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THE LAW AND ECONOMICS OF AN ACT TO ENCOURAGE PRIVATEERING ASSOCIATIONS

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Abstract

This article examines New York's 1814 Act to Encourage Privateering Associations, the second general incorporation statute in U.S. history and a unique example of early industrial policy designed to facilitate private maritime warfare. The article situates the 1814 Act within the broader context of the War of 1812, examining the costs, risks, and organizational challenges that made both the privateering business and incorporation of that business attractive to potential investors. This early experiment in using incorporation to advance public policy objectives through private initiative offers valuable insights into both the historical development of American corporate law and the relationship between legal innovation and economic development in the early Republic.

Through detailed analysis of the Act's provisions and historical context, this study advances three principal arguments. First, it demonstrates that early general incorporation statutes functioned as deliberate instruments of industrial policy rather than neutral procedural mechanisms, with the 1814 Act representing a novel state effort to harness private capital for national defense. Second, it provides insight into the contested evolution of essential corporate attributes by analyzing which features of the modern corporation the Act provided and which it omitted, contributing to ongoing scholarly debates about the truly indispensable characteristics of the corporate form. The statute's design reveals contemporary understanding of how corporate privileges could encourage high-risk entrepreneurial ventures by providing limited liability, centralized management, and rudimentary asset partitioning. Third, it offers a case study of how economic necessity can drive the functional development of corporate features—particularly asset partitioning and limited liability—even when formal legal architecture remains incomplete.

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Introduction

It is a simple matter to form a corporation today. One simply files articles of incorporation with the appropriate state office and pays the requisite filing fees and franchise tax.[1] The process is so straightforward that almost 60,000 new corporations were formed in 2023 in Delaware alone.[2]

In Colonial and early post-Revolutionary War America, the process was considerably more complex. Each new corporation required the state legislature to pass a statute creating the corporation's charter.[3] In general, charters would only be granted if the corporation served a public purpose, which limited corporations to quasi-public enterprises such as turnpikes, canals, water supply, and the like.[4]

The special chartering era was problematic for both legislatures and entrepreneurs. Dealing with the volume of requests for charters chewed up a significant amount of legislative time and attention, especially as the demand for incorporation increased during the middle of the nineteenth century.[5] The result of the amount of legislative time devoted to the chartering

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[1] See, e.g., Model Bus. Corp. Act § 2.03(A) (2016) [hereinafter MBCA] ("Unless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are filed.").

[2] Delaware Division of Corporations, 2023 Annual Report (2024), https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2023-Annual-Report.pdf.

[3] James Willard Hurst, The Legitimacy of the Business Corporation in the Law of the United States 1780-1970 15 (1970) ("After independence the consistent practice was to create corporations by special statute."). In the colonial period, a small number of corporations were chartered in England. See I Joseph Stancliffe Davis, Essays in the Earlier History of American Corporations 30-48 (1917) (describing such companies). A larger number of public corporations—such as municipalities, charities, and educational institutions—were chartered by royal governors or colonial assemblies. See id. at 49-74 (describing such companies). Colonial charters were also granted to private entities, but few were business enterprises. Id. at 87. Most "were engaged in promoting ends which appeared to be of general public utility," such as churches, schools, hospitals, and the like. Id. at 103.

[4] On the evolution of the public purpose requirement from the special chartering era to that of general incorporation statutes, see Elizabeth Pollman, The History and Revival of the Corporate Purpose Clause, 99 Tex. L. Rev. 1423, 1436-41 (2021). According to Merrick Dodd, there were only 310 corporations in 1800, of which two-thirds "were companies for the improvement of inland transportation," with the rest consisting mainly of banks, insurance companies, and water supply corporations. Edwin Merrick Dodd, American Business Corporations Until 1860: With Special Reference to Massachusetts (1954).

[5] See John W. Cadman, Jr., The Corporation in New Jersey: Business and Politics 1791-1875 161 (1949) (noting the large amount of time required to process special charters in the period 1858 to 1875); David B. Guenther, Of Bodies Politic and Pecuniary: A Brief History of Corporate Purpose, 9 Mich. Bus. & Entrepreneurial L. Rev. 1, 56-57 (2019) (noting the particular burden placed on state legislatures by the proliferation of railroad corporations); Donald Kehl, The Origin and Early Development of American Dividend Law, 53 Harv. L. Rev. 36, 55 (1939) ("The legislative burden in considering large numbers of special charters led inevitably to the passage of general incorporation acts similar to the form now in use, eliminating the necessity for any specific approval by the legislature.").

process was both poorly drafted special charters and "poorly conceived and ill-considered public legislation."[6] The process was tainted by lobbying, logrolling, and bribery.[7]

A pivotal moment in the evolution of the modern business corporation act thus was the shift from the special chartering era to the early general incorporation statutes. Under these enabling laws, a corporation was formed simply by jumping through certain statutory hoops, the most important of which were preparing articles of incorporation conforming to the statute's requirements and filing them with the appropriate state official.[8] Today, all states have enabling statutes and creating a corporation has become a straightforward process.[9]

General incorporation statutes offered a triple advantage over the special chartering process: they minimized the likelihood of biased or favoritism-driven laws, ensured fair access to incorporation benefits for all qualifying groups, and freed up the legislative agenda while sparing individuals the cost and effort of pursuing individual legislative requests.[10] Curiously, however, adoption of general incorporation statutes was a relatively slow process, which did not really take off until the period just before the Civil War.[11] In some states, such as New Jersey, adoption of a comprehensive general incorporation statute was long delayed, while the existing statutes that covered specific industries were flawed but rarely reformed and, as a result, rarely used.[12]

In contrast, New York was an early adopter. New York's 1811 Act Relative to Incorporations for Manufacturing Purposes ("1811 Act")[13] is widely given pride of place as the first general incorporation statute.[14] It is more accurate, however, to identify the 1811 Act as the

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[6] Cadman, supra note 5, at 162.

[7] Reuven S. Avi-Yonah, The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility, 30 Del. J. Corp. L. 767, 792 (2005) ("The granting of corporate charters by state legislatures became in the 1820s and 1830s a process fraught with corruption."); Nancy J. Knauer, The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity, 44 DePaul L. Rev. 1, 21 (1994) ("The legislative prerogative to grant corporate charters presented the potential for corruption and monopolistic concentration in certain industries.").

[8] See Alexander Hamilton Frey, Legal Analysis and the " De Facto" Doctrine, 100 U. Pa. L. Rev. 1153, 1158 (1952) ("Every general incorporation statute requires as part of the process of incorporation some form of recordation of the articles of incorporation . . ..").

[9] Id. at 1153.

[10] Ian Speir, Corporations, the Original Understanding, and the Problem of Power, 10 Geo. J.L. & Pub. Pol'y 115, 152 (2012). In addition, general incorporation reduced the administrative burden on states of enforcing the provisions of special charters. Elizabeth Pollman, The History and Revival of the Corporate Purpose Clause, 99 Tex. L. Rev. 1423, 1437 (2021).

[11] Susan Pace Hamill, From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations, 49 Am. U.L. Rev. 81, 102–03 (1999) (explaining that, by 1859, "twenty-four of the thirty-eight existing states or territories" had adopted a general corporation statute).

[12] Cadman, supra note 5, at 165.

[13] An Act Relative to Incorporations for Manufacturing Purposes, 1811 N.Y. Laws 350 (Mar. 22, 1811) [hereinafter 1811 Act].

[14] See, e.g., Christopher J. Bebel, Why the Approach of *Heckmann v. Ahmanson* Will Not Become the Prevailing Greenmail Viewpoint: Race to the Bottom Continues, 18 Tex. Tech L. Rev. 1083, 1115 (1987) ("In

first general incorporation statute under which businesses could be incorporated. New York had adopted a general incorporation law for churches in 1784, with general incorporation laws for institutions such as colleges and schools, municipal corporations, charities, medical societies, and the like following by 1808.[15]

This approach of adopting separate general incorporation statutes for specific types of institutions continues to this day. New York's current Business Corporation Law contains a comprehensive statute for incorporating for-profit business, but also includes separate provisions for professional services corporations and benefit corporations.[16] In addition, New York provides separate statutes for various types of cooperative corporations,[17] joint stock associations,[18] non-profit corporations,[19] religious corporations,[20] and multiple types of transportation and utility corporations.[21]

An unusual example of these specialized corporate forms is New York's 1814 Act to Encourage Privateering Associations ("1814 Act").[22] A privateer is "a privately owned vessel (fitted out and equipped at the owner's expense) specifically commissioned by a letter of marque to attack and seize enemy vessels and property."[23] American privateers had played important

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1811, New York enacted the first general incorporation statute."); Hamill, supra note 11, at 101 (stating that "New York technically enacted the first general incorporation statute in 1811"); Act Relative to Incorporations for Manufacturing Purposes of 1811, https://en.wikipedia.org/w/index.php?title=Act_Relative_to_Incorporations_for_Manufacturing_Purposes_of_1811&oldid=1256440485 (last visited June 14, 2025) (asserting that the 1811 Act "was the first law in the US giving a general authorization for formation of corporations").

[15] See Ronald E. Seavoy, The Origins of the American Business Corporation, 1784-1855 283 (1982) (providing a chronology of New York general incorporation statutes).

[16] N.Y. Consol. Laws ch. 4 (2025).

[17] Id., ch. 77.

[18] Id., ch. 29, art. 1.

[19] Id., ch. 35.

[20] Id., ch.51.

[21] Id., ch. 63.

[22] An Act to Encourage Privateering Associations, 1814 N.Y. Laws 11 (Oct. 21, 1814) [hereinafter 1814 Act].

[23] Richard Brabander, Book Review: Privateering: Patriots and Profits in the War of 1812 by Faye M. Kert, 89 New Eng. Q. 513, 513-14 (2016). A letter of marque and reprisal is a government authorization "to private shipowners to seize property of foreign parties, usually ships or property from ships." C. Kevin Marshall, Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars, 64 U. Chi. L. Rev. 953, 954 (1997). The U.S. Constitution authorizes Congress to "grant Letters of Marque and Reprisal." U.S. Const., art. I § 8. The Constitution expressly prohibits states from doing so. U.S. Const. art. I § 10. The Congressional Research Service explains that:

> The letters were originally conceived of as separate instruments: letters of marque authorized passing beyond a country's borders and letters of reprisal authorized use of force and seizure to redress a past harm. Because claimants usually sought both, the terms became synonymous, and these authorizations were generally combined into a single instrument. The

roles in the Franco-British wars of the colonial period, the American Revolution, and the quasi-war between the United States and Revolutionary France at the end of the eighteenth century.[24] In the run up to the outbreak of war in 1812, American political leaders expected privateers to once again play an important role by impeding British trade.[25] The 1814 Act was intended to operationalize that expectation by "facilitat[ing] to patriotic citizens, every efficacious means of defence [sic] and annoyance to enemy" by authorizing "the uniting of a capital by means of patriotic associations to be formed for fitting out at the expence [sic] of such companies."[26] In other words, the legislature intended to promote the business of privateering by allowing their owners to incorporate.

Although the 1814 Act failed to accomplish the legislative purpose,[27] the statute is interesting for a number of reasons. It was New York's second general incorporation statute under which for-profit businesses could incorporate and, as such, the second US general incorporation statute.[28] Along with the 1811 Act, the 1814 statute thus gives us insight into a critical stage of the evolution of American corporate law. In addition, both the 1811 and 1814 Acts were intended to encourage the businesses that could be incorporated under them, so

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> combined instruments—often called commissions—distinguished those who held them from pirates who captured vessels for private gain without government authorization. Holders of the instruments became known as privateers because they used privately owned vessels to engage in hostilities with foreign-owned ships for private gain.

Congressional Research Service, Letters of Marque and Reprisal (Part 1): Introduction and Historical Context 2 (Feb. 26, 2025). Unless the context requires otherwise, letters of marque and letters of marque and reprisal are used interchangeably herein.

[24] See generally Jerome G. Garitee, The Republic's Private Navy: The American Privateering Business as Practiced by Baltimore During the War of 1812 7-8, 17-19, 26 (1977) (discussing the colonial, American Revolutionary, and French Revolutionary periods, respectively). Conversely, during the long wars between England and France at the end of the eighteenth and beginning of the nineteenth centuries, privateers of both nations preyed on neutral American shipping. Id. at 24. Some claims arising out of that period remained unpaid as late as 1915. Id. at 25.

[25] See infra notes 59-60 and accompanying text.

[26] 1814 Act pmbl.

[27] An 1819 listing of New York corporations included both those formed via special charters and those under the 1811 Act, but lists no corporations formed under the 1814 Act. Aaron Clark, Clerk of the Assembly, List of All the Incorporations in the State of New York, Except Religious Incorporations, with a Recital of All Their Important Particulars and Regularities (1819). The absence of privateering associations formed under the 1814 Act is more likely attributable to wartime conditions than to any flaws in the act. First, the act was passed on October 21, 1814, while the Treaty of Ghent was concluded just two months later on December 24th. Donald R. Hickey, The War of 1812: A Forgotten Conflict 296 (1989). Word of the treaty reached New York on February 11, 1815. Id. at 297. The period during which privateering associations could have been formed was thus quite brief. Second, by late 1814 the British blockade of American ports and the system of convoying British shipping were both in place. See Faye M. Kert, Privateering: Patriots & Profits in the War of 1812 24-26, 32-35 (2015) (discussing the British blockade and convoy system, respectively). As a result, declining profits led to a decline in the volume of New York-based privateers. Id. at 84.

[28] See Seavoy, supra note 15, at 283 (listing New York's general incorporation statutes chronologically).

evaluating them provides insight into the contemporary understanding of how incorporation promoted economic activity.

Based on that evaluation, this article advances the thesis that early corporate law functioned as a form of industrial policy.[29] By trying to encourage the incorporation of businesses to engage in what amounted to legalized piracy, the 1814 Act provides a unique example supporting that claim. Of course, the 1814 Act is also unique in U.S. history in harnessing incorporation to facilitate private entities waging war on behalf of the state and nation.[30] Yet, despite the many interesting features of the 1814 Act, this is the first law review article to undertake either a detailed examination of the statute or of the use of general incorporation laws as a vehicle for achieving industrial policy goals.

As an early example of a general incorporation statute, the 1814 Act also provides a useful case study of the corporate form's success. In 1912, Columbia University President Nicholas Murray Butler opined that:

> I weigh my words, when I say that in my judgment the limited liability corporation is the greatest single discovery of modern times . . .. Even steam and electricity are far less important than the limited liability corporation, and they would be reduced to comparative impotence without it.[31]

Today, of course, the corporation is the dominant form of business organization in the U.S. Until recently, there were more corporations than all other forms of business organizations combined (excluding sole proprietorships).[32] The total net income of corporations is triple that of unincorporated business associations.[33]

There is an ongoing debate in the legal literature as to why the corporation has proven so successful—i.e., what are the essential features of the corporation without which it would not have succeeded? The 1814 statute lacks some features of modern corporations, including some that scholars claim are essential. Given that the 1814 Act was intended to leverage ease of

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[29] See infra Part III.C.

[30] As Elizabeth Pollman pointed out to me, both the Dutch East India Company and the British East India Company waged private war on behalf of the respective sovereigns. See Kenneth B. Moss, Marque and Reprisal: The Spheres of Public and Private Warfare 131-48 (2019) (discussing the role of trading companies in waging private wars that often redounded to their sovereign's benefit).

[31] CITE

[32] In 2015, the most recent year for which IRS data is available, there were 6,119,565 corporations and 3,715,187 partnerships of all forms (including general and limited partnerships and limited liability companies). IRS, SOI Tax Stats—Integrated Business Data, https://www.irs.gov/statistics/soi-tax-stats-integrated-business-data. More recent data collected by my UCLA colleague Andrew Verstein, however, finds that limited liability companies now significantly outnumber corporations. Andrew Verstein, The Corporate Census 25-29 (February 25, 2025), https://ssrn.com/abstract=5154952 comparing data on corporations and LLCs).

[33] In 2015, corporate net income (less deficit) was $2.5 trillion, while partnerships of all sorts had $780 billion. Id.

incorporation to promote social goals, evaluating the Act's provisions should contribute to those ongoing debates.

In sum, this article has three major claims. First, it argues that general incorporation statutes were a species of early industrial policy and claims that the 1814 Act provides support for that assertion. Second, it sheds light on which attributes of the corporation were driven by market forces or by the law. Third, although the article does not resolve the debate over which of the corporation's attributes are the truly essential ones, it contributes to that debate by offering the 1814 Act as a case study.

Part I provides the 1814 Act's background context by offering an historical perspective on privateering. Part II reviews the business of privateering during the War of 1812, which will frame the discussion in Parts III and IV of the advantages of the corporate form over alternatives such as the partnership. Part III develops the argument that early general incorporation statutes were a form of industrial policy. Although it seems clear that the legislature believed switching from special chartering to general incorporation would encourage the formation of privateering associations, the question remains why it believed that to be the case. In other words, what advantages did the legislature believe the corporate form possessed that would provide the anticipated encouragement? Part IV explores that question by examining which of the corporation's essential features the 1814 Act provided, analyzing how those features would have facilitated privateering, and why the missing features probably did not matter given the historical and business context developed in Parts I and II. In doing so, the analysis allows us to draw inferences about how other early general incorporation statutes worked, especially the closely related 1811 Act. The text of the 1814 Act is provided in an Appendix.

