THE INTRODUCTION OF LIMITED LIABILITY INTO THE ENGLISH AND AUSTRALIAN COLONIAL COMPANIES ACTS: INEVITABLE PROGRESSION OR CHAOTIC HISTORY?

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This article examines the introduction of limited liability into the English and Australian companies legislation in the mid-19th century and compares how this legal change was adopted in two different societies. This historical development illustrates that the interaction of legal change and socio-economic developments is complex, unpredictable and the result of a number of historical contingencies and so offers an alternative perspective to functionalist, and in particular, the predominant law-and-economics explanations of the rationale for limited liability. It is a contention of this article that recognising the complexity of legal change better enables us to question why the law developed as it did and whether it should be reformed. The concept of limited liability has given rise to particular problems such as corporate group tort liabilities and 'phoenix' companies that should be reconsidered in the light of its historical development.

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I Introduction

This article deals with the historical context of the introduction of limited liability into the English and Australian colonial Companies Acts, how it was adopted in commercial practice in the two societies and the modern day consequences of its operation. In its examination of the history of limited liability, the article offers an alternative perspective to the functionalist approach based upon the widely accepted law-and-economics analysis of the role played by limited liability in the modern corporation.

The concept of limited liability has a long history and was already a widely used commercial practice well before its introduction into the English *Limited Liability Act* in 1855 and its adoption in the Australian colonies soon after. The extent of shareholder liability for limited-liability company debts is limited to the amount, if any, unpaid on their shares, so if a shareholder holds fully paid shares, there is no further liability.[1] The separate-legal-entity and limited-liability concepts are closely related. Limited liability presupposes that a limited-liability company and its shareholders are clearly differentiated as distinct legal personalities because the debts of the company are separate from the debts of its shareholders. One of the main ways in which the law restricts the operation of limited liability is by piercing or lifting the corporate veil so as to hold a shareholder liable for the debts of the company.[2]

According to the most widely accepted explanation of the role of limited liability, it is one of the crucial characteristics of the modern company, providing it with the important advantage of facilitating the raising of share capital from investors. The core structural characteristics of the modern

[1] *Corporations Act 2001* (Cth) s 516. The typical limited-liability company is described as a company '[l]imited by shares': at s 112(1). Hansmann and Kraakman made the point that in addition to protecting shareholders, limited liability can also be seen as protecting a company from claims brought by creditors of its shareholders: Henry Hansmann and Reinier Kraakman, 'The Essential Role of Organizational Law' (2000) 110 *Yale Law Journal* 387. They have described this aspect of limited liability as 'affirmative asset partitioning' (at 393–4) or 'entity shielding' (Henry Hansmann, Reinier Kraakman and Richard Squire, 'The New Business Entities in Evolutionary Perspective' [2005] *University of Illinois Law Review* 5, 6; Henry Hansmann, Reinier Kraakman and Richard Squire, 'Law and the Rise of the Firm' (2006) 119 *Harvard Law Review* 1335, 1335.

[2] The term 'piercing the corporate veil' refers to a decision of the courts which finds an exception to the separate legal entity principle so that a shareholder is not regarded for some legal purpose as separate from the company: see generally S Ottolenghi, 'From Peeping behind the Corporate Veil, to Ignoring It Completely' (1990) 53 *Modern Law Review* 338. For an empirical study of when the corporate veil has been pierced in Australia, see Ian M Ramsay and David B Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 *Company and Securities Law Journal* 250, 260–71.

corporate form, including limited liability, are driven by economic efficiency imperatives so that inevitably the history of company law and corporate practice saw corporations adopt these features and corporate law around the world assumes their existence.[3] A number of economic analyses have considered the impact of limited liability rules on companies and capital markets.[4] These analyses generally emphasise the efficiency advantages of limited liability rules which include avoidance of exposure of passive shareholders to risks of the business. This ability to avoid risk encourages investment in very large enterprises where ownership and control are separated, the diversification of investor share portfolios and enhanced liquidity for the shares of listed limited liability companies. Shareholders are spared the need to form judgments as to the wealth of other shareholders, as '[i]n the absence of limited liability', creditors of an insolvent company would first look to pursuing the wealthier shareholders and this would impair the efficient operation of capital markets.[5]

