the trust “was never a distinct juridical personality”).

²⁶⁶ 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.

shipowners to finance shipping 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. 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 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, 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.