I. Privateering in the War of 1812

Privateers were privately owned ships, armed and equipped by their owners rather than the government, but authorized by the government to prey on enemy shipping.[34] Although unlicensed privateering—essentially piracy—dated back at least to Roman times, privateering as a licensed and regulated business emerged in the twelfth century.[35] Privateers played an important role in many wars in the centuries that followed until privateering was effectively banned by the 1856 Declaration of Paris.[36]

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[34] Frederick C. Leiner, Privateers and Profit in the War of 1812, 77 J. Milt. Hist. 1225, 1225 (2013).

[35] J. Gregory Sidak, The Quasi War Cases-and Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers, 28 Harv. J.L. & Pub. Policy 465, 472 (2005) ("In the middle of the twelfth century, the rights and privileges of privateers were summarized in a document called the Confolato de Mare.").

[36] David J. Bederman, The Feigned Demise of Prize, 9 Emory Intl. L. Rev. 31, 43 (1995). The United States did not sign the Declaration. Id. at 43 n.54. During the Civil War the United States continued to maintain the right to issues letters of marque and reprisal to privateers. See Fifield v. Ins. Co. of Pennsylvania, 47 Pa. 166, 169 (1864) (noting the federal government's refusal to surrender "our right of privateering"). At the outbreak of the Spanish-American War, however, President McKinley issued a proclamation "that the policy of this government will be, not to resort to privateering, but to adhere to the rules of the Declaration of Paris . . .." The Pedro, 175 U.S. 354, 359 (1899).

A. Privateering Before the War of 1812

Privateering first emerged in Italy in the twelfth century as merchants waged private wars of reprisal against pirates.[37] Sovereigns issued licenses authorizing such reprisals, while treating unauthorized reprisals as illegal piracy.[38] Initially, nations issued letters of reprisal authorizing privateers to carry out anti-pirate operations only within the sovereign's territorial waters.[39] Subsequently, sovereigns began issuing letters of marque authorizing their subjects to carry out reprisals on the high seas.[40]

By the late eighteenth century, privateering had evolved from its thirteenth-century origins as "state-sanctioned personal reprisals" into a "respectable state-regulated business."[41] Unlike the original holders of letters of marque and reprisal, who sought to defend their shipping or obtain restitution from pirates or an enemy nation, eighteenth and nineteenth century privateers sailed for profit.[42] But they did so under increasing levels of regulation. Requirements that privateers bring prizes into port so that the legality of the capture could be adjudicated emerged in England by 1589.[43] In the same period, England began requiring privateers to post bonds guaranteeing they would comply with all of the sovereign's rules and regulations.[44] By the seventeenth century, letters of marque and reprisal were granted not for private restitution, but "to serve a strong public-policy interest such as disrupting enemy shipping during wartime."[45]

By the War of 1812, similar regulations were embedded in U.S. law. In order to function lawfully, privateers needed a letter of marque and reprisal—i.e., a license or commission—from the federal government.[46] In order to obtain the requisite commission, the owners had to post a bond as security that they would not prey upon neutral or domestic shipping.[47] Captured ships

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[37] Garitee, supra note 24, at 3.

[38] See Jon Latimer, Buccaneers of the Caribbean: How Piracy Forged an Empire 13-14 (2009) (explaining that "a . . . shipowner who had been robbed in the territory of or by subjects of a foreign prince in peacetime, but was unable to obtain redress through the courts of that country, could be authorized by a court (the court of admiralty in the case of a shipowner) to recoup his losses up to a specified sum by seizing the property of subjects of that country").

[39] Garitee, supra note 24, at 4.

[40] Id. See also Sidak, supra note 35, at 473 ("Originally, letters of reprisal allowed only seizures within the local jurisdiction of a sovereign, whereas letters of marque allowed seizures beyond that jurisdiction, but over time the two terms became linked as claimants consistently applied for both.").

[41] Brabander, supra note 23, at 514.

[42] Sidak, supra note 35, at 474-75.

[43] Garitee, supra note 24, at 4.

[44] Id. at 6. For a detailed overview of the European development of privateering regulations, see John M. Golden, Patent Privateers: Private Enforcement's Historical Survivors, 26 Harv. J.L. & Tech. 545, 566-70 (2013).

[45] Golden, supra note 44, at 558.

[46] Leiner, supra note 34, at 1229.

[47] Id. at 1229-30.

had to be declared a valid prize by a U.S. court before the ship and its cargo could be sold and the proceeds divided between the investors and crew.[48]

B. Privateering During the War of 1812

Throughout the first decade of the nineteenth century, recurring trade disputes, objections to the British practice of impressment, violations of American waters by British warships, and British blockades of European ports bedeviled British-U.S. relations.[49] By 1812 the disputes had grown sufficiently annoying that Congress passed a package of resolutions to enhance the nation's military preparedness.[50] Despite some belated British concessions, the Madison administration and the war party in Congress gradually moved towards a declaration of war in the spring of 1812.[51]

On the eve of war, the Federalists and some Democratic-Republicans—including President Madison—favored a limited war fought at sea.[52] Ultimately, however, an unlimited war on both land and sea was declared.[53] Unfortunately, the United States was woefully unprepared to fight on either land or sea.[54] Under both Presidents Jefferson and Madison, the government sought to economize on military expenditures, leaving the country almost unprepared for war.[55]

The navy's inadequacy resulted from the decision by Thomas Jefferson and the Democratic-Republicans, after they came to power in 1801, to reverse the Federalist policy of building up the navy.[56] Construction of ships-of-the-line was halted and some of the existing frigates were decommissioned.[57] By 1812, the U.S. Navy consisted mainly of 7 frigates.[58] In the event of war, the Jeffersonians therefore planned to rely on privateers.[59] As Jefferson put it, privateers would make British "merchants feel, and squeal, and cry out for peace."[60]

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[48] Id. at 1230.

[49] See Hickey, supra note 27, at 11-13 (discussing diplomatic frictions between the two nations).

[50] Id. at 32-37.

[51] Id. at 44-45.

[52] Id. at 45.

[53] Id. at 46.

[54] See William M. Davidson, A History of the United States § 390 at 306-07 (1902) (discussing the weakness of both the U.S. army and navy when the war broke out).

[55] Charles E. Chadsey et al., American in the Making: From Wilderness to World Power 320 (1927).

[56] Hickey, supra note 27, at 8.

[57] Id.

[58] Id. See also Leiner, supra note 34, at 1228 (stating that, in 1812, the U.S. Navy consisted of "only fifteen-odd vessels of all rates and sizes").

[59] Hickey, supra note 27, at 8.

[60] Kert, supra note 27, at 10.

Reliance on privateers made sense "for an administratively weak state with a small navy (like the early United States)."[61] Maintaining a large standing navy would be very expensive.[62] A large standing navy might also provoke the European maritime powers, especially those with Caribbean colonies.[63] In addition to addressing such concerns, the policy of relying on privateers as a temporary wartime expedient addressed the country's administrative deficiencies by harnessing the knowledge and drive of private individuals with business and shipping experience to handle various tasks like securing funding, gathering skilled workers, and managing those workers' conduct.[64]

Given those advantages it is not surprising that, shortly after declaring war, Congress therefore passed resolutions authorizing and regulating the use of privateers against British shipping.[65] By war's end over 100,000 Americans were involved in privateering as sailors, investors, and owners.[66] Estimates of the number of ships involved vary, ranging from 492 to over 600.[67] At least 1,172 letters of marque were issued to those vessels.[68] Two hundred forty six U.S. vessels took at least one cruise as a privateer, capturing 1,941 prizes, of which 762 were successfully taken into port for adjudication before a prize court.[69]

New York ranked third in the number of privateers with 107, behind Massachusetts (140) and Maryland (126).[70] Only about a third of New York-based privateers actually captured a prize, for a total of 283 captured vessels, of which just 121 were actually brought before a prize

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[61] Nicholas Parrillo, The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century, 19 Yale J.L. & Humanities 1, 9 (2007).

[62] Kenneth J. Hagan, This People's Navy: The Making of American Sea Power 24 (1992); Rain Liivoja et. al., The Legal Requirement for Command and the Future of Autonomous Military Platforms, 99 Int'l L. Stud. 638, 660 (2022).

[63] Hagan, supra note 62, at 24-25.

[64] See Golden, supra note 44, at 550 (observing that privateering "also leveraged private parties' expertise and energy for a variety of activities that could strain the capacities of early modern European states—activities such as raising money, assembling technically talented personnel, and overseeing such personnel's behavior"). For discussion of the disadvantages of privateering from the perspective of sponsoring governments, see id. at 560-61 and 564-70.

[65] Hickey, supra note 27, at 50.

[66] Brabander, supra note 23, at 513.

[67] Kert, supra note 27, at 8.

[68] Id.

[69] See Kert, supra note 27, at 149 (appendix); see also Leiner, supra note 34, at 1229 (asserting that U.S. Navy warships captured 257 enemy vessels during the war, while privateers took "four or five times that number").

[70] Kert, supra note 27, at 36 (table 1.1).

court.[71] The rest were either recaptured by the British, destroyed, or released.[72] Out of the 107 known New York-based privateers, 47 were captured by the British navy and 5 were captured by British privateers.[73]

There is some disagreement as to the military significance of privateering. Privateers generally tried to avoid combat with British naval vessels,[74] which makes sense as an armed merchantman was likely to be sunk or captured in combat with a dedicated warship.[75] As such, it seems no one expected privateers to defeat the Royal Navy at sea or to defend the coast.[76] Instead, it was expected privateers could substantially impede British trade.[77]

Whether the privateers succeeded is a matter of debate. Historian Faye Kert, for example, argues that privateering "served no strategic purpose beyond annoying and embarrassing their respective governments."[78] She views the impact of privateers as being "scarcely a pinprick" compared to the economic impact of the British blockade of U.S. ports.[79] In contrast, Richard Brabander contends that commerce warfare (including privateering) was historically "an integral part of the overall military strategies" of various powers and lists several tactical advantages of privateering, including disrupting enemy commerce, gathering intelligence, and boosting morale.[80]

There is some evidence that privateers achieved the sort of results identified by Brabander. In 1812 alone, privateers operating principally in Canadian and Caribbean waters took 450 British prizes, triggering widespread concern in the British press about the impact on Britain's trade.[81] By 1813, most British merchant ships therefore traveled the open Atlantic in

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[71] Id. at 83.

[72] Id.

[73] Id.

[74] Garitee, supra note 24, at xv.

[75] See C. Kevin Marshall, Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars, 64 U. Chi. L. Rev. 953, 968 (1997) ("Clashing unnecessarily with a British warship was both folly and bad business . . .."); William Young, A Check on Faint-Hearted Presidents: Letters of Marque and Reprisal, 66 Wash. & Lee L. Rev. 895, 904 (2009) ("Outmanned, outgunned, and with little reason to attack a warship in the first place, it is not surprising that privateers generally focused on limited engagements with merchant ships.").

[76] Hickey, supra note 27, at 9.

[77] Leiner, supra note 34, at 1226.

[78] See Brabander, supra note 23, at 514 (discussing Kert's argument).

[79] Kert, supra note 27, at 36. Kert acknowledges that privateers outperformed both the U.S. land army and the navy. Id. at 9.

[80] Brabander, supra note 23, at 514-15.

[81] Hickey, supra note 27, at 97.

convoy.[82] As a result, successful U.S. privateers shifted their focus to the waters around Britain's Caribbean colonies and the British home isles, where convoying was less common.[83]

The impact of American privateering can be seen in insurance rates. By 1814 the rate to cover a voyage from Liverpool to Halifax had increased to 30 percent.[84] The rate to cover shipping "between England and Ireland rose to an unprecedented 13 percent," which was triple what the rate had been when Britain was at war with France alone.[85] Merchant complaints grew sufficiently loud to trigger a parliamentary investigation.[86]

The War of 1812 ended in a draw.[87] Although privateers did not win the war for the United States, they did prove "to be the only effective American offensive weapon" of the war.[88] Their activities boosted domestic morale and contributed to the desire in Britain to end the war.[89]

II. The Business of Privateering

Studies of the business of privateering commonly distinguish between letter of marque traders and true privateers. Both required a letter of marque and reprisal and were subject to the various legal requirements imposed on privateers, but their business model differed.[90] When

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[82] Id. at 157. The British policy of convoying transatlantic shipping helped reduce losses, but wolfpacks of American privateers had some success jointly attacking convoys and cutting out weaker ships. Kert, supra note 27, at 34-35.

[83] Hickey, supra note 27, at 157. The privateers' cruising of British home waters was facilitated by Napoleon's policy of allowing American privateers to operate out of French ports and to have their prizes adjudicated there. Id. at 287. American privateers roamed not just the home and European waters, but also went as far afield as China, thereby impacting British trade on a global basis. Kert, supra note 27, at 27.

[84] Hickey, supra note 27, at 217.

[85] Hickey, supra note 27, at 218.

[86] Id. at 218. In addition to capturing merchants and thus disrupting British trade, privateers directly impacted the British war effort by capturing mail packets and transport vessels. Kert, supra note 27, at 13.

[87] Hickey, supra note 27, at 228.

[88] Dorothy Denneen Volo & James M. Volo, Daily Life in the Age of Sail 235 (2002). See also Golden, supra note 44, at 562 ("During the Revolutionary War and the War of 1812, privateers accounted for the overwhelming bulk of the United States' maritime successes.").

[89] Kert, supra note 27, at 147.

[90] Naval historian William Dudley explained:

> A government-issued letter of marque and reprisal gave license to a ship's captain to engage in warlike acts in self defense. Some ships with such a license would carry a cargo for trade while mounting cannon for defensive purposes, but others sailed with holds filled with munitions for the sole purpose of capturing or destroying enemy merchantmen. Letter of marque traders, however, might also seek out targets of opportunity as their navigation permitted.

William S. Dudley, 1 The Naval War of 1812: A Documentary History 166 (1985). In Hooe v. Mason, 1 Va. 207 (1793), the court held that "[t]he general principle of law, that a merchantman, having letters of marque, may chase an enemy in sight, but cannot cruize [sic] out of her course to look for one, is well established . . .."

sailing under a letter of marque, the ship was primarily engaged in the cargo trade but could incidentally take prizes.[91] In contrast, a privateer was "a full-time commerce raider."[92] According to one estimate, which counted a total of 1,581 prizes, 1,312 were captured by privateers and only 62 were captured by letter of marque traders.[93] The focus herein is on privateers.

A. Costs and Rewards

The average cost of buying a "first class, armed, and fully equipped letter of marque schooner" was $25,000.[94] Outfitting a ship as a privateer was more expensive, commonly totaling $40,000.[95] Converting a trading vessel into a privateer took four to six weeks, as the ship needed new rigging for speed, reinforced decks to bear the weight of the additional guns, and larger crew accommodations.[96] The venture's financial backers assumed all expenses and monetary risks, earning a return from the auction proceeds of captured vessels and their cargo.[97]

The basic business model for privateering in the early stages of the war was that a vessel so outfitted would cruise seeking smaller or less well-armed merchant vessels, while avoiding clashes with enemy warships.[98] Once a prize was captured, the privateer put on board a prizemaster and small crew charged with sailing the prize into a port in which an admiralty court

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Id. at 211. The court explained that "since commerce is the principal object of such a vessel, it would be improper, that she should lose sight of this, and go in search of prizes." Id. Similarly, in Wiggin v. Amory, 13 Mass. 118 (1816), the court defined the material difference between a privateer and a ship sailing under a letter of marque" is that the former "intends to cruise in search of prizes, and the other intends to attack and take only what may fall in her way." Id. at 127.

[91] See Garitee, supra note 24, at 164 (explaining that letter of marque "traders took some prizes and fought some intense battles, but their primary objective was to earn profits from trade"); see also David J. Starkey, A Restless Spirit: British Privateering Enterprise, 1739—1815, in Pirates and Privateers: New Perspectives on the War on Trade in the Eighteenth and Nineteenth Centuries 130, 130 (David J. Starkey et al. eds., 1997) (noting that for "so-called 'letters of marque' [traders] commerce-raiding represented an incidental, opportunist facet of the venture").

[92] Nicholas Parrillo, The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century, 19 Yale J. L. & Humanities 35 n.170 (2007).

[93] Timothy S. Good, American Privateers in the War of 1812: The Vessels and Their Prizes as Recorded in Niles' Weekly Register 177 (2012) (appendix A). The US Navy captured 175 and the remainder by various other forces. Id.

[94] Garitee, supra note 24, at 111.

[95] Id.

[96] Kert, supra note 27, at 71-72.

[97] Leiner, supra note 34, at 1232.