A number of disadvantages of limited liability have also been noted. The efficiency advantages largely apply to investors and voluntary creditors such as contract creditors. These advantages largely disappear when the position of involuntary creditors such as tort creditors is considered.[6] In such cases limited liability enables a company to externalise the full costs of its business

[3] Armour, Hansmann and Kraakman describe limited liability as one of the five 'core structural characteristics of the business corporation': John Armour, Henry Hansmann and Reinier Kraakman, 'What is Corporate Law?' in Reiner Kraakman et al (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2nd ed, 2009) 1, 5. They make the point that 'limited liability has become a nearly universal feature of the corporate form' and this 'indicates strongly the value of limited liability as a contracting tool and financing device': at 9. Bainbridge and Henderson suggest that 'limited liability became an essential feature and a driver' in the dominance of the corporation because of 'the growth of very large corporations', especially railroad companies, with many 'geographically dispersed shareholders, creditors, and other stakeholders' and the growth of enterprise liability that exposed businesses to greatly increased risks: Stephen Bainbridge and M Todd Henderson, *Limited Liability: A Legal and Economic Analysis* (Edward Elgar Publishing, 2016) 14–15.

[4] The best known and most influential of these analyses are Frank H Easterbrook and Daniel R Fischel, 'Limited Liability and the Corporation' (1985) 52 *University of Chicago Law Review* 89, 99–100; Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991) 41–4. See also Tony Orhnial, 'Liability Laws and Company Finance' in Tony Orhnial (ed), *Limited Liability and the Corporation* (Croom Helm, 1982) 179.

[5] See Phillip I Blumberg, 'Limited Liability and Corporate Groups' (1986) 11 *Journal of Corporate Law* 573, 614.

[6] Ibid 616–19; Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 *Yale Law Journal* 1879, 1916–19.

activities by shifting its tort liabilities to outside parties such as tort victims or the government, thereby undermining the deterrent objective of tort law and encouraging undesirable excessive risk-taking. A similar situation of unfairness arises in the case of employee entitlements. These disadvantages are particularly apparent in the case of corporate groups, where 'layer upon layer of insulation from liability can result'.[7]

Most economic analyses of limited liability assume that the only alternative to joint and several unlimited liability is the form of limited liability that was introduced in England in 1856 and has been almost universally adopted. However other alternative forms of limited liability or practices have been adopted or proposed at various times. In California between 1849 and 1931 there was a pro-rata system whereby shareholders were liable only for a proportion of each creditor's claim determined in accordance with the shareholder's proportion of the total stock of the corporation.[8] In New South Wales and Victoria in the 1840s and 1850s a number of companies, at first mostly banks but later mining and other companies, were incorporated with shareholder liability limited to twice the nominal value of shares held.[9] This practice was also common in the US, where some states provided for triple liability.[10] As discussed in Part II, a widely adopted commercial practice in England after the introduction of limited liability into the *Limited Liability Act* was the issue of high par value shares with large unpaid amounts. This had the effect of substantially reducing the advantage to shareholders of limited liability because they were still obliged to pay a large amount representing the unpaid portion of their shares in the event the company made a call or became insolvent and went into liquidation. These alternative forms of limited liability and the practice of companies issuing shares with large unpaid liabilities have largely disappeared but that is not to say that this was inevitable or the adoption of unlimited liability or alternative forms of limited liability invariably proved detrimental to economic activity.[11]

[7] Blumberg (n 5) 623.

[8] Ibid 597–9.

[9] Phillip Lipton, 'A History of Company Law in Colonial Australia: Economic Development and Legal Evolution' (2007) 31 *Melbourne University Law Review* 805, 811–12.

[10] Blumberg (n 5) 599–600. See also Jonathan R Macey and Geoffrey P Miller, 'Double Liability of Bank Shareholders: History and Implications' (1992) 27 *Wake Forest Law Review* 31, 37.