[98] Kert, supra note 27, at 7-8.

would adjudicate the legality of the capture.[99] The anticipated need to slough off a portion of the privateer's crew to man each prize explains why true privateers had larger crews than letter of marque traders.[100]

When a duly constituted prize court ruled a captured vessel to be a lawful prize, the privateer was entitled to sell the ship, its equipment, and any cargo.[101] This process ensured that the purchaser had a clean title to the purchased goods.[102] In addition, the government paid a bounty on captured British sailors.[103] Various deductions were taken from the total auction revenue, including legal fees, contributions to the Seamen's Hospital Fund (2 percent), compensation for lawyers, marshals, auctioneers, and prize agents (typically 1.5 percent), dock fees, and import taxes.[104] Once all these costs and charges were settled, the remaining amount constituted the net profits. [105] Under the standard articles of agreement, the crew received half of these net profits, while the ship's owners split the other half among themselves.[106] The crew's half of the profit was divided into predetermined shares according to a collective contract known as "articles of agreement" that each person signed prior to setting sail. [107] A fairly standard agreement used by the privateer Comet had 270 shares, with allocations ranging from 16 to the Captain down to 1 share for each greenhand.[108]

B. Risks

There were substantial risks—both economic and personal—associated with privateering. Many cruises resulted in no captures.[109] Many prizes were recaptured before they could be gotten to port and sold.[110] Many privateering vessels were captured or destroyed by the British Navy.[111] Crews faced the risk of death or serious injury in every encounter with a potential prize or warship. Captured privateering crews were imprisoned at Dartmoor Prison or in prison

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[99] See Garitee, supra note 24, at 167 (discussing handling of prizes). Although privateers profited only if they got a prize to port where the legality of the capture could be determined and, if it was a legal capture, ship and cargo could be sold, patriotic privateers did sometimes burn enemy ships such as troop transports having little or no prize value. Id. at 57.

[100] See id. (discussing impact of prize taking on the smaller letter of marque traders crew).

[101] Kert, supra note 27, at 4.

[102] Golden, supra note 44, at 559.

[103] Kert, supra note 27, at 73.

[104] Leiner, supra note 34, at 1232.

[105] Id. at 1232.

[106] Id. at 1232.

[107] Id. at 1232.

[108] See Garitee, supra note 24, at 191-92 (describing allocation).

[109] Leiner, supra note 34, at 1234.

[110] Leiner, supra note 34, at 1234.

[111] Leiner, supra note 34, at 1234.

hulks.[112] Conditions at Dartmoor were so bad that one inmate stated that "death itself, with hopes of an hereafter, seemed less terrible than this gloomy prison."[113] Yet, Dartmoor was regarded as better than the prison hulks.[114]

As the war progressed, and the British blockade tightened, the risks faced by privateers rose. The blockade both made it harder for privateers to reach the sea and for captured prizes to be brought into U.S. ports for prize adjudication.[115] By 1814, it was not uncommon for some captured British merchant ships to be recaptured by the British and in some cases to change hands several times before reaching a prize port or safety.[116] To encourage privateers to destroy captured ships they were unable to get to port, Congress authorized payment of a bounty equal to half of a destroyed prize's value.[117] In addition, Congress increasingly offered various subsidies,[118] including reducing the customs duties owed on the sale of captured goods by a third and paying increased bounties for captured British sailors.[119]

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[112] Garitee, supra note 24, at xv. Prison hulks were unseaworthy ships converted into floating jails. Robert M. Jarvis, Prison Ships, 10 Brit. J. Am. Legal Stud. 281, 284-85 (2021). The conditions on British prison hulks were such that during the Revolutionary War 11,500 American prisoners of war died on the hulks compared to 6,800 colonial troops who died in battle. Id. at 288.

[113] Craig A. Munsart, Military Captives in the United States: A History from the Revolution Through World War II 166 (2025).

[114] Id. Jeffrey Ornstein summarized the risks faced by privateers thusly:

> The great profits to be had from privateering were complemented by great risks. The $25,000 investment required to launch a private armed vessel was in jeopardy every dicey day of the privateer's cruise. First, there was the often violent task of intercepting British vessels and forcing their surrender. Next, the captain had to select a trustworthy prize master (essentially a temporary captain of the prize) and crew to safely sail the prize into the nearest port with a U.S. district court. At the same time, there was the delicate matter of distributing prisoners between the prize vessel and the privateer, the wrong ratio of prisoners-to-crew being a recipe for rebellion and loss of the prize. Finally, an admiralty lawyer, or "proctor," had to claim, or "libel," the prize successfully in district court. At every step, things could--and frequently did--go wrong. British men-of-war captured or destroyed privateers, crews mutinied, men were horribly wounded and killed in battle, prizes sank en route to port, and courts returned adverse judgments (normally meaning that the prize or its proceeds had to be restored to the original owners).

Jeffrey Orenstein, Joseph Almeida Portrait of A Privateer, Pirate & Plaintiff, Part I, 10 Green Bag 2d 307, 311 (2007).

[115] Hickey, supra note 27, at 217; Leiner, supra note 34, at 1243. The British blockade of the U.S. coast began in March 1813. Leiner, supra note 34, at 1228. It quickly strangled the trade of ports such as Baltimore. Garitee, supra note 24, at 52-53.

[116] Hickey, supra note 27, at 217.

[117] Id. at 113.

[118] Leiner, supra note 34, at 1247.

[119] Hickey, supra note 27, at 124. Congress' policy of paying bounties to privateers anticipated modern arrangements where governments harness private resources for public ends. Contemporary examples include qui tam suits under the False Claims Act, where private parties receive financial rewards for

C. The Lottery Nature of the Business

In a December 1812 letter to the House Ways and Means Committee, Treasury Secretary Albert Gallatin wrote that "risky ventures such as privateering were generally 'overstocked' and attracted too much investment."[120] Gallatin specifically compared the privateering business to a lottery, pointing to "the uncertain and improbable chance of a large, easy profit."[121] The comparison to a lottery was apt: like a lottery, privateering produced far more losers than winners. Kert estimates that 73 percent of privateers commissioned during 1812—the year in which the British blockade least impeded their activities—failed to earn a profit.[122] Taking the war as a whole, Kert estimates that only about a half of privateers and letter of marque traders actually captured a prize and only about a third of those prizes were successfully taken before a court.[123]

Although many privateering ventures thus lost money, some were spectacularly successful. One of the most successful privateers, the Baltimore-based Chasseur, took 14 prizes and earned its owners an estimated $221,000.[124] The most successful privateer, the Surprize [sic], took 37 prizes.[125] It sent 9 of those prizes into Baltimore, earning its owners an estimated $178,500.[126]

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identifying fraud against the government, and various whistleblower bounty programs. See Thomas Goers, From Banking to Data Breaches: Ensuring Financial Institution Accountability with Public and Private Oversight, 2020 Mich. St. L. Rev. 1141, 1165 (2020) ("One major benefit of qui tam suits is that they take stress off of the limited resources of the government and allow private enforcers to utilize their resources."). Like the 1814 Act's provisions for dividing prize proceeds, these modern programs use financial incentives to align private profit motives with public policy goals. See Jeffrey R. Boles et. al., Protecting the Protectors: Whistleblowing and Retaliation in the Compliance Arena, 62 Am. Bus. L.J. 23, 35 (2025) ("In whistleblowing statutes, a "bounty model" provides a financial incentive to would-be whistleblowers, whose livelihood is largely on the line when they decide to blow the whistle, by rewarding them with cash awards for bringing the government pertinent information about wrongdoing that leads to a successful enforcement action."). The complicated formulas for reward allocation under such programs echo the detailed provisions in the 1814 Act governing how captured vessels and cargo would be distributed among investors and crew.

[120] Leiner, supra note 34, at 1240.

[121] Id.

[122] Kert, supra note 27, at 78.

[123] Id. at 35. See also Good, supra note 93, at 8 (reporting that 55 percent of privateers had at least one capture, from which one infers that almost half took none)

[124] Garitee, supra note 24, at 273.

[125] Good, supra note 93, at 92.

[126] Garitee, supra note 24, at 273.

D. Investors

Although some privateers had single owners, many privateering ventures had multiple investors.[127] Historian Jerome Garitee's study of Baltimore-based privateers found many ships with numerous so-called marginal owners; i.e., those who invested in a single cruise.[128] Marginal owners came from a wide variety of trades, such as small merchants, manufacturers, and ship chandlers.[129] They typically did not put large sums at risk.[130] So-called moderate investors (those who invested in two or three cruises) invested larger amounts but diversified by investing relatively small amounts across several cruises or multiple vessels.[131] Active investors invested in four or more cruises, with the 50 most active averaging investments in just under 10 cruises each.[132] The very largest active investors paid out as much as $40,000, which was more than 100 times the annual wage of a first class seamen and almost 10 times the annual salary of the secretary of the navy.[133] Kert reports, using Garitee's categories, that New York had 124 marginal investors, 39 moderate investors, and 13 active investors.[134]

E. Organizational Forms for Privateering Ventures

Garitee's study found that Baltimore-based privateers with multiple owners were often owned by partnerships or limited partnerships.[135] Organizing as a partnership with multiple owners rather than as relying on a single owner, meant sharing profits and managerial decision making but it allowed cost-sharing and risk spreading.[136] According to Garitee, a further virtue of the partnership form was enhanced managerial flexibility.[137] As one example, he cites a case in which Henry Didier unilaterally converted two letter of marque traders into privateers while his partner John D'Arcy was in Europe.[138] As another example, Garitee cites Peter Karthaus' transfer of four-twentieths of the shares in the privateer Amelia without authorization from his fellow partners.[139] Although there doubtless were advantages to such a structure in an era in

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[127] See id. at 34 (reporting that wealthy ship owning merchants bore considerably greater risks, as they commonly invested in privateers as single or dual ship owners); Kert, supra note 27, at 87 (reporting that investors typically diversified their risk by investing in multiple cruises).

[128] Garitee, supra note 24, at 33.

[129] Id. at 33-34.

[130] Id. at 35.

[131] Id. at 35.

[132] Id. at 37.

[133] Id. at 38.

[134] Kert, supra note 27, at 83.

[135] See Garitee, supra note 24, at 84-85 (discussing Baltimore-based privateers so owned).

[136] Garitee, supra note 24, at 84,

[137] Id.

[138] Id.

[139] Id.

which communication was slow and hazardous, we shall see that it also poses difficulties with respect to both management and asset preservation.[140]

III. The 1814 Act as Industrial Policy

This Part explores one of this article's core theses; namely, that early general incorporation statutes—far from being neutral procedural mechanisms—functioned as deliberate instruments of industrial policy. While the 1811 Act sought to bolster manufacturing, the 1814 Act aimed to stimulate private maritime warfare. Each, in its own way, illustrates how the state deployed incorporation to direct capital toward strategically important enterprises, blending legal innovation with economic and political objectives.

A. An Overview of Industrial Policy

Industrial policy broadly refers to "full range of measures through which governments seek to enhance the performance of individual industries as well as the economy as a whole."[141] Contemporary approaches to industrial policy emphasize fostering foster strategically important industries through sector-targeted policies, such as subsidies, tax incentives, regulations, R&D support, and trade measures.[142] Modern proponents of industrial policy justify it as a means of addressing market failures including externalities and spillovers, coordination failures, information asymmetries, and credit market imperfections.[143]

Horizontal industrial policy represents broad-based interventions that improve general business conditions and framework policies benefiting all sectors equally, rather than targeting

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[140] See infra Parts IV.C and IV.F (discussing the separation of ownership and control and asset partitioning aspects of the corporate form, respectively).

[141] Calvin S. Goldman & Joel T. Kissack, The Role of Competition Policy in Canada's Industrial Policy, 19 Can.-U.S.L.J. 105 (1993) (quoting Robert D. Anderson and S. Dev. Khosla, Competition Policy As A Dimension of Industrial Policy: A Comparative Perspective (June 1993) (draft at 4)). For a discussion of "the longstanding debate about how best to define the term," see Amy Kapczynski & Joel Michaels, Administering A Democratic Industrial Policy, 18 Harv. L. & Pol'y Rev. 279, 286 (2024). Kapczynski & Michaels define the term as "as the deliberate attempt to shape different sectors of the economy to meet public aims." Id.

[142] See Kapczynski & Michaels, supra note 141, at 286-87 (stating that "industrial policy self-consciously adopts sector-specific rules, instead of prioritizing more generic levers to influence the economy"); Ruchir Agarwal, Industrial Policy and the Growth Strategy Trilemma (Mar. 21, 2023), https://www.imf.org/en/Publications/fandd/issues/Series/Analytical-Series/industrial-policy-and-the-growth-strategy-trilemma-ruchir-agarwal (asserting that industrial policy is "achieved through a range of tools such as subsidies, tax incentives, infrastructure development, protective regulations, and research and development support").

[143] See Mitsuo Matsushita, The Intersection of Industrial Policy and Competition: The Japanese Experience, 72 Chi.-Kent L. Rev. 477, 478 (1996) (describing industrial policy as "a governmental policy to supplement the market in the face of market failure and facilitate its performance in the long run and that it is a set of measures to deal with specific sectors of the economy").

specific firms or industries.[144] Key modern examples include R&D tax credits, comprehensive education and training programs, infrastructure investment, and competition policy reforms.[145] Vertical industrial policy involves targeted government interventions supporting specific firms, industries, or narrow sectors, operating through sector-specific targeting mechanisms that require higher implementation complexity and greater government administrative capacity.[146]

B. New York's Nascent Industrial Policy

In the early decades of the nineteenth century, the New York legislatures adopted what has been aptly described as a "nascent industrial policy" using a variety of innovative statutes to pursue rapid economic expansion, characterized above all by practical, large-scale state involvement to promote and steer economic growth.[147] New York's approach consisted primarily of vertical industrial policy aimed in particular at promoting manufacturing. Although legislative interventions designed to promote manufacturing began as early as 1790, the perceived urgency of doing so ramped up significantly during the period immediately prior to the outbreak of the War of 1812. As the war grew nearer, the limits on trade with Britain and France imposed by the Embargo and the Non-Intercourse Act of 1809 resulted in shortages of textiles and other consumer goods.[148] In response, the legislature adopted tools of vertical horizontal policy—including loans, subsidies, and prizes—to encourage domestic manufactures, especially textile production.[149]

Although the legal literature has not recognized it, the 1811 Act was an integral part of New York's industrial policy.[150] The act was specifically enacted to encourage domestic

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[144] Nick Bloom, Rachel Griffith & John Van Reenen, Do R&D Tax Credits Work? Evidence from a Panel of Countries 1979-1997, 85 J. Pub. Econ. 1 (2002).

[145] Kristone Farla et al., Industrial Policy in the European Union, in Development and Modern Industrial Policy in Practice Issues and Country Experiences 346, 351 (Jesus Felipe ed. 2015) (discussing horizontal tools).

[146] See Jean-Christophe Defraigne et al., Introduction, in EU Industrial Policy in the Multipolar Economy 1, 21-23 (Jean-Christophe Defraigne et al. eds. 2022) (describing tools used in vertical industrial policy).

[147] David A. Moss, When All Else Fails: Government as the Ultimate Risk Manager 55-56 (2002).

[148] Seavoy, supra note 15, at 87.

[149] Moss, supra note 147, at 56; Seavoy, supra note 15, at 87-88.

[150] This article appears to be the first to develop this thesis in depth. The point has been noted in passing by at least one economist, however, see Moss, supra note 147, at 56 ("Integral to this nascent industrial policy was the world's first general incorporation law for manufacturing companies . . .."). One prior legal scholar likewise noted in passing that Pennsylvania in the mid-1800s adopted "a blend of special and general incorporation that represented a de facto industrial policy" of promoting the "development of both anthracite and bituminous coal fields." Sean Patrick Adams, Different Charters, Different Paths: Corporations and Coal in Antebellum Pennsylvania and Virginia, 27 Bus. & Econ. Hist. 78, 82 (1998). In addition, the legal literature recognizes that general incorporation statutes were a tool in the state competition for corporate charters. See, e.g., Charles M. Yablon, The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910, 32 J. Corp. L. 323, 332 (2007) ("The desire to attract [more businesses to the state,

manufacturing due to declining imports during a time of international crisis.[151] In particular, the act targeted those manufacturing sectors—textiles, glass, metal, and paints—whose products were no longer available due to the impending conflict.[152] Although the act did not replace incorporation by special charter, it offered a way of bypassing the more convoluted legislative process inherent in special chartering. As business professor David Moss notes:

> Until [the 1811 Act], citizens wishing to incorporate [a for-profit business] had been required to make special appeals to the legislature. Lawmakers enjoyed complete discretion over the process, often wielding their authority with all the subtlety of a sledgehammer. Special favors, connections, and payoffs frequently made the difference in a rough-and-tumble political system where successful appeals were more the exception than the rule.[153]

In addition to significantly streamlining the incorporation process, the 1811 Act eliminated the need for a corporation to have a public purpose. The special chartering era inherited from English precedents the idea that only a sovereign authority—in the U.S. case, a state legislature—could establish a corporation and typically would do so only for purposes that served the public.[154] As such, early corporate charters generally were granted only to charitable or municipal entities rather than for-profit commercial ventures.[155] In contrast, the 1811 Act contained no requirement that the incorporators set out a demonstrable public purpose.

The legislature's belief that switching from special chartering to general incorporation would promote growth in the manufacturing sector proved well founded. Between 1811 and 1815 there were 210 incorporations under the statute.[156] By 1848, the year in which the 1811 Act was replaced with a broader general incorporation statute, 362 charters had been issued under the statute.[157] In contrast, 150 manufacturing companies were incorporated using the special charter

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particularly manufacturing firms,] was a major impetus for passage of the early general incorporation statutes.").

[151] L. Ray Gunn, The Decline of Authority 226 (1988).

[152] See George F. Carpinello, State Protective Legislation and Nonresident Corporations: The Privileges and Immunities Clause As A Treaty of Nondiscrimination, 73 Iowa L. Rev. 351, 411 n.243 (1988) (noting that the 1811 Act was intended "to encourage local manufacture of products no longer available because of the Napoleonic Wars"); Seavoy, supra note 15, at 85 (noting that the 1811 Act was initially limited to businesses in the textile, glass, metal, and paint industries).

[153] Moss, supra note 147, at 56.

[154] Robert Anderson, The Sea Corporation, 108 Cornell L. Rev. 1569, 1618 (2023).

[155] Id. at 1618-19.

[156] Seavoy, supra note 15, at 94.

[157] W.C. Kessler, A Statistical Study of the New York General Incorporation Act of 1811, 48 J. Pol. Econ. 877, 878 (1940). The high rate of incorporations in the statute's early years likely was due to the shortages of textiles and other consumer goods during the war, while the declining rate in the post-war period probably reflected renewed competition with British manufacturers and depressed economic conditions. Id.

process during that period.[158] As a leading empirical survey of the 1811 Act concluded, "[i]f the legislators wished to aid 'war babies' by means of this law, they must have been quite satisfied with the results."[159]

Although the 1811 Act initially had a five year sunset provision, the act's success led to it being periodically renewed and eventually made permanent in 1821.[160] In addition, the scope of businesses that could be incorporated under it steadily increased.[161] As the leading study of history of New York corporate law explained, the act "remained in force in New York because entrepreneurs found it convenient to seek incorporation without having to relate their business to a narrow definition of public service and because they liked its cheap legal procedure that required no political lobbying to pass an individual charter."[162]

The success of the New York statute eventually inspired imitators. Indeed, the proposition that general incorporation was a tool of vertical industrial policy is supported by the fact that early general incorporation statutes were commonly targeted at encouraging specific industries.[163] In New Jersey, for example, there were separate general incorporation statutes for manufacturing, mutual savings associations, mutual loan and building associations, banks, plank road companies, insurance companies, various types of transportation and internal improvement companies, and so on.[164] New Jersey's earliest general incorporation statute, which applied to manufacturing businesses, largely duplicated the 1811 Act, presumably because New Jersey's legislature was "doubtless aware of the extent to which the New York act had been successful."[165] As with New York, the initial New Jersey general incorporation statute appears to have been a form of vertical industrial policy, because it "seems to have been designed especially to encourage [manufacturing] establishments."[166] In particular, the New Jersey statute

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[158] Id.

[159] Id. See also Seavoy, supra note 15, at 85 ("Of all the steps taken by the states to encourage domestic manufacturing, few were as important as the passage of general incorporation laws, which freed potential manufacturers from the troublesome tasks of relating businesses to a narrow definition of public service and of pushing individual charters through the legislative process.").

[160] Seavoy, supra note 15, at 93.

[161] Id. In 1815, for example, the classes of companies eligible for incorporation under the statute was expanded to include makers of clay and earthenware. Id. Leathermakers in specified counties were included in 1817 and 1819. Id. Saltworks in Western New York were added in 1821. Id. In addition to the 1811 Act, New York had separate statutes to promote incorporation of several dozen types of corporations, including multiple types of for-profit business ventures. See id. at 191-92 (listing the statutes).

[162] Id. at 93.

[163] See Yablon, supra note 150, at 332 n.36 ("Other states followed with general incorporation statutes of various sorts, as well as incremental expansion of permissible corporate size, duration, privileges, and limitations on liability.").

[164] See Cadman, supra note 5, at 445-46 (listing New Jersey statutes).

[165] Id. at 23.

[166] Id. at 35.

likely was intended "to encourage manufacturing in the midst of depression as the New York legislators had seemingly hoped to encourage it in anticipation of war."[167]

C. The 1814 Act: A State Industrial Policy of Promoting a National Interest

The 1814 Act presents an interesting wrinkle on the early general incorporation statutes. Just as those early statutes advanced the adopting state's industrial policy of promoting manufacture, New York's 1814 Act was motivated by a state policy of encouraging the business of privateering.[168] As the preamble to the act explains:

> Whereas a barbarous warfare on our coast and frontiers, by pillage and conflagration, is carried on by the enemy, and a determination is avowed to lay waste our cities and habitations, and to make a common ruin of both public and private property, contrary to the usages of civilized warfare: Wherefore, it has become expedient and necessary, that the legislature should facilitate to patriotic citizens every efficacious means of defence [sic] and annoyance to the enemy; and whereas the uniting of a capital by means of patriotic associations, to be formed for fitting out at the expence [sic] of such companies, private armed vessels . . ..[169]

Unlike the other early general incorporation statutes, which focused on promoting the state's economic interests, the 1814 Act aimed at promoting a national interest; namely, national defense. As the preamble also explained, the privateers outfitted by companies formed under the act were "to be licensed by the government of the United States" and were to "guard and protect the commerce of the United States," not merely New York's trade.[170] The question thus arises: why would New York adopt an industrial policy intended to benefit the nation as a whole rather than leaving defense to the national government?

One answer is that the 1814 Act did address local as well as national interests. The statute's references to "our coast and frontiers" and "our cities and habitations" likely reflects a concern by the legislature that the war threatened the persons and property of New Yorkers. In addition, privateering provided opportunities for New York-based shipowners to put their

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[167] Id. at 423.

[168] Indeed, it has been aptly noted that "[p]rivateering, like the creation of corporations, allowed governments to pursue policy objectives without any impact on the treasury." Tom Ewing, Practical Considerations in the Indirect Deployment of Intellectual Property Rights by Corporations and Investors, 4 Hastings Sci. & Tech. L.J. 109, 114 (2012).

[169] 1814 Act pmbl. Recall that privateering was thought "to serve a strong public-policy interest" by "disrupting enemy shipping during wartime." See supra text accompanying note 45. Privateering associations thus likely would have satisfied the public purpose requirement in the special chartering era such that the 1814 Act was not needed to evade that requirement.

[170] 1814 Act pmbl.

valuable assets to potentially profitable pursuits and offered employment for the sailors who served on the ships and the many vendors who outfitted and repaired them.[171]

Another potential answer is that the legislators were motivated by a patriotic desire to support the war effort. Brabander contends that privateering combined patriotism with self-interest.[172] Garitee even more emphatically argues that profit was not the privateers' sole motive, explaining that many exhibited a patriotic willingness to take on powerful enemy ships even when the prospects of profit were nil.[173] It thus seems probable that similar motives animated the legislators who passed the 1814 Act.[174]

Still another potential answer is that focusing on the national interest was a response to arguments about the constitutionality of the legislation. Opponents complained that privateering was a matter for federal rather than state law.[175] A principal spokesman for the opposition was Chancellor James Kent, who argued that the power to "grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"[176] vested in Congress by the Constitution effectively preempted the field.[177] In addition, Kent argued that federal law did not recognize an "association of individuals for privateering purposes as a body corporate" with limited liability,

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[171] See, e.g., Garitee, supra note 24, at 56-57 (discussing privateering as a profitable alternative to trading ventures); Kert, supra note 27, at 60 (observing that privateering allowed shipowners to "keep their ships and crews busy" despite the blockage).

[172] Brabander, supra note 23, at 514.

[173] Garitee, supra note 24, at 57. Yet, Garitee concedes that the privateers' primary motive was profits, id., and that the business of privateering remained a business. Id. at xv. In contrast, Kert argues that privateering was "neither piracy nor national defense." Kert, supra note 27, at 7. Instead, it was a lawful private business that incidentally benefited the country. Id.

[174] A leading New York legal history contends that the 1814 Act was passed by a legislature "bent upon loyally sustaining the government at Washington." 2 J. Hampden Dougherty, The Legal and Judicial History of New York 68 (1911). The author goes on to cite other examples of patriotically motivated acts by the New York legislature of the period, such as adopting of a bill to aid in the capture of deserters from the federal army and navy. Id. at 68-70.

[175] Seavoy, supra note 15, at 73.

[176] U.S. Const. art. I, § 8.

[177] Dougherty, supra note 174, at 67-68 (explaining that Kent argued that privateering fell within Congress' jurisdiction rather than that of a state). The constitutional tensions surrounding the 1814 Act presaged modern federalism challenges in areas where state and federal authority overlap. If enacted today, similar legislation might face constitutional scrutiny on grounds that letters of marque and reprisal, combined with federal authority over foreign relations and naval affairs, preempt state initiatives in privateering. The parallel to contemporary state-federal tensions—such as state immigration enforcement or foreign policy initiatives—is striking. See generally Jennifer R. Phillips, Note, Arizona's S.B. 1070 and Federal Preemption of State and Local Immigration Laws: A Case for A More Cooperative and Streamlined Approach to Judicial Review of Subnational Immigration Laws, 85 S. Cal. L. Rev. 955 (2012) (discussing controversies relating to state and local laws dealing with immigration). Like modern state officials who sometimes pursue policies in tension with federal priorities, New York's privateering statute operated in a gray area where state industrial policy intersected with national defense prerogatives.

but rather required "security in their individual capacities."[178] Accordingly, he argued, the 1814 Act was unconstitutional, as incorporation would "weaken or destroy individual responsibility."[179] The 1814 Act's focus on promoting the national interest in defense may have been intended, at least in part, as a way of assuaging such concerns.

D. Broader Questions

The 1814 Act's approach to risk allocation also reflects broader questions about optimal risk-bearing in government contracting. As Treasury Secretary Gallatin observed, privateering attracted too much investment precisely because of its lottery-like nature.[180] Yet unlike modern government contractors who often demand extensive immunity and indemnification,[181] privateering associations under the 1814 Act bore substantial personal and financial risks without full limited liability protection.[182] This risk allocation may have enhanced incentive alignment—privateers had strong incentives to succeed because they bore meaningful downside risk, unlike contractors who get paid regardless of the success of the mission. The contrast is instructive: while contemporary industrial policy often involves reducing private sector risk through subsidies and guarantees,[183] the 1814 Act sought to harness private risk-taking for public purposes.

E. Summation

Despite its ambitious intent, the 1814 Act produced little practical uptake.[184] Several factors likely contributed to this failure. First, the statute came relatively late in the War of 1812—by the time it was enacted, many privateering ventures were already organized, and the British blockade had intensified.[185] Second, the business of privateering remained acceptably well-served by more well established partnership and joint-stock forms.[186] The added complexity of incorporation may have seemed unnecessary to many investors. Third, the reputational and

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[178] Letter from Samuel Young to James Kent (Nov. 11, 1814) (copy on file with author).

[179] Id. Kent and other opponents also argued that privateering was contrary to public morals. Kent argued, for example, that privateering "was liable to great disorder, and as its professed object was the plunder of private property for private gain, its tendency was to impair the public morals, to weaken the sense of right and wrong, and to nourish a spirit of lawless ferocity."

[180] See supra notes 120-121 and accompanying text.

[181] See In re Agent Orange Prod. Liab. Litig., 611 F. Supp. 1221, 1222 (E.D.N.Y. 1985), aff'd, 818 F.2d 204 (2d Cir. 1987) (suggesting that the government's refusal to contribute to settlement of Agent Orange litigation would lead many future contractors to require indemnification and that those contractors' "increased insurance costs will be added to the price of the goods the government purchases").

[182] See infra Part IV.F.2 (discussing nature of limited liability under the 1814 Act).

[183] See supra text accompanying note 142.

[184] See supra note 27 (discussing lack of incorporations under the 1814 Act).

[185] See supra note 27 (discussing reasons the 1814 Act did not generate incorporations).

[186] See supra Part II.F (discussing unincorporated forms used by privateering ventures).

legal risks surrounding privateering—exacerbated by moral and constitutional critiques like those voiced by Chancellor Kent—may have dampened interest in formalizing ventures under a state statute.

The failure of the Act, then, does not undercut the thesis that it represented industrial policy. Rather, it underscores the experimental nature of such policy: not all state-sponsored economic incentives succeed, particularly when constrained by timing, public perception, and institutional fit.

IV. The Law and Economics of the 1814 Act

As we have seen, the New York legislature wished to encourage businesspeople to outfit privateers to wage private war against the British. In order to do so, they decided to make it easier for such entrepreneurs to incorporate their association. Logically, therefore, the legislature must have believed that something about the corporate form would provide the requisite encouragement. Unfortunately, the act itself is silent on that subject. In order to understand the legislature's likely view of the benefits of incorporation, it will be useful to evaluate which of the principal attributes that made the modern corporation the "greatest discovery" were present in the act. In turn, that should shed light on the on-going debate over which of those attributes are the truly essential ones that set the corporation apart from its competitors.[187]

Scholars have identified various attributes as the essential features of the corporate form. Although the precise items vary from list to list, most lists include: (1) formal creation under state law; (2) legal personality; (3) separation of ownership and control; (4) freely alienable interests; (5) indefinite duration; and (6) asset partitioning.[188] The last attribute is typically

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[187] There is a closely related debate over the extent to which some or all of the corporation's essential attributes can be created through private ordering and which, if any, can only be created by statute. See, e.g., Paul G. Mahoney, Contract or Concession? An Essay on the History of Corporate Law, 34 Ga. L. Rev. 873, 873-74 (2000) (asking whether 'the indicia of "corporateness'—transferability of shares, legal personality, limited liability, and centralized management—[can] be created by contract, supplemented perhaps by other common law devices such as trusts or agency?"). Robert Anderson persuasively argues that the enduring reliance on state-granted corporate charters shows that contracts alone can't fully address certain issues arising between the corporation and outside third-parties. Anderson, supra note 154, at 1589. Contracts operate in personam, meaning they bind only the parties involved and can't shape third-party rights the way corporate law can. Id. In contrast, the corporate form provides in rem protections—property-like features that apply universally—especially through mechanisms like entity shielding, which can't be recreated by contract alone. Id.

[188] See, e.g., Stephen M. Bainbridge, Corporate Law 1 (4th ed. 2020) (asserting that one can "think of the corporation as a legal fiction characterized by six attributes: formal creation as prescribed by state law; legal personality; separation of ownership and control; freely alienable ownership interests; indefinite duration; and limited liability"); Anderson, supra note 154, at 1577 (identifying the key attributes as "(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"); John Armour, Henry Hansmann, Reinier Kraakman, & Mariana Pargendler, What is Corporate Law?, in The Anatomy of Corporate Law: A Comparative and Functional Approach 1, 5 (Reinier Kraakman et al. eds., 3rd ed. 2017) (identifying legal personality, limited liability, transferable shares, delegated management with a board structure, and investor ownership as the key characteristics of the corporation); Robert C. Clark, Corporate Law § 1.1 at 2 (1986) (highlighting limited liability, centralized management, perpetual existence,

subdivided into affirmative asset partitioning (a.k.a. entity shielding), capital lock-in, and defensive asset partitioning (a.k.a., limited liability).[189]

A. Formal Creation by Government Act

If you want to have a corporation, you must have the state's blessing.[190] It is true today and it was true in 1814. Under the 1814 Act, "five or more persons" who wished to form "a company for the purpose of annoying the enemy of the United States, and their commerce," could do so by a signing a written certificate before a justice of the supreme court, a judge of common pleas, or the mayor or recorder of any city in the state.[191] Not unlike a modern corporation's articles of incorporation, the certificate had to include the corporation's name, the amount of the capital being paid into the corporation by its shareholders, the number of shares to be issued, the number names of the initial board directors, and the principal place of business.[192] The certificate then had to be filed with "the office of the secretary of state."[193]

The 1814 Act, like modern statutes, did not require any minimal capital investment at formation. Unlike modern statutes, however, the 1814 Act did impose a maximum capital amount of $1 million.[194] This was a substantial increase over the maximum capital allowable under the 1811 Act, which was only $100,000.[195]

The absence of a minimum capital requirement is perhaps surprising. At that time, the corporation's capital was viewed as a trust fund to be preserved for the benefit of creditors.[196] A minimum capital requirement would ensure that the purported trust fund was actually funded. On the other hand, requiring a minimum amount of capital would have defeated the purpose of encouraging formation of privateering associations by limiting the pool of possible investors to those who could afford to collectively contribute the requisite amount of capital. As a New York

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and the ability to transfer shares as fundamental characteristics of the corporate structure); Andrew A. Schwartz, The Corporate Preference for Trade Secret, 74 Ohio St. L.J. 623, 646 (2013) ("Corporations are creatures of statute, legal entities defined by their legal attributes, including limited liability, centralized management, perpetual life, capital lock-in, and alienable shares.").