[11] See Graeme G Acheson, Charles R Hickson and John D Turner, 'Does Limited Liability Matter? Evidence from Nineteenth-Century British Banking' (2010) 6 *Review of Law and Economics* 247, 269–70. In their empirical study of 19th-century British banks, Acheson, Hickson and Turner concluded that bank shares which had limited liability were no more liquid than bank shares with unlimited liability, thereby raising doubt about the role limited

A number of writers have put forward proposals to curtail limited liability especially in relation to torts claims against corporate groups. These proposals include abolition of limited liability among companies within corporate groups,[12] imposing unlimited liability on shareholders of small, closely held companies and personal liability on directors of large publicly traded corporations in relation to involuntary creditors and pro-rata shareholder liability for corporate torts.[13]

While limited liability has been universally adopted in a similar form by virtually all corporate law systems around the world, the discussion in Part II indicates that this does not mean that its adoption in English company law in the mid-19th century was inevitable, nor was it simply the result of obvious demand from the wider commercial community. Because limited liability is usually seen as a fundamental conceptual basis of company law that better enables companies to raise capital and facilitates stock exchange trading, there is a reluctance to tamper with or restrict the operation of this venerable legal concept. As discussed in Part IV, a widely held view of legal history is that the law is continually progressing towards its more efficient modern form. It is implicit in such approaches to examining the interaction of legal change and economic developments that law serves as a 'functional' instrument in meeting the economic needs of society.

This article suggests that an alternative approach to viewing how law and economic developments interact with each other is to consider the broad range of social and economic contexts and historical contingencies, including the ideas and debates circulating in the society at the time that legal change occurred. Such a 'historicist' approach recognises the complexities surrounding significant legal historical developments and the possible alternative paths that could have been, but were not taken.[14] In a 'chaotic' historical environ-

liability played in the rise and dominance of the corporate form. They also raised the question 'whether extended liability would be possible in modern financial markets' and companies with very large numbers of shareholders: at 270.

12 Blumberg (n 5) 623–6. See also David W Leebron, 'Limited Liability, Tort Victims, and Creditors' (1991) 91 *Columbia Law Review* 1565.

13 Paul Halpern, Michael Trebilcock and Stuart Turnbull, 'An Economic Analysis of Limited Liability in Corporation Law' (1980) 30 *University of Toronto Law Journal* 117, 148–9; Hansmann and Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (n 6).

14 'Historicism' has a number of meanings but in this article means the theory that social and cultural phenomena are determined by history and so it values rigorous and contextualised interpretations of history as a means of understanding such phenomena.

ment,[15] outcomes are more often the result of the interaction of complex historical factors, chance occurrences and unexpected consequences.

It is a contention of this article that a historicist approach is more conducive to explaining why the law developed as it did, what alternative legal outcomes could feasibly have arisen and whether there may have been subsequent significant changes in society or commercial developments which now render the law sub-optimal or inefficient. While forms of this argument have been put by a number of contemporary writers,[16] this article contributes to the literature on this discussion by drawing upon an analysis of functionalist perspectives to demonstrate that they do not adequately explain the complex historical circumstances surrounding the introduction of limited liability in England and the Australian colonies. It is further contended that the law should not be assumed to functionally exist in its best form nor that its adoption was somehow part of an inevitable progression, so if evidence shows that a particular law is inefficient or otherwise unsuitable and so does not meet its desired purpose in some respects, consideration should be given to amending the law so it does not facilitate undesirable socio-economic outcomes.

It is important to reconsider the history of limited liability because in more recent times, the reluctance to modify or create exceptions to the concept of limited liability has raised particular social and economic problems in two respects. Firstly, parent or holding companies in corporate groups have sought the protection of limited liability as shareholders of controlled subsidiaries that prove to be inadequately funded to meet their liabilities to tort creditors. This problem arose in a number of mass tort cases, especially involving asbestos miners and manufacturers, which provoked considerable community and political condemnation. Secondly, limited liability has also proved to be problematic in relation to 'phoenix' companies.

[15] George A Reisch, 'Chaos, History, and Narrative' (1991) 30 *History and Theory* 1, 4–9. Reisch explains why history is 'chaotic': in a chaotic system, small differences among initial conditions produce very great differences in its final state. Generally, socio-economic and legal systems tend to be complex and chaotic. See also Mark J Roe, 'Chaos and Evolution in Law and Economics' (1996) 109 *Harvard Law Review* 641, 642.