[189] See infra Part IV.F.

[190] Larry E. Ribstein, The Rise of the Uncorporation 75 (2010) (arguing that, "if firms want corporate features such as limited liability they must seek state authorization to be entities").

[191] 1814 Act § I.

[192] Id. The act uses the term "capital stock," but New York courts interpreted that to mean "the capital owned by the corporation; the fund required to be paid in and kept intact as the basis of the business enterprise and the chief factor in its safety." People ex rel. Union Tr. Co. v. Coleman, 27 N.E. 818, 819 (N.Y. 1891).

[193] 1814 Act § I.

[194] See id., § VI (stating that the "capital stock . . . shall not exceed one million dollars").

[195] 1811 Act § V. Some early New Jersey general incorporation statutes mandated both minimum and maximum amounts of capital. Cadman, supra note 5, at 260. Some, including the 1816 general incorporation statute for manufacturing companies, imposed only maximums. Id.

[196] See infra notes 288-296 and accompanying text.

court observed of the 1811 act, "the benefits from associating and becoming incorporated, for the purposes held out in the act, are offered to all who will conform to its requisitions."[197] Stephen Presser observes that the court thereby "made clear what it perceived as the democratic character of general incorporation."[198] Among the policies driving New York's adoption of general incorporation laws was the desire "of encouraging the small-scale entrepreneur, and of keeping entry into business markets competitive and democratic."[199]

As for the cap on the maximum allowable capital, such provisions are usually attributed to suspicion of the corporate form and a desire to limit the scope of corporate power.[200] As discussed in the next section, so attributing the capital limitation is consistent with the provision of the 1814 Act limiting the real estate a corporation formed thereunder could own.[201] If so, however, it seems curious that the 1814 Act increased the maximum allowable capital to ten times that of the 1811 statute. Given that the million dollar cap was 40 times the cost of outfitting a letter of marque trader and 25 times that of outfitting a dedicated privateer, such an increase seems unwarranted.

B. Legal Personality

As firms increased in size, the key features of corporation's legal personhood became increasingly important. The ability to hold and convey property and to sue or be sued in the corporation's name appear to have been widely valued.[202] Both of those rights were granted by the 1811 and 1814 Acts.[203]

Interestingly, however, both acts limited the amount of property corporations formed thereunder could own. The 1811 Act authorized ownership of only such real property as was "necessary to enable the said company to carry on their manufacturing operations mentioned in such certificate."[204] The 1814 Act authorized the corporation to acquire only such real estate as was necessary for "building, repairing, and fitting out" privateering vessels or necessary for the directors and officers to conduct the business.[205]

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[197] Slee v. Bloom, 1822 WL 1808 (N.Y. 1822).

[198] Stephen B. Presser, Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics, 87 Nw. U.L. Rev. 148, 155 (1992).

[199] Id.

[200] Noting that caps on the amount of capital corporations were authorized to raise were "long universal," along with various other limits on corporate size and power, Justice Brandeis points to "a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations." Louis K. Liggett Co. v. Lee, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting).

[201] See infra notes 204-210 and accompanying text.

[202] Cadman, supra note 5, at 41.

[203] 1811 Act § II; 1814 Act § II.

[204] 1811 Act § II.

[205] 1814 Act § VII.

Economist John Cadman contends that restrictions on corporate ownership of real property were a manifestation of the Jeffersonian and Jacksonian skepticism of and opposition to the corporate form.[206] In New Jersey, for example, during the special chartering era some corporate charters placed specific limits on the amount of land the chartered corporation could own.[207] More commonly, however, New Jersey charters in that period—like the New York acts—limited the corporation to owning the amount of land necessary for the purposes of the business.[208]

Taken together with the cap on allowable capital, the restriction on real estate ownership suggests that the Jeffersonian suspicion of the potential for the corporate form to permit concentrations of economic—and thus political—power was influential in New York during the period.[209] In addition, these provisions may have been intended to ensure that the corporate privileges granted by the state were used only for their intended economic purpose—respectively, manufacturing and privateering—rather than for speculation or other activities that might not serve the public interest.[210]

C. Separation of Ownership and Control

Under the law in the early nineteenth century, as it remains today, each member of a partnership had the authority to sign contracts binding the whole firm, meaning that a single partner could cause considerable trouble for the others.[211] Recall, for example, the incident in which Baltimore-based venturer Henry Didier unilaterally converted two letter of marque traders into privateers while his partner John D'Arcy was in Europe.[212] The corporate form offered a solution; namely, the board of directors.

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[206] See Cadman, supra note 5, at 232 (noting that "there was a distinct feeling on the part of early nineteenth century legislators that it was undesirable to permit large amounts of land to come into corporate hands").

[207] Id.

[208] Id.

[209] In the early days of the Republic, Jeffersonians "were not favorably inclined toward business corporations." Herbert Hovenkamp, The Classical Corporation in American Legal Thought, 76 Geo. L.J. 1593, 1651-52 (1988).

[210] The latter interpretation is supported by the corresponding language of the 1811 Act, which tied the grant of power to own property to "manufacturing operations mentioned in" the articles of incorporation. Tying the real property limitation directly to the corporation's articles of incorporation or charter created a clear boundary for permissible corporate activity under the statute.

[211] See Garitee, supra note 24, at 84 (observing the law of the time "empowered any partner alone to sell the vessel or even to terminate the venture").

[212] See supra note 138 and accompanying text. The risk that partners will behave opportunistically can be mitigated by trust built up through relationships and reinforced by social norms. See Stewart Macaulay, Renegotiations and Settlements: Dr. Pangloss's Notes on the Margins of David Campbell's Papers, 29 Cardozo L. Rev. 261, 289 (2007) (discussing the "trust conventions that typify close relationships between a firm and its partner, thus encouraging rather than discouraging opportunistic behavior"); Henry E. Smith, The Equitable Dimension of Contract, 45 Suffolk U. L. Rev. 897, 912 (2012) ("Trust is also important for equity in

The corporation is the only form of business organization in which separation of ownership and control is mandated.[213] The requisite separation is created by assigning corporate management to a board of directors separate from both the shareholders and the company's employees. As the Model Business Corporation Act commands, "all corporate powers shall be exercised by or under the direction of the board of directors, and the business and affairs of the corporation shall be managed by or under the direction of, and subject to the oversight, of the board of directors."[214]

The board of directors is a very old feature of corporate governance, dating back at least as far as the Bank of England's 1694 charter.[215] Indeed, depending on what institutions one is willing to count as forerunners of the modern corporation, one can date the board back to the twelfth century.[216] In the early U.S., both special charters and general incorporation laws provided for a group of individuals—variously designated as directors, managers, or trustees—to manage the corporation.[217] Electing those individuals was regarded as the shareholders' principal corporate governance function.[218]

The 1814 statute differed slightly from the standard model, assigning the management power of the corporation to "a president and so many directors as are mentioned in" the articles of incorporation.[219] The directors were to be elected annually using plurality voting.[220] There were to be at least three and not more than twenty-one directors, all of whom were to be shareholders.[221] Binding decisions could be made by a majority of the directors present a meeting at which there was a quorum, which was defined as a majority of the total directors. The powers of the board included setting the time and place of meetings, appointing officers and

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that people who fear opportunism on the part of their potential or actual contractual partners will take costly precautions and sometimes forgo contracting altogether."). Interestingly, the principal holders of stock in the corporations formed under the 1811 Act tended to be officers and directors of the company. Kessler, supra note 157, at 881-82. Most stockholders were residents of the area in which the company did business. Id. at 882. Trust is likely to arise in communities, while communities often have social norms backstopping trust. See Paul E. McGreal, Social Capital in Constitutional Law: The Case of Religious Norm Enforcement Through Prayer at Public Occasions, 40 Ariz. St. L.J. 585, 585 (2008) (positing that "members of a community trust that other members will follow certain norms of behavior, and that trust is enforced by a threat of informal punishment (e.g., ostracism) for violating the community's norms").

[213] Ribstein, supra note 190, at 67.

[214] Mod. Bus. Corp. Act § 8.01(b) (2016).

[215] See Stephen M. Bainbridge & M. Todd Henderson, Outsourcing the Board: How Board Service Provides Can Improve Corporate Governance 19 (discussing the history of the board).

[216] See id. at 22 (discussing the organization of Hansa outposts).

[217] Cadman, supra note 5, at 301.

[218] Id. at 303.

[219] 1814 Act § III.

[220] See id. (stating that "the persons having the greatest number of votes, shall be directors").

[221] Id.

agents, and making bylaws,[222] calling and demanding monies owed by shareholders,[223] and selling or disposing of any vessels by vote of a majority of the directors.[224] Note how that a broad interpretation of that latter provision together with the general assignment of managerial power to the board would have precluded Mr. Didier from unilaterally converting those letter of marque traders into privateers.

Although many modern commentators are sharply critical of the corporate form's separation of ownership and control,[225] with some condemning it as a twentieth century departure from a golden era in which the owners of a corporation ran the corporation,[226] the evidence suggests that the drafters of the 1814 statute regarded that separation as a feature of the corporation rather than a bug. Indirect support for that proposition is provided by the many early New Jersey special charters alluding to the advantages of having the corporation run by a smaller subset of managers rather than the owners collectively.[227] More direct support is found in an 1822 New York decision, *Slee v. Bloom*,[228] in which the court identified "the capacity to manage the affairs of the institution, by a few and select agents" as one of the "only advantages of incorporation under the [1811 Act] over partnerships . . .."[229] As such, the 1811 and 1814 acts support the claim that the separation of ownership and control is a feature of the corporation not a bug.[230]

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[222] 1814 Act § V.

[223] Id., § VI.

[224] Id., § XI

[225] See Charles R. Korsmo, Woke Capital and the Ownership of Enterprise, 26 U. Pa. J. Bus. L. 511, 568 (2024) ("Critics of investor capitalism have long lamented the strange amorality that can arise from the separation of ownership and control characterized by the traditional public company.").

[226] See Stephen M. Bainbridge, Director v. Shareholder Primacy in the Convergence Debate, 16 Transnatl. Law. 45, 59 (2002) (noting that "Berle and Means," for example, "believed that the separation of ownership and control was both a departure from historical norms and a serious economic problem").

[227] Cadman, supra note 5, at 41.

[228] 19 Johns. 456 (1822).

[229] Id. at 474.

[230] Bainbridge, supra note 226, at 59. To be sure, the 1814 Act required that directors be shareholders. 1814 Act § III. The same is true of modern corporate governance best practice, however. See Ronald J. Gilson & Jeffrey N. Gordon, Board 3.0: An Introduction, 74 Bus. Law. 351, 357 (2019) (observing that "'best practice" is to deliver a significant fraction of director compensation in the form of stock-based pay, commonly 50 percent, and to require directors to accumulate an ownership stake during their period of board service'"). While some commentators believe director stockownership ameliorates the agency costs generated by the separation of ownership and control, it has not eliminated that separation. See Sanjai Bhagat et. al., The Promise and Peril of Corporate Governance Indices, 108 Colum. L. Rev. 1803, 1817 (2008) ("Studies of the impact of director stock ownership similarly have ambiguous findings . . ..").

D. Freely Alienable Interests

Unlike partnerships, whose ownership interests were illiquid as a matter of law,[231] there was nothing in the 1814 Act that would have limited stockholders from disposing of their shares. To the contrary, the act provided that the company's shares "shall be transferable in such manner as shall be prescribed by the bye-laws [sic] of such company."[232] Of course, the bylaws could have imposed restraints on alienation of the shares, as do the organic documents of many modern closely held corporations.[233]

Assuming the bylaws permitted shares to be transferred, a selling shareholders would have to find a willing buyer. That difficulty would have been alleviated somewhat because an over-the-counter market for stocks already existed in New York as early as 1792.[234] In 1817, that market was formalized by founding of the organization that became the modern New York Stock Exchange.[235]

Freely transferable shares give the corporation significant advantages over the partnership form. In particular, they provide a safety valve for shareholders, mitigating the risks created by the capital lock-in rules discussed below.[236] Although those rules bar shareholders from forcing dissolution of the firm or a buyout of their shares by the firm or their fellow shareholders, the free transferability of their shares gives them an exit option unavailable to partners.

E. Duration

Until quite recently, partnerships were potentially unstable entities. Under the Uniform Partnership Act of 1914, a partnership was dissolved by operation of law if, *inter alia*, a durational term specified in the partnership agreement expired, a partner in a firm with no express durational term ceased to be associated with the firm, a partner was expelled pursuant to the partnership agreement, a partner died, of a partner became bankrupt.[237] In contrast, a modern

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[231] See Guenther, supra note 5, at 9 ("At common law, . . . partnership interests were not freely transferable.").

[232] 1814 Act § XII.

[233] The Model Business Corporation Act allows restraints on alienation of shares to be included in the corporation's "articles of incorporation, bylaws, an agreement among shareholders, or an agreement between shareholders and the corporation," subject to various restrictions. Mod. Bus. Corp. Act § 6.27 (2016). For a discussion of why some corporations opt for such restrictions and their legality, see Bainbridge, supra note 188, at 532-33.

[234] NYSE, The History of the NYSE, https://perma.cc/97J7-EBDH.

[235] Id.

[236] Ribstein, supra note 190, at 72.

[237] Unif. Partnership Act § 31 (1914). These difficulties were considerably alleviated by the revised Uniform Partnership Act promulgated in 1997, whose provisions allowed the partnership to remain in business in most of those situations if it bought out the interest of the dissociated partner. See Ribstein, supra note 190, at 53 (noting that the revised act "slightly mitigates the threat").

corporation has an indefinite life, which is unaffected by the death or other acts of any of its shareholders.[238] As early as 1793, "indefinite duration, by a continued accession of new members to supply the place of those who are removed by death, or other means," was being described as an "essential characteristic of a corporation," albeit by an English lawyer.[239]

Curiously, however, both the 1811 and 1814 Acts had express durational limits. The 1811 Act gave corporations thereunder a maximum life of twenty years.[240] The 1814 Act provided that corporations formed thereunder would "cease and expire at the end of one year after termination of the present war with Great Britain."[241] The latter act's durational limit probably reflected the debate over the merits of privateering. Privateering was a temporary expedient during times of war. Encouraging or even merely allowing one's citizens to prey on the trade of a foreign nation could have serious diplomatic consequences, including triggering a war, as illustrated by the disputes between Spain and England over the quasi-piracy waged by buccaneers such as Francis Drake during Elizabethan times.[242] The year's grace given by the 1814 statute probably reflected the likelihood that some privateering associations would have ships at sea when peace returned, potentially as far away as China, and the amount of time it would take for word of peace to reach them. In any case, note the under both the 1811 and 1814 acts, the instability of partnerships was avoided because of the difficulty of dissolving the corporation prior to the expiration of the statutory term.

F. Asset Partitioning

Asset partitioning encompasses two distinct but related concepts that protect different parties and serve different economic functions: (1) affirmative asset partitioning, which can be subdivided into entity shielding, which protects an organization's assets from owners' personal creditors, and capital lock-in, which prevents shareholders from unilaterally withdrawing their capital; and (2) defensive asset partitioning (limited liability), which protects owners' personal assets from the organization's creditors.[243] The problems addressed by these asset partitioning

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[238] See, e.g., Mod. Bus. Corp. Act § 3.02 (2016) ("Unless its articles of incorporation provide otherwise, every corporation has perpetual duration . . ..).

[239] Stewart Kyd, A Treatise on the Law of Corporations 2 (1793). Kyd's text on corporations, however, was "familiar to American lawyers." Thomas G. Gronert, The History of the Business Corporation in the United States 61 (1921).

[240] 1811 Act § II. Cadman asserts that such limits on the corporation's lifespan "were calculated to deter corporations from organizing under them," but fails to explain why the legislature sought to do so. Cadman, supra note 5, at 368.

[241] 1814 Act § VI.

[242] See Edward F. Benson, Sir Francis Drake 96 (19127) (discussing the impact of Drake's raiding of Spanish shipping on Queen Elizabeth's diplomacy with Spain).

[243] See Mariana Pargendler, The New Corporate Law of Corporate Groups, 14 Harv. Bus. L. Rev. 339, 345 n.15 (2024) (describing the "three dimensions" of asset partitioning).

rules are "ubiquitous in any economic system that relies on property and contract as organizing principles."[244]

Corporations provide strong asset partitioning by creating legal persons entitled to own assets in their own name, with the firm's equity investors owning claims to cash flows but not the organization's assets directly.[245] As a result of these rules, shareholders and their personal creditors cannot access corporate assets unless a shareholder majority votes to liquidate the company, while conversely creditors of the firm may not reach the personal assets of shareholders to satisfy claims against the firm. This differs significantly from partnerships, where individual partners or their creditors can unilaterally force dissolution and the full personal assets of the partners are subject to claims of the firm's creditors.[246]

1. Affirmative Asset Partitioning

a. Entity Shielding

A core function of business association law is identifying a set of assets that are legally separate from those personally or jointly held by the shareholders, with the firm—through its appointed managers—recognized by law as the rightful owner of those assets.[247] Because the assets comprising that pool are owned by the firm, which has the sole right to use, dispose, or pledge them, they are not subject to attachment by the personal creditors of the firm's shareholders.[248] Accordingly, while limited liability protects shareholders from being responsible for the corporation's debts, entity shielding protects the corporation from the owners' personal debts.[249]

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[244] Mahoney, supra note 187, at 878. Modern legal systems primarily enforce contracts by allowing unpaid creditors to claim the assets of the defaulting party. Henry Hansmann, Reinier Kraakman, & Richard Squire, Law and the Rise of the Firm, 119 Harv. L. Rev. 1333, 1337 (2006). By default, when an individual enters into a contract, the law assumes that all of their personal assets are pledged to guarantee performance. Id. This same principle applies to corporations—unless specified otherwise, all corporate assets are used to secure the firm's obligations. Id. To determine which assets back which obligations, the law relies on rules of asset partitioning. Id. These rules specify which assets belong to which entities and which entities are responsible for which contracts. Id. Asset partitioning is often complete—creditors of one entity cannot touch assets of another—but it can also be partial. Id. For instance, in general partnerships, personal creditors of a partner may access firm assets, but only after the firm's own creditors are fully satisfied. Id. This leads to two key types of asset separation: entity shielding, which protects the entity's assets from the personal creditors of its owners, and owner shielding, which protects the owners' personal assets from the entity's creditors. Id.

[245] See Anderson, supra note 154, at 1595-96 (describing the features of the corporation creating strong asset partitioning).

[246] See Morgan Ricks, Organizational Law As Commitment Device, 70 Vand. L. Rev. 1303, 1311–12 (2017) (distinguishing "between strong- and weak-form asset partitioning . . . by comparing the corporation to the partnership at will").

[247] Armour et al., supra note 188, at 5.

[248] Id.

[249] Anderson, supra note 154, at 1586-87. The seminal work on entity shielding, which originally was termed affirmative asset partitioning, was Henry Hansmann & Reinier Kraakman, The Essential Role of

Entity shielding is essential to a corporation's ability to attract funding from creditors because it ensures a clear separation between the corporation's assets and those of its owners.[250] This separation—reinforced by mechanisms like capital lock-in—prevents both the owners and their creditors from seizing or liquidating the corporation's assets.[251] Scholars consider entity shielding at least as important as limited liability—if not more so—and see both as foundational to the emergence of the modern business firm.[252]

Business association forms offer differing strengths of entity shielding. Weak entity shielding such as found in partnership law gives firm creditors first priority over the firm's assets. [253] Strong entity shielding such as that found in corporate law includes not only this priority but also liquidation protection, which prevents both shareholders and their personal creditors from forcing liquidation of the firm, which would undermine the firm's ability to meet its obligations.[254]

Law professors Henry Hansmann and Reinier Kraakman assert that entity shielding is the "core defining characteristic of a legal entity."[255] Along with law professor Richard Squire, they identify several benefits of entity shielding. They posit that entity shielding lowers creditor monitoring costs by insulating them from hard-to-assess risks and allowing them to focus on familiar or easily monitored businesses.[256] It reduces the risk that managers will engage in

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Organizational Law, 110 Yale L.J. 387, 393-98 (2000). The term entity shielding originated with Hansmann et al., supra 244, at 1336.

[250] Anderson, supra note 154, at 1586.

[251] Id.

[252] Id. at 1587.

[253] See John Morley, The Common Law Corporation: The Power of the Trust in Anglo-American Business History, 116 Colum. L. Rev. 2145, 2168 (2016) ("The common law of partnership is said to have offered only priority and not liquidation protection.").

[254] See id. at 2168 (discussing strong form entity shielding). So-called complete entity shielding goes even further by fully insulating the firm's assets from claims by any non-firm creditors, including those of the firm's owners or beneficiaries. Hansmann et al., supra note 244, at 1338. This is found in nonprofit entities and charitable trusts, where only the firm's own contractual commitments are backed by its assets, not the personal liabilities of anyone involved with it. Id.

[255] Hansmann & Kraakman, supra note 249, at 393. It seems generally accepted that entity shielding cannot be created through private ordering, but instead requires mandatory legal rules. This is so because, while many aspects of the corporate form can be replicated by contract, one crucial feature cannot; namely, the ability to bind third parties, such as the personal creditors of corporate owners. Anderson, supra note 154, at 1590. These third parties might try to reach corporate assets to collect on debts owed by the owners. Contracts, being *in personam* (binding only the parties involved), can't prevent this. Id. Without a legal mechanism to stop such creditors, a corporation's borrowing ability would be unstable, shifting with changes in ownership. Id. Entity shielding provides the essential *in rem* feature that protects the corporation's assets from being seized by owners' creditors. Id. at 1590-91.

[256] Hansmann et al., supra note 244, at 1345.

excessive borrowing by tying creditors' claims to specific asset pools.[257] It protects the firm's going concern value, as it precludes individual owners from withdrawing assets at will.[258] Entity shielding lowers the need for firm owners to oversee each other's personal finances, making it less costly to bring in new equity investors, especially those who aren't personally known or trusted, which facilitates investment in multiple firms and promotes risk diversification.[259] It facilitates use of freely transferable shares by reducing the need for owners to monitor each other's personal finances and thereby lessening the need to restrict who can become an owner, thereby reducing the need for restraints on alienation.[260]

b. Capital Lock-in

Strictly speaking, entity shielding refers to the priority of entity creditors over shareholders' personal creditors, not to the priority of entity creditors over shareholders themselves. The latter is ensured by the closely related concept known as capital lock-in, which refers to the legal and structural feature of corporations whereby the capital contributed by shareholders becomes permanently committed to the firm and cannot be easily withdrawn by individual investors.[261] Capital lock-in is a longstanding attribute of the corporate form, having been traced back as far as the seventeenth century Dutch East India Company.[262] Its survival suggests that it fulfills essential economic functions.

First, lock-in insulates company operations from individual shareholders' financial circumstances or preferences. By keeping corporate assets intact regardless of shareholders' liquidity needs or creditor obligations, it eliminates the need for shareholders to monitor one another. This complements other corporate features like delegated management and share transferability. It enables the separation of ownership and control, for example, because managers have more stable resources and can operate the company without frequent disruptions from investor turnover.

Second, the stability provided by capital lock-in allows corporations to make long-term investments without the risk of sudden capital withdrawals. By precluding individual investors

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[257] Id. at 1346. As an example, they1 offer the hypothetical of a merchant with businesses in multiple cities, suggesting that such a merchant may prefer separate partnerships for each shop so as to prevent one manager from leveraging all firm assets. Id. This structure forces creditors to absorb the risk of that shop alone, prompting more cautious lending and disciplining managers. Id.

[258] Id. at 1348-49.

[259] Id. at 1350.

[260] Armour et al., supra note 188, at 6.

[261] Margaret Blair is generally credited with having brought attention to the importance of capital lock-in as a core feature of the corporation. See, e.g., Anderson, supra note 154, at 1595. Blair argues that the ability of the corporate form to provide a mechanism for locking capital into the firm was crucial to the corporation's rise in the 19th century as the dominant form of business organization. See Margaret M. Blair, Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century, 51 UCLA L. Rev. 387, 427-33 (2003) (discussing the role of capital lock-in in nineteenth century businesses).

[262] Mariana Pargendler, How Universal Is the Corporate Form? Reflections on the Dwindling of Corporate Attributes in Brazil, 58 Colum. J. Transnat'l L. 1, 9-10 (2019).

from dissolving the firm at will, capital lock-in protects not only shareholders but also other stakeholders, including creditors, by ensuring that the firm's capital remained within the enterprise.[263] By thus promoting corporate continuity and integrity over time, lock-in encourages firm-specific investments from various enterprise participants. As a result, incorporated businesses could become durable institutions, capable of amassing enterprise-specific assets and developing specialized, long-term organizational structures.[264]

c. Modern Law

In modern corporations, entity shielding and capital lock-in are provided by a number of legal rules. At the most basic, both forms of asset partitioning rest on the rules identifying the assets of a business as property of a legal entity separate from its owners, thereby creating "separate asset pools for separate creditors."[265] Entity shielding is specifically provided by rules governing the priority of claims against the corporation's assets, such as the absolute priority rule in bankruptcy,[266] the automatic stay in bankruptcy,[267] and limitations on the ability of personal creditors of shareholders to reverse pierce the corporate veil.[268]

Capital lock-in is provided by rules protecting the corporation from capital withdrawals and liquidation. When shareholders buy stock in a corporation, their capital becomes part of the firm's assets and they cannot later demand that the corporation return their investment (as they might in a partnership or mutual fund). After making an investment—either through new share subscriptions or secondary market purchases—shareholders are entitled only to pro rata dividend distributions of surplus corporate earnings but only when approved by the board of directors and subject to the limits of the legal capital rules.[269] Outside the bankruptcy context, shareholders

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[263] Anderson, supra note 154, at 1596 ("The fact that capital could be locked in protected all types of investors in the entity, both financial and nonfinancial."); Ribstein, supra note 190, at 71 (arguing that capital lock-in prevents opportunism by investors who might seek to hold up the other investors by threatening to dissolve the firm).

[264] The ease with which partnerships may be dissolved creates considerable drafting and operating challenges, which become exponentially greater as the firm's size grows. Large firms whose development commonly requires "many years and much planning and capital to develop." Ribstein, supra note 190, at 71. In addition, "a significant component of firm value often comes from its reputation or goodwill, which the firm builds over many years of advertising and being good to customers, workers, and suppliers." Id. Much of that value "may be lost if the firm has to liquidate to pay off exiting owners." Id. In turn, the risk of losing such value might deter large firms from developing in the first place. Id.

[265] Andrew Verstein, Enterprise Without Entities, 116 Mich. L. Rev. 247, 263 (2017).

[266] See, e.g., Adler v. Lehman Bros. Holdings (In re Lehman Bros. Holdings), 855 F.3d 459, 470 (2d Cir. 2017) (explaining that "the absolute priority rule is "a bedrock principle of bankruptcy law, under which creditors are entitled to be paid ahead of shareholders in the distribution of corporate assets").

[267] The automatic stay ensures equality of creditors by preventing distribution of assets on a first come first served basis. In re MortgageAmerica Corp., 714 F.2d 1266, 1274 (5th Cir. 1983).

[268] See Kathryn Hespe, Preserving Entity Shielding: How Corporations Should Respond to Reverse Piercing of the Corporate Veil, 14 J. Bus. & Sec. L. 69 (2013)

[269] As for the legal capital rules limiting payment of dividends, see Bainbridge, supra note 188, at 499-506. As for the shareholder's extremely limited ability to compel directors to pay dividends, see id. at 515-18.

may only withdraw their capital upon dissolution and liquidation, which requires not just the individual act of a single investor (as in partnership law) but approval by the board of directors and, if such approval is forthcoming, approval by a majority shareholder vote.[270]

d. Did the 1814 Act Provide Affirmative Asset Partitioning?

Did privateering associations need legal rules providing entity shielding and capital lock-in comparable to the modern rules? The late professor Larry Ribstein argued that the significance of capital lock-in as an essential feature of the corporation is overstated, as private ordering can insulate the firm's assets from claims by partners and voluntary creditors, while partnership law early developed legal protection against third party claims in which private ordering was difficult.[271] Having said that, however, Ribstein conceded that, on a firm-by-firm basis, the importance of capital lock-in depends on whether the firm in question needs "to own substantial property for factories and the like."[272] While capital lock-in thus may be less important in today's modern service economy, corporations created under the 1814 Act would have been capital intensive firms that needed to own significant physical assets. They likely would have found capital lock-in rules helpful.

Law professor Susan Wilson in fact argues that entity shielding and capital lock-in were essential features of British privateering ventures. She observes that English privateering associations during the wars with Spain in the late sixteenth century frequently organized as joint stock companies.[273] The length of privateering voyages required capital lock-in.[274] The privateering association's assets would be at sea for an extended period of time, facing risks from both adverse weather and enemy ships. Presumably, few assets remained ashore. Hence, if a shareholder was able to withdraw their capital before the ship returned to port, the other shareholders presumably would have to pay in a sufficient amount of additional capital to cover the withdraw. Not only was this inconvenient, but it would increase the risk exposure of the remaining investors, who now stood to lose even more money if the vessel were captured or

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[270] See, e.g., Mod. Bus. Corp. Act § 14.02 (2016) (setting out process for voluntary dissolution). As Richard Squire explains in more detail, unless the corporate charter states otherwise, the board of directors has sole authority over the corporation's capital, and shareholders are not entitled to demand its return. Richard Squire, Why the Corporation Locks in Financial Capital but the Partnership Does Not, 74 Vand. L. Rev. 1787, 1802 (2021). To be sure, shareholders can earn on a return on their investment through dividends. Only the board can declare dividends, however, and usually only when the company has surplus funds. As for recovering their entire invested capital, shareholders can typically so do in just three ways: share repurchase, exercising appraisal rights in a merger, or during the company's dissolution. Id. at 1802. All these actions must be initiated by the board, and in some cases—such as dissolution or certain mergers—shareholder approval is also required. Id.

[271] Ribstein, supra note 190, at 76.

[272] Ribstein, supra note 190, at 234. Hansmann, Kraakman, and Squire contend that capital lock-in can partially be created by contractual provisions limiting the shareholders' ability to withdraw capital at will. Hansmann et al., supra note 244, at 1341-42. Locking in capital against the claims of shareholders' personal creditors, however, does require mandatory legal rules. Id. at 1342-43.

[273] Susan Watson, The Making of the Modern Company 24-25 (2022)

[274] Id. at 20.

sunk. As a practical matter, it simply was unworkable to allow a shareholder to withdraw capital—let alone force a dissolution—while the ship was at sea. The joint stock company provided this because the shareholders' capital contributions were only returned if and when the ship returned.[275]

Curiously, however, the 1814 Act contains few provisions speaking to entity shielding and capital lock-in. Nothing in the statute expressly grants priority of firm creditors over shareholders and their personal creditors. The 1814 statute thus supports the view that the functional economic need for asset partitioning—particularly for ventures requiring pooled capital and risk isolation—often outpaced formal legal recognition, suggesting that legal evolution followed market imperatives rather than leading them.[276]

Having said that, however, there is indirect evidence that firms formed under the 1814 Act would have had entity shielding. First, corporations formed under the act had a definite term with no provision for shareholders—whether acting individually or collectively—to withdraw their capital or dissolve the firm. If the firm dissolved, shareholders likely had double liability for the debts of the corporation,[277] which implies priority of firm creditors over the shareholders. Second, the shares would have been freely tradable (assuming the bylaws so provided). As Hansmann, Kraakman, and Squire observe:

> The strongest evidence that [English and Dutch chartered joint stock companies] enjoyed liquidation protection against personal creditors, and thus strong entity shielding, is the fact that their shares were tradable. In the absence of liquidation protection against personal creditors, excessive borrowing by any owner would have threatened a firm's going-concern value, and thus given owners a collective interest in restricting membership in the firm. Fully tradable shares, by contrast, are consistent with a lack of concern about any given shareholder's personal

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[275] Id. at 25. See generally Hansmann et. al., supra note 244, at 1377 ("The best evidence indicates that the English and Dutch chartered joint stock companies featured strong entity shielding . . ."); Morley, supra note 253, at 2173 (noting that "even from the very dawn of trust-based joint-stock companies, something like entity shielding was widely expected").

[276] For comparative perspectives on the development of asset partitioning across jurisdictions, see Timothy W. Guinnane, Ron Harris, Naomi R. Lamoreaux & Jean-Laurent Rosenthal, Putting the Corporation in Its Place, 8 Enterprise & Soc'y 687, 693–701 (2007) (arguing that while strong entity shielding became a central feature of corporate law in common-law jurisdictions like the U.S. and U.K., other countries—such as France and Germany—developed functionally similar partitioning through partnerships with legal personality and other hybrid forms). Their research highlights that effective asset partitioning need not originate solely through corporate statutes; it can emerge through a mix of statutory, doctrinal, and contractual tools shaped by local institutional constraints. The 1814 Act's reliance on judicial doctrine and informal norms to supplement statutory silence on dissolution and liquidation fits this broader pattern. See also Ron Harris, The Institutional Dynamics of Early Modern Eurasian Trade: The Corporation and the Commenda, 78 Bus. Hist. Rev. 109 (2004) (documenting variation in legal forms of asset separation in early capitalist enterprises).

[277] See infra notes 318-338 and accompanying text (discussing the extent of shareholder liability for debts of a dissolved corporation).