[16] See, eg, Robert W Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57; Allan C Hutchinson, *Evolution and the Common Law* (Cambridge University Press, 2005); James Taylor, *Creating Capitalism: Joint-Stock Enterprise in British Politics and Culture 1800–1870* (Royal Historical Society, 2006) 3; Rob McQueen, *A Social History of Company Law: Great Britain and the Australian Colonies 1854–1920* (Ashgate, 2009) 316–20; Paul Johnson, *Making the Market: Victorian Origins of Corporate Capitalism* (Cambridge University Press, 2010) 230–2; Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2010) 34 *Cambridge Journal of Economics* 837, 837–9.

A much publicised example of such an asbestos case involved the James Hardie group of companies, which was the largest asbestos manufacturer in Australia until it ceased manufacturing asbestos products in the 1970s. The holding company of the James Hardie group undertook a corporate restructuring aimed at least in part at removing present and future tort liabilities from its main building products business activities. In response to widespread community concerns that the company was disregarding its corporate social responsibilities by failing to properly take into account the welfare of current and future asbestos disease victims, a Special Commission of Inquiry was established by the New South Wales Government in 2004 to inquire into the events surrounding the proposed restructure of the group. The report of the Commission pointed out that there were significant deficiencies in the law where there are substantial 'long-tail liabilities'. Such liabilities arise where the conduct of a company results in personal injuries that are inherently latent and so only become apparent at some indefinite future time. The Commission raised the 'question whether existing laws concerning the operation of limited liability or the "corporate veil" within corporate groups adequately reflect contemporary public expectations and standards'.[17]

The problem of limited liability in the context of the tort liability of corporate groups has given rise to a considerable literature critical of the law.[18] Phillip Blumberg strongly argued against the application of limited liability in these circumstances:

> Limited liability has been carried unthinkingly beyond the original objective of insulating the ultimate investor from the debts of the enterprise. Limited liability now enables a corporate group organized in tiers of companies to insulate each corporate tier of the group, and thus, achieve layers of insulation for the parent corporation from liability for the obligations of its numerous subsidiaries. In light of recent environmental disasters of worldwide dimensions, re-examination of the traditional doctrine of limited liability as applied to corporate groups has emerged as an issue of major importance.[19]

[17] DF Jackson, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (Report, September 2004) 572. The concept of 'long-tail liabilities' and the difficulties they present were explained in Corporations and Markets Advisory Committee, *Long-Tail Liabilities: The Treatment of Unascertained Future Personal Injury Claims* (Report, May 2008) 4–5.

[18] See, eg, Blumberg (n 5); Hansmann and Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (n 6).

[19] Blumberg (n 5) 575 (citations omitted).

It is likely that this legal problem will remain as an important economic and social issue in the future as mass torts involving large multinational corporate groups become more common and the amount of damages claimed increases.[20]

The second type of problem stems from the widespread adoption of limited liability by relatively small, closely held companies which has led in a large number of cases to significant issues arising in relation to 'phoenix companies'. These are companies that become insolvent and go into liquidation so that the claims of creditors including employees, taxation authorities, consumers and others remain unpaid. The company then reappears post-liquidation as a newly registered company with ownership of the failed company's business, usually acquired at an undervalue, essentially the same shareholders and directors and often with a similar name, to continue the defunct company's business, now freed from the claims of the creditors of the liquidated entity. In some cases this strategy has been deliberately used on multiple occasions by directors to evade various liabilities or debts. Limited liability, together with the separate legal personality of the company, enables phoenix activity to occur because it allows dishonest directors to assert that the debts of the company are not the debts of its directors and shareholders and so they are shielded from liability as shareholders. In this way the burden of failure of the company is imposed on the creditors rather than the directors whose dishonesty or mismanagement led to its failure.[21]

This article examines in Part II the background and context leading to the introduction of limited liability into the English Limited Liability Acts of 1855 and 1856. This discussion reveals the chaotic and unpredictable circumstances which led to these statutory developments and how they were commercially utilised. It challenges the notion that the limited liability concept's evolution — as a traditional foundation of corporate law in both common law and civil law systems — was inevitable. The article then turns in Part III to examine the adoption of the limited liability concept in the Australian colonies, which were far less developed economies with fewer established

[20] Fleming attributed the rise in litigation involving mass torts to technological change that increased the probability of 'man-made hazards' causing 'immense harm' and the 'social climate of accountability' to tort victims: John G Fleming, 'Mass Torts' (1994) 42 *American Journal of Comparative Law* 507.