> borrowing habits, and thus with liquidation protection against personal creditors.[278]

As for capital lock-in, there are no restrictions on the payment of dividends. Indeed, to the contrary, there is a requirement that dividends be paid every six months in such amount as the directors deemed advisable.[279] As noted below, however, this statutory authorization may have been limited by the common law trust fund doctrine.[280]

As noted, the 1814 Act lacked any provisions relating to dissolution of corporations formed thereunder. Given that restrictions on voluntary dissolution are regarded as critical parts of entity shielding and capital lock-in, the omission seems highly curious. Yet, general incorporation statutes of the time rarely provided for voluntary dissolution.[281] Indeed, cases from the 1830s and 1840s in other states held corporations had no power to dissolve themselves without legislative consent.[282]

The most directly relevant New York precedent is *Slee v. Bloom*,[283] an 1822 decision by the Court for the Correction of Errors. The Duchess Cotton Manufactory was incorporated under the 1811 Act. It effectively ceased doing business in December 1817 and in February 1818 all of its property was sold by a sheriff under an order of execution.[284] An unpaid creditor sued the shareholders under the 1811 Act's provision imposing liability on the shareholders for debts owed by the company at the time of its dissolution.[285] Shareholders argued that the corporation remained in existence, pointing to the 1811 Act's provision granting corporations a 20 year duration, such that the creditors had to wait for payment until that 20 year period expired.[286] The court rejected the shareholders' argument, holding that the "corporation was dissolved, within the meaning and intent of the act, as regards creditors, when it ceased to own any property, real or personal, and when it ceased, for such a space of time, from doing any one act manifesting an intention to resume their corporate functions," and that the stockholders were therefore liable for the unpaid debt.[287] New York law thus provided less effective entity shielding than the law of

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[278] Hansmann et al., supra note 244, at 1377.

[279] 1814 Act § IX.

[280] See infra notes 288-296 and accompanying text.

[281] Dodd, supra note 4, at 184. In New Jersey, for example, the early general incorporation laws lacked provisions for dissolution of corporations formed under them. Cadman, supra note 5, at 326. This omission was not corrected under 1870. Id.

[282] Dodd, supra note 4, at 184.

[283] 19 Johns. 456 (N.Y. 1822).

[284] Id.

[285] See id. at 464 (summarizing plaintiff's argument).

[286] See id. at 476 ("The doctrine urged by the respondents' counsel is, that this corporation must endure for twenty years, unless it is judicially declared to be dissolved, for misuser or nonuser . . ..").It appears that only the state attorney general could sue to dissolve the corporation on those grounds. See id. ("The people of the state, through their law officer, can only institute such proceedings.").

[287] Id. at 477.

those states in which dissolution required a legislative act. Achieving dissolution, however, required the shareholders to abandon the corporation's assets and wholly cease any functioning and expose themselves to personal liability for the company's debts. To be sure, *Slee* arose under the 1811 Act, but the statutes are similar enough—e.g., both creating corporations having defined durations—that the result likely would have been the same under the 1814Act.

In addition, the common law likely supplemented the 1814 Act by providing some forms of asset partitioning.[288] In particular, as Justice Story held in *Wood v. Dummer*, "the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank."[289] As such, this so-called trust fund doctrine ensured that creditors had the first claims on a corporation's assets and shareholders had no rights thereto until all creditors were satisfied.

Two objections might be raised to assuming that the trust fund doctrine would have applied to corporations created under the 1814 Act. First, in setting out the basic statement of the doctrine, Story refers not to corporations but to the "capital stock of banks." Elsewhere in the opinion, however, Story treats the doctrine as applying to corporations generally.[290]

Second, *Wood v. Dummer* was not decided until a decade after the 1814 Act became law. But while the trust fund doctrine is usually said to have originated in *Wood v. Dummer*,[291] it seems highly unlikely that the doctrine sprang full grown from Story's head like Athena from the brow of Zeus. In *Wood* itself, for example, Story cited an earlier pair of Massachusetts cases dating from 1819 as having recognized the doctrine.[292] In addition, Story opined that the doctrine reflected legislative intent, presumably referring to the special charter granted the bank by the Massachusetts legislature in 1804 and Massachusetts banking legislation in 1812 and 1816 extending the charters of any banks whose charters otherwise would have expired.[293] Story also opined that the public had "always supposed [the capital stock] to be a fund appropriated for

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[288] Note that the following analysis likely would have applied to the 1811 Act, as well. The statutes were close enough in time and sufficiently similar to allow one to draw that inference.

[289] Wood v. Dummer, 30 F. Cas. 435, 436 (C.C.D. Me. 1824). As noted above, the term capital stock presumably referred to the bank's stated capital, see supra note 192, which was set out in the original charter of the bank at the center of *Wood v. Dummer* as $200,000 divided into shares with a par value of $100 each. An Act to Incorporate Sundry Persons by the Name of the President, Directors & Company of the Hallowell & Augusta Bank, 1803 Mass. Acts 684.

[290] See, e.g., *Wood*, 30 F. Cas. at 436 ("During the existence of the corporation it is the sole property of the corporation, and can be applied only according to its charter, that is, as a fund for payment of its debts, upon the security of which it may discount and circulate notes.").

[291] See, e.g., In re Mortgage America Corp., 714 F.2d 1266, 1269 (5th Cir. 1983) ("It was first established in 1824 by Chief [sic] Justice Story sitting alone as a Circuit Justice on the Circuit Court for the District of Maine . . .."); Edwin S. Hunt, The Trust Fund Theory and Some Substitutes for It, 12 Yale L.J. 63 (1902) (stating that the "new doctrine was for the first time announced in the year 1824 by Judge Story in the well-known case of *Wood v. Dummer*").

[292] *Wood*, 30 F. Cas. at 437 (citing Vose v. Grant, 15 Mass. 505 (Mass. 1819) and Spear v. Grant, 16 Mass. 9 (1819)).

[293] *Wood*, 30 F. Cas. at 436.

such purpose [i.e., payment of the corporation's debts]."[294] In so doing, Story acknowledged that the doctrine was not new but rather had precedents.[295] As such, it may have helped provide capital lock-in for New York corporations at the relevant time period.[296]

e. Summation

The 1814 Act offers a nuanced perspective on the longstanding debate over the role of affirmative asset partitioning in corporate law. While contemporary corporate theory often treats both forms of affirmative asset partitioning as an indispensable legal feature—enforced through priority rules, dividend constraints, board control over dividends and dissolution, and statutory capital rules—the 1814 Act lacked most of these mechanisms. Yet the nature of privateering ventures made affirmative asset partitioning functionally indispensable: vessels once launched could not return for recapitalization; investors needed assurance that fellow shareholders would not undermine the voyage by withdrawing funds mid-cruise. In this sense, the 1814 Act reflects an economic demand for affirmative asset partitioning that outpaced its legal formalization. The persistence of this structure despite minimal statutory protection suggests that affirmative asset partitioning can be driven as much by enterprise design and investor expectations as by black-letter law. Thus, the 1814 Act both supports and complicates existing scholarly views—it affirms the importance of capital stability in certain economic contexts, while also illustrating that affirmative asset partitioning may arise through commercial norms, institutional design, and judicial doctrines like the trust fund rule, rather than comprehensive statutory mandates.

2. Defensive Asset Partitioning (a.k.a. Limited Liability)

Limited liability has been described as "[t]he key feature of the corporation that makes it such an attractive form of human cooperation and collaboration."[297] Yet, although corporations are now closely associated with limited liability, it was not firmly established in England until

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[294] Id.

[295] Indirect evidence that the trust fund doctrine predated 1824 is provided by the articles of association of a woolen manufactory organized in 1788, which provided that no part of the capital stock could be withdrawn except by vote of a majority of the shareholders. II Davis, supra note 3, at 266. In his Commentaries, Chancellor Kent referred to an 1803 Irish case as precedent for the trust fund doctrine, but the Irish case involved family rather than corporate law. Annot., Corporations: Expiration of Charter, 47 A.L.R. 1366 n.3 (1927).

[296] Although a New York court did not cite *Wood* until 1850, Mann v. Pentz, 3 N.Y. 415, 422 (N.Y. 1850), an 1837 New York decision invoked the doctrine, stating that "the assets of the company are in the nature of a trust fund for the payment of the debts due to the creditors of the corporation." DePeyster v. Am. Fire Ins. Co., 6 Paige Ch. 486, 487 (N.Y. Ch. 1837).

[297] Stephen M. Bainbridge & M. Todd Henderson, Limited Liability: A Legal and Economic Analysis 2 (2016). See also Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 40 (1991) ("Limited liability is a distinguishing feature of corporate law—perhaps the distinguishing feature"); David Leebron, Limited Liability, Tort Victims, and Creditors, 91 Colum. L. Rev. 1565, 1566 (1991) ("No principle seems more established in capitalist law or more essential to the functioning of the modern economy [than the principle of limited liability].").

the 1700s.[298] In the U.S., states gradually adopted limited liability laws, and by 1839, all New England states except Rhode Island had done so.[299] However, some states alternated between limited and unlimited liability well into the mid-19th century, with California maintaining shareholder liability until 1931.[300]

In part because of evidence that limited liability emerged slowly and in some states like California not until very late, some modern scholars deprecate its importance.[301] They contend that the ability of the corporate legal form to lock in financial capital or the ability of the corporation and other business organizations to shield their assets from their owners' creditors are the corporate form's truly indispensable feature.[302] They claim entity shielding cannot be created through private ordering, while limited liability can be created by contract and thus does not require a statutory basis.[303] As they acknowledge, however, their argument is limited to contractual liability.[304] They acknowledge that limited liability against tort liability cannot be eliminated by contract, but dismiss this objection on grounds that tort liability "has been relatively unimportant to the economics of business firms until very recently, and there is reason to doubt its efficiency."[305] As to the former, even if it is true that corporations only recently began to face significant tort liability, there is no doubt that concerns over tort liability are now of considerable importance for business corporations. As for the latter, they rely on Hansmann

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[298] Anderson, supra note 154, at 1607.

[299] Id.

[300] Id.

[301] See id. at 1589-90 (asserting that economic history has suggested that important periods of industrial development happened without limited liability, leading scholars to question how important limited liability was"); see, e.g., Blair, supra note 261, at 440 (arguing that "limited liability cannot fully explain why business people began seeking out incorporation in the nineteenth century, because early corporations were not always granted limited liability").

[302] See Anderson, supra note 154, at 1590 (observing that "recent scholarship has shown that it is entity shielding that is the truly unique feature of modern organizations"); see, e.g., Hansmann et al., supra note 244, at 1336 ("Firms can prosper without limited liability, but significant enterprises lacking entity shielding are largely unknown in modern times.").

[303] In a series of articles, for example, Hansmann and Kraakman "identify entity shielding as a central feature of modern firms, and argue that entity shielding, unlike limited liability, cannot be created through contract but instead requires law." Taisu Zhang & John D. Morley, The Modern State and the Rise of the Business Corporation, 132 Yale L.J. 1970, 1985–86 (2023). Hansmann, Kraakman, and Squire, for example, contend that firm owners can create a significant level of owner shielding, especially limited liability, by having firm agents (including themselves) negotiate contract terms with creditors that restrict or waive claims against the owners' personal assets. Hansmann et al., supra note 244, 1341. Additionally, agency law offers protection: owners can specify that agents have authority only over firm assets, not personal ones. Id. This method becomes more effective if firms use signals like including the term "limited" in the firm's name or correspondence to alert third parties that personal assets are off-limits. Id.

[304] Hansmann et al., supra note 244, at 1341 n.15.

[305] Id.

and Kraakman's 1991 article, *Toward Unlimited Shareholder Liability for Corporate Torts.*[306] Their argument therein against limited liability for tort claims, however, is highly controversial and, in any case, has had no traction as a law reform proposal.[307] In addition, their argument overlooks the possibility that contractual liability could be created by agents acting with apparent authority or inherent agency power, which would be difficult to prevent through private ordering.[308]

Whatever theoretical merit the view of modern scholars like Hansmann and Kraakman may have or the reasons states such as California came late to limited liability,[309] the historical record demonstrates that the lawyers, judges, and legislators of early nineteenth century New York saw limited liability as an essential feature of the corporate form. As we have seen, for example, the 1822 *Slee v. Bloom* decision identified the separation of ownership and control as one of the "[t]he only advantages of an incorporation under the [1811 Act] over partnerships . . .."[310] The other cited advantage was the "exoneration [of shareholders] from any responsibility beyond the amount of the individual subscriptions."[311]

In addition to New York's industrial policy of encouraging growth of manufacturing businesses, law professor Stephen Presser argues the New York legislature saw limited liability as an expression of populist democratic values:

> [I]t appears that to the nineteenth-century legislators in states such as New York, who mandated limited liability for corporations' shareholders, the imposition of limited liability was perceived as a means of encouraging the small-scale entrepreneur, and of keeping entry into business markets competitive and democratic. Without limitations on individual shareholder liability, it was believed, only the very wealthiest men, industrial titans such as New York's John Jacob Astor, could possess the privilege of investing in corporations. Without the contributions of investors of moderate means, it was felt, the kind of economic progress states like New York needed would not be achieved.[312]

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[306] Henry Hansmann & Reinier Kraakman, Toward Unlimited Shareholder Liability for Corporate Torts, 100 Yale L.J. 1879, (1991).

[307] For critiques of their argument, see Stephen M. Bainbridge, Abolishing Veil Piercing, 26 J. Corp. L. 479, 496-500 (2001) (discussing multiple arguments against the proposal); Franklin A. Gevurtz, The Globalization of Corporate Law: The End of History or A Never-Ending Story?, 86 Wash. L. Rev. 475, 505 (2011) (noting that the article was "controversial"); Christopher W. Peterson, Piercing the Corporate Veil by Tort Creditors, 13 J. Bus. & Tech. L. 63, 95 n.127 (2017) (same).

[308] See State Farm Fire and Cas. Co. v. P. Rent-All, Inc., 978 P.2d 753, 765 (Haw. 1999) (discussing contractual liability of a corporation whose agent acts with apparent authority).

[309] For a discussion of why unlimited liability persisted in California, see Bainbridge & Henderson, supra note 297, at 40-42.

[310] See supra text accompanying note 229 (quoting *Slee* opinion).

[311] Slee v. Bloom, 19 Johns. 366, 474 (N.Y. 1822)

[312] Id. at 155-56. In contrast, Paul Mahoney argues that English law was based on a related but slightly different concern that, in a system in which liability is unlimited, investment relationships involving different

As such, limited liability was viewed as essential not merely for economic reasons but for social justice concerns.

Recognition of limited liability's importance was not limited to New York. Charters of early New Jersey corporations commonly stated or implied that obtaining limited liability was a motivating factor in seeking incorporation.[313] Contemporaneous judicial and treatise commentary likewise emphasized that importance of limited liability. The first edition of Angell and Ames, for example, explained that it was "frequently the principal object . . . in securing an act of incorporation, to limit the risk of the partners to their shares in the stock of the association . . . ."[314] Joseph Davis' magisterial 1917 study of the early history of U.S. corporate law argues that limited liability "was a principal object desired through incorporation" in the late eighteenth and early nineteenth century.[315] As support for that proposition, he cites examples from New York in the 1780s.[316]

Given the importance placed on limited liability at the time, it is not surprising that the 1814 Act limited shareholder liability. There is some uncertainty, however, about the precise nature of the limitation it provided. The uncertainty arises because of the way courts interpreted the comparable provision of the 1811 Act. Both acts stated that "for all debts which shall be due and owing by the company at the time of its dissolution, the persons then composing such company shall be individually responsible to the extent of their respective shares of stock in the said company, and no further."[317] The question is whether by that the language the acts adopted the modern conception of limited liability, under which shareholders whose stock was fully paid and nonassessable had no personal liability for corporate debts, or a form of double liability, under which shareholders could be held personally liable to pay creditors an amount equal to the par value of their stock.[318]

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economic classes become practically impossible, reinforcing existing wealth disparities. As John Stuart Mill explained in testimony before a parliamentary committee, limited liability "so far as relates to the working classes themselves, might not be essential [because they would invest nearly all their wealth in it]; but still I think that an alteration of the law in regard to the responsibility of partners would be of great importance to those associations, not for the sake of the responsibility of the [entrepreneurs], but in order to induce persons of capital to advance it to them for those purposes." Mahoney, supra note 187, at 891-92. In other words, limited liability was not primarily needed to protect the poor themselves (who had little to lose) but rather to encourage the wealthy to invest alongside them. If corporations lacked limited liability, wealthy investors would refuse to invest alongside those of modest means because the wealthy would be disproportionately targeted if the business failed.

[313] Cadman, supra note 5, at 39-40.

[314] Joseph K. Angell & Samuel Ames, Treatise on the Law of Private Corporations Aggregate 23 (1832).

[315] II Davis, supra note 3, at 317.

[316] Id.

[317] 1811 Act § XII; 1814 Act § XII.

[318] See Stanley E. Howard, Stockholders' Liability Under the New York Act of March 22, 1811, 46 J. Pol. Econ. 499, 500 (1938) (posing this question with respect to the 1811 Act).