[21] See generally Australian Government, *Action against Fraudulent Phoenix Activity* (Proposals Paper, November 2009). See Helen Anderson et al, 'Profiling Phoenix Activity: A New Taxonomy' (2015) 33 *Company and Securities Law Journal* 133, 135–7, which categorises various forms of legal and illegal phoenix activity.

vested-interest groups. This resulted in a greater willingness of the colonial legislatures to experiment with limited liability than was the case in England.

Part IV describes the characteristics of functionalist approaches to explaining the interaction between legal change and economic developments. In particular, functionalist approaches tend to attribute predictable and linear outcomes to legal changes which are seen as inevitably progressing legal development towards its optimal form.[22] Part V then draws upon the preceding discussion to show that the historical factors surrounding the introduction of limited liability were complex and unpredictable and so did not fit neatly into a functionalist framework.

II The Evolution of Limited Liability in England

A *Early Corporations*

The origins of the concept of limited liability can be traced back to medieval times. The concept possibly came to England from the Continent where limited liability was widely utilised as a central feature of *commandite* partnerships.[23] These were partnerships comprised of both active members of the enterprise who were liable for debts of the business to an unlimited extent and passive partners who had limited liability in the event of the enterprise becoming insolvent. The passive partners were regarded from a commercial point of view as being similar to lenders. Limited liability was not of particular significance for early corporations such as guilds, local government entities and public benefit organisations as they primarily held land or major assets, incurred few debts and did not seek to engage in profit-generating activities, and there was little or no likelihood of their incurring liabilities such as tort

[22] Functionalist approaches have been described as 'teleological'. Developments are due to the purpose they fulfil so that the way the law has developed to its present state is shaped by its functionality. It is implicit in a teleological view that the current position tends to be the most functional, as less functional alternatives have been discarded by the forces of history, which act as if by some design: see Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press, 2005) 34. See generally Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720–1844* (Cambridge University Press, 2000) 6–7.

[23] Sir William Holdsworth, *A History of English Law* (Methuen, 1903–66) vol 8, 207 stated that the joint stock company originated in Italy. See also Armand Budington DuBois, *The English Business Company after the Bubble Act, 1720–1800* (Commonwealth Fund, 1938) 94. This claim was disputed by William R Scott, *The Constitution and Finance of English, Scottish and Irish-Joint Stock Corporations to 1720* (Cambridge University Press, 1910–12) vol 1, 13. See also M Schmitthoff, 'The Origin of the Joint-Stock Company' (1939) 3 *University of Toronto Law Journal* 74.

claims. However, shareholder liability did become an important issue in the 16th and 17th centuries with the emergence of commercial chartered corporations with permanent joint stock and shareholders drawn from beyond the membership of a particular merchant trade (and so not necessarily personally known to each other). The advantage of limited liability clearly enhanced the attractiveness of a corporation's shares as an investment, particularly to investors who had no other connection to the corporation and did not directly take part in management. The severity of bankruptcy law in application to debtors is probably a further reason why limited liability was strongly sought by shareholders.

By the late 17th century, limited liability appears to have been a common characteristic of incorporation.[24] Limiting the liability of shareholders for the debts of a company became especially advantageous for raising capital after joint stock companies came to have permanent stock and engaged in overseas trading activities that often involved high degrees of risk. An important part of the development of the joint stock company was the growth of a broader investment class.[25] By the beginning of the 18th century, limited liability was an important 'motive' for incorporation.[26]

However, even in cases where shareholders had unlimited liability, there were considerable practical difficulties faced by creditors seeking to enforce debts of a company against its shareholders. To do so, creditors had to ascertain the identity of members and the composition of the company's membership where there was often a constantly changing membership.[27] Generally shareholders could not be arrested on account of a company's

[24] An *Act Declaratory Concerning Bankrupts 1662*, 13 & 14 Car 2, c 24 was passed in 1662, which provided that the shareholders of the East India, Africa (or Guinea) and Royal Fishing Trade Companies were not subject to the law of bankruptcy for losses incurred by the named companies: see Scott (n 23) 270. There were several references to limited liability in a number of 17th-century cases which held that members of a corporation could not be made liable in their private capacities in an action to enforce a bond issued by a company under its corporate seal: see, eg, *Edmunds v Brown* (1668) 1 Lev 237; 83 ER 385; *Naylor v Brown* (1673) Rep Temp Finch 83; 23 ER 44.