In *Slee v. Bloom*,[319] the highest New York court held that under the 1811 Act shareholders were liable only up to the contractually agreed amount of their contributions. Importantly, during this period, it was not generally expected that investors would pay the entire amount owed for their shares before the corporation began operating.[320] Hence, one of the powers granted by the 1814 Act to a company's directors was to call upon the shareholders to pay in any unpaid amounts.[321] If a shareholder had fully paid for their stock, however, courts would not enforce a capital call against them.[322] Interestingly, one of the important early cases establishing that principle involved a privateering association. In *Packard v. Lienow*,[323] the defendant was one of multiple investors in a privateer. Each investor agreed to pay $1,000 for their share of the venture.[324] As it turned out, however, the expense of fitting out the vessel was higher than anticipated, such that the apportioned cost was $1,151.86.[325] When called upon to contribute the necessary additional capital, the defendant refused to pay.[326] The agent charged with outfitting the vessel paid the necessary additional funds out of his own pocket and then sued the defendant for the unpaid allocated amount.[327] The court explained that "[u]nder the original agreement, had nothing more been done by the defendant, he could not be compelled to contribute towards any expenses incurred beyond the amount raised by the subscription."[328] If the money raised to finance the venture "proved insufficient to accomplish the proposed object, he had a right to say he would be no further answerable for any expenditures that might be made; and the act of a majority of those concerned could not operate to make him chargeable."[329]

The *Packard* decision illuminates how the structure of privateering associations blended formal contract with informal norms of risk allocation. From an industrial policy perspective, it highlights both the promise and the limits of early corporate law: incorporation could attract investment by setting liability caps, but it could not override investors' caution in the face of mounting costs. The case underscores how the 1814 Act operated in a context where

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[319] 19 Johns. 456 (N.Y. 1822).

[320] Cadman, supra note 5, at 250.

[321] 1814 Act § VI.

[322] Watson, supra note 273, at 204 (noting that English law established a form of limited liability by the mid-eighteenth century by a general rule against judicial enforcement of capital calls on shareholders).

[323] 12 Mass. 11 (Mass. 1815).

[324] Id.

[325] Id. at 12.

[326] Id.

[327] Id. at 13-14.

[328] Id. at 13.

[329] Id. In the case at bar, however, because "the defendant consented to the sailing of the vessel, knowing at the time that the whole expense was not covered by the shares then subscribed at $1000 on each share, he was liable to the plaintiff for his proportion of the money advanced above the amount of the shares subscribed for." Id. at 13-14.

entrepreneurial risk was both embraced and tightly hedged—a fitting hallmark of a state-led effort to spur wartime commerce.

As with *Packard*, the *Slee* decision assumed that shareholders who had purchased their shares by subscription—in effect, on an installment basis—could be held liable for any unpaid subscriptions.[330] If the shareholders had fully paid for their stock, however, they were not personally liable for the defunct corporation's debts.[331] According to the leading account of the *Slee* decision, "the liability provided by the [1811 Act under *Slee* thus] was limited liability in the modern sense."[332]

Four years after *Slee,* however, the court held in *Briggs v. Penniman*[333] the court held that:

> Corporators are liable to the amount of their stock, beyond what they have paid in. . . . Something more was intended; and it is to my mind very clearly expressed, that the extent of the stock held by them should be the measure of their individual liability to creditors. The statute does not refer to them in their corporate capacity, but as individual stockholders; and it declares their liability, without reference to the amount they may have paid in on their stock.[334]

As so interpreted, the 1811 Act offered creditors double liability.[335] In other words, "shareholders stood to lose only the money they had initially invested" (or agreed to invest), but also could be required "to contribute an amount equal to the par value of their stock."[336] As Stephen Presser observes, however, "double liability is still limited liability. Even under double liability stockholders would not be held responsible for the full extent of their corporation's debts."[337] Just two years later, moreover, the New York court legislatively overturned *Briggs*, amending the 1811 Act to provide shareholders whose stock was fully paid and nonassessable

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[330] See Blair, supra note 261, at 438-39 (arguing *Slee* allowed creditors to sue "shareholders for at least the par value of their stock").

[331] *Slee*, 19 Johns. at 483-84 (holding that a shareholder whose shares "had been paid up in full" had no liability for the corporation's debts).

[332] Howard, supra note 318, at 508. See Seavoy, supra note 15, at 70 (suggesting that Justice Spencer's preface to the *Slee* decision "leaves the impression that he meant modern limited liability").

[333] 8 Cow. 387 (Ct. Err. N.Y. 1826).

[334] Id. at 395-96.

[335] Howard, supra note 318, at 511-12 (concluding that Briggs adopted a rule of double liability); Seavoy, supra note 15, at 72 (describing the rule set out in Briggs as "unmistakable double liability").

[336] Amalia D. Kessler, Limited Liability in Context: Lessons from the French Origins of the American Limited Partnership, 32 J. Leg. Stud. 511, 534 (2003).

[337] Stephen B. Presser, Piercing the Corporate Veil, § 1.3 n.6 (2024).

modern style limited liability,[338] reflecting "the strong New York policy of encouraging investment through limited liability for corporation shareholders."[339]

Assuming that the courts would have interpreted the 1814 Act as they did the 1811 Act, imposing double liability on corporations created under the former, the resulting risks posed to shareholders by the prospect of double liability were somewhat ameliorated by § 8 of the act, which capped the debt of the company at the amount of capital stock that had actually been paid into the company.[340] If the company's debts exceeded the allowable amount, the directors could be held liable for the excess "in their separate and private capacities," with directors who were absent or dissented being excused.[341] This provision thus limited the shareholders' liability exposure, at least in their capacity as shareholders.

In sum, among the various innovations introduced by the 1814 Act, its most attractive and consequential feature from the perspective of potential investors was its provision of limited liability. As Treasury Secretary Albert Gallatin observed in 1812, the privateering industry bore many hallmarks of a lottery—highly speculative, prone to extreme outcomes, and "generally overstocked" with capital chasing improbable windfalls.[342] In this environment, limited liability played a transformative role. It allowed marginal and moderate investors—those with neither the wealth nor the appetite for catastrophic loss—to participate in privateering associations without risking assets beyond their subscribed capital. By capping downside exposure in a business defined by uncertainty, the act reduced the friction of entry for smaller investors and effectively democratized participation in a wartime enterprise that had historically been dominated by elite merchant capital. In doing so, the 1814 Act advanced its underlying industrial policy objective: to harness dispersed patriotic investment to wage economic warfare at sea, while using the corporate form to convert an unpredictable gamble into a legally bounded risk.

As such, the 1814 Act offers insight into the contested and evolving nature of limited liability in early corporate law. Although limited liability is now seen as a defining feature of the corporate form, the statutory language of the 1814 Act—and judicial interpretations such as *Slee v. Bloom* and *Briggs v. Penniman*—reveal a period of doctrinal ambiguity. Despite this uncertainty, it is clear that contemporaneous actors viewed limited liability as a critical incentive for participation in high-risk ventures like privateering. The Act's cap on shareholder liability reflects both the economic necessity of attracting diffuse capital and the populist desire to make incorporation accessible beyond wealthy elites. In this respect, the 1814 Act supports the claim that limited liability was not merely a technical legal innovation, but also a policy instrument central to early American economic development. It also challenges modern scholarly efforts to downplay the role of limited liability, reminding us that its historical significance often rested as much on perception and politics as on legal precision.

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[338] Id. at 535. Double liability was retained for shareholders of banks. Id.

[339] Presser, supra note 337, § 1.3 n.6.

[340] 1814 Act § VIII.

[341] Id.

[342] See supra Part II.C (discussing the lottery-like aspect of privateering ventures).

3. Summation

While the 1814 Act lacked the full formal architecture of modern corporate law, its treatment of limited liability, capital lock-in, and entity shielding is suggestive. As we have seen, some modern commentators rank limited liability below the other forms of asset partitioning in importance, dismissing its significance in the corporate form's success. In contrast, the 1814 Act suggests that lawyers, judges, and legislators of the period during which the 1814 Act was drafted regarded limited liability as playing a central role in attracting a broad base of investors by capping their exposure in risky and potentially volatile enterprises.

The point should not be overstated, of course. The point is not the limited liability was the only form of asset partitioning that mattered; nor is the point that limited liability was the most important form. Capital lock-in also would have been an essential attribute of the corporations contemplated by the act, as the capital-intensive nature of privateering—where ships and crews remained at sea for extended periods—required legal and structural barriers against premature capital withdrawal. While entity shielding was not directly codified, it appears to have been assumed through judicial doctrines like the trust fund rule and commercial norms such as share transferability. The point thus is that no one of the forms of asset partitioning played a uniquely indispensable role. Instead, when taken in context, the 1814 Act's design reflects an implicit recognition that all three of these features, though not yet fully formalized, were critical to the corporate form's utility in high-risk ventures.

V. Conclusion

The 1814 Act stands as a remarkable, if overlooked, artifact in the evolution of American corporate law. It was not just a procedural innovation, but rather a legislative experiment with incorporation as a tool of industrial—and even national—policy. It illustrates how the corporate form was strategically deployed to mobilize private capital in service of public ends. As such, it represents a critical moment in the emergence of a uniquely American approach to blending public goals with private initiative.

This article has advanced three central claims. First, that early general incorporation statutes, including the 1814 Act, were instruments of targeted economic policy—tools to guide capital toward sectors deemed vital to the state or nation. Second, that by analyzing which features of the corporate form the 1814 Act did or did not provide, we gain valuable insight into the evolution and contested indispensability of core corporate attributes. And third, that economic necessity and commercial practice often outpaced formal legal innovation, with functional equivalents of features like entity shielding and capital lock-in arising from custom, common law, and institutional design rather than comprehensive statutory frameworks.

Appendix

LAWS OF NEW-YORK, THIRTY-EIGHTH SESSION

CHAP. XII.

AN ACT TO ENCOURAGE PRIVATEERING ASSOCIATIONS.

PASSED OCTOBER 21, 1814

WHEREAS a barbarous warfare on our coast and frontiers, by pillage and conflagration, is carried on by the enemy, and a determination is avowed to lay waste our cities and habitations, and to make a common ruin of both public and private property, contrary to the usages of civilized warfare: Wherefore, it has become expedient and necessary, that the legislature should facilitate to patriotic citizens every efficacious means of defence and annoyance to the enemy; and whereas the uniting of a capital by means of patriotic associations, to be formed for fitting out at the expence of such companies, private armed vessels, to be licensed by the government of the United States, would contribute to the destruction of the commerce of the enemy on the ocean, and of her armed vessels on our coast, and would guard and protect the commerce of the United States, under such encouragement as shall be provided for by the government of the United States for that purpose: Therefore,

I. *Be it enacted by the people of the state of New-York, represented in Senate and Assembly*, That at any time during the present war, any five or more persons, who shall be desirous to form a company for the purpose of annoying the enemy of the United States, and their commerce, by means of private armed vessels, to be fitted out in conformity with the laws of the United States, at the expence and risk of such company, may make, sign and acknowledge, before a justice of the supreme court, or a judge of the court of common pleas, or the mayor or recorder of any city, within this state, and file in the office of the secretary of state, a certificate in writing, in which shall be stated, the corporate name of the said company and its object, and the amount of the capital stock of the said company, the number of shares of which the said stock shall consist, the number of directors and their names who shall manage the concerns of the said company for the first year, and the place where they shall carry on the concerns of the said company.

II. *And be it further enacted,* That as soon as such certificate, as aforesaid, shall have been filed, the persons who shall have executed the same, and their successors, shall, for the period expressed in such certificate, be a body politic and corporate, in fact and in name, by the name stated in such certificate, by which name they and their successors shall and may have succession, and shall be in law capable of suing and being sued, pleaded and being impleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever, in all manner of actions, suits, complaints, matters and causes whatsoever; and they and their successors may have a common seal, and the same may make, alter and change at their pleasure : and that they and their successors, by their corporate name shall, in law, be capable of buying, purchasing, holding, and conveying, any lands, tenements, hereditaments, goods, chattels, wares and merchandize whatsoever, necessary to enable the said company to carry on their operations authorized by this act.

III. *And be it further enacted,* That the stock, property and concerns of such company, shall be managed and conducted by a president and so many directors as are mentioned in their certificate of incorporation, who except those for the first year, shall be annually elected, at such time and place as shall be directed by the bye-laws of the said company; and public notice shall be given thereof, not less than fourteen days previous thereto, in at least one newspaper printed in or nearest to the place where the business of the said company shall be carried on; and every such election shall be made by such of the stockholders as shall attend for that purpose, either in person or by proxy, and shall be by ballot; and each stockholder shall be entitled to as many votes as he owns shares of the stock of the said company, and that none but stockholders shall be eligible as directors, and the persons having the greatest number of votes, shall be directors; and the directors chosen at any such election, shall hold their first meeting as soon as conveniently may be thereafter, and shall at such meeting elect one of their number to be their president; and if any director shall at any time cease to be a stockholder in said company, his office shall be considered vacant: and as often as any vacancy or vacancies may happen among the directors, by death, resignation or otherwise, the place or places vacated shall be filled for the remainder of the year, by such stockholder as the remainder of the directors for the time being, or a majority of them, shall appoint: *Provided*, That the number of directors shall in no case be less than three nor more than twenty-one.

IV. *And be it further enacted,* That in case it shall at any time happen that an election of directors be not made by any company who shall have incorporated themselves according to the provisions of this act, on the day when by the laws of such company it ought to have been done, such company, for that cause, shall not be deemed to be dissolved, but it shall and may be lawful on any other day, to hold an election for directors, in such manner as shall be directed by the bye-laws of such company, within three months thereafter.

V. *And be it further enacted,* That the directors of every such incorporated company, or a majority of them, shall have power to appoint the time and place of all meetings for the dispatch of business; to appoint all such officers, agents and servants, as the directors, or a majority of them convened, may deem necessary for carrying into effect the objects of such company, and to make and establish such bye-law, rules, orders and regulations respecting the concerns of such company as they shall deem necessary for the well ordering the affairs of the said company: *Provided*, That such bye-laws shall, in no wise be inconsistent with the constitution and laws of the United States, or of this state: P*rovided further*, That a majority of such directors shall constitute a quorum to transact business.

VI. *And be it further enacted,* That the capital stock of any such incorporation shall not exceed one million of dollars; and it shall be lawful for the directors of every such company, to call and demand of the stockholders of such company respectively, all such sums of money by them subscribed, at such times, and in such proportions, as such directors shall see fit, under the pain of forfeiture of their shares, and all previous payments made on their stock to such company, if such payments shall not be made within sixty days after a notice requiring such payment shall have been published in such newspaper as before mentioned: and every each incorporation shall cease and expire at the end of one year after the termination of the present war with Great Britian.

VII. *And be it further enacted,* That the real estate which it shall be lawful for any such incorporated company to hold, shall be such only as shall be requisite for its accommodation in building, repairing and fitting out vessels employed or to be employed by such company as private armed vessels, or for their offices necessary for the officers, clerks or agents of such company, by way of security, or conveyed to it in satisfaction of debts to such company, or purchased at sales upon judgments which shall have been obtained for such debts.

VIII. *And be it further enacted,* That the amount of debts which any such incorporated company shall at any time owe, shall not exceed the sum of the capital stock subscribed and actually paid into the funds of such company, and in case of excess, the directors of such company, under whose administration it shall happen, shall be liable for the same in their separate and private capacities, but this shall not be so construed, as to exempt the said corporation, or any estate, real or personal, which such corporation may hold, from also being liable for and chargeable with such excess; but such of the directors of such company, who shall have been absent when such excess was contracted, or who may have dissented from the resolution or act whereby the same was so contracted, shall not be liable.

IX. *And be it further enacted,* That it shall be the duty of the directors of every such company, to make dividends every six months, of so much of the profits of their association, as to them shall appear advisable.

X. *And be it further enacted,* That the directors of every such incorporated company shall, from time to time, when required by a majority of the stockholders, lay before them for their information, at a general meeting, a particular statement of the debts and credits of such company, and of the concerns thereof.

XI. *And be it further enacted,* That it shall and may at all times be lawful for a majority of the directors of any such company, to sell or dispose of any of the vessels which may belong to such company.

XII. *And be it further enacted,* That the stock of every such company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the bye-laws of such company, and that for all debts that shall be due and owing by such company at the time of its dissolution, the persons then composing such company shall be individually responsible to the extent of their respective shares of stock in such company, and no further; and that it shall not be lawful for such company to use their funds, or any part thereof, in any banking transaction, or in any other business or employment than such as may be proper and necessary for carrying into effect the declared objects of this act: and further, that no such company shall directly or indirectly, deal or trade in buying or selling any stock created under any act of the United States or of this state, unless in selling the same when truly pledged by way of security for debts due to such company.

XIII. *And be it further enacted,* That the copy of any certificate filed in pursuance of this act, and certified to be a true copy by the secretary of state, or his deputy, shall, together with this act, be received in all courts and places within this state, as legal evidence of the incorporation of such company.