[25] The granting of limited liability to the shareholders of the large chartered companies operated to the disadvantage of unincorporated companies of which there were already many in existence by the late 17th century: Scott (n 23) 270. See also DuBois (n 23) 97–8.

[26] Harris, *Industrializing English Law* (n 22) 129–31. But see DuBois (n 23) 93–4, who claimed that limited liability was not of great importance in the late 17th and early 18th centuries as it was not a common feature of corporation charters at this time nor was it mentioned frequently in incorporation application documents.

[27] Formoy provides an example of a situation where there were substantial practical complexities in suing an unincorporated joint stock company: Ronald Ralph Formoy, *The Historical Foundations of Modern Company Law* (Sweet and Maxwell, 1923) 33–6.

insolvency in the same way as if the debts were personal debts, thereby removing an important means of debt enforcement available to creditors up to the mid-19th century.

While limited liability became widely used in incorporation charters during this period, it was not yet a coherent and well-defined legal concept. To a large extent the concept of limited liability was the result of ad hoc incorporation Acts and charter provisions and the practical and procedural difficulties faced by company creditors seeking to enforce payment of corporate debts against shareholders. The term did not have a settled meaning and could refer to the debts of shareholders to the company, the debts of shareholders to outsiders or the debts of the company to outsiders. Shareholder liability could arise upon liquidation of the company or when the debt was claimed. It was also unclear whether shareholders were liable only up to the unpaid amount of their shares or were jointly and severally liable — so that one shareholder could be held liable for the full debts of the company — or whether the liability was limited to an amount proportional to the number of shares held.[28]

By the mid-18th century, incorporation Acts of Parliament generally provided for full limited liability.[29] Applications for incorporation presented to Parliament often stated that limited liability was a major reason for incorporation and was essential for the success of the undertaking.[30] Being a shareholder of an unincorporated joint stock company did not in itself make the shareholder subject to bankruptcy law where the company became insolvent. Bankruptcy law applied only to traders so it was only shareholders of companies engaged in trade that could be imprisoned or made liable for a company's debts.[31] Calls on members could only be made where there was a clear power to make calls in the corporation's incorporation Act or charter. Where a

[28] Harris, *Industrializing English Law* (n 22) 128–9.

[29] Harris cited the English Linen Company (1764), the British Society for Extending the Fisheries (1786) and the Sierra Leone Company (1791) as examples of companies formed by incorporating Acts which expressly provided for limited liability of members: ibid 130. Harris pointed out that *Bubble Companies Act 1825*, 6 Geo 4, c 91 (the 1825 Act which repealed the *Bubble Act 1720*, 6 Geo 1, c 18) provided in s 2 that it was lawful to grant charters without full limited liability. This may have implied that the general practice up to then was to grant full limited liability: Harris, *Industrializing English Law* (n 22) 130.

[30] See DuBois (n 23) 94–8.

[31] Before the bankruptcy reforms of the mid-19th century, arrest and imprisonment were the main consequences of a failure to pay trading debts. On the operation of bankruptcy law during the 18th and first half of the 19th centuries, see Harris, *Industrializing English Law* (n 22) 131.

company lacked the power to make calls on members, a creditor of the corporation could not recover debt from members.[32]

The late 18th and early 19th centuries were characterised by harsh insolvency laws and periods of speculative booms and busts and economic volatility. In this environment, businessmen constantly feared financial failure and the real possibility of being sent to debtors' prison. Business risks tended to be highly concentrated with little spreading of risks. Many reported legal cases indicate that very large sums of money were at stake and success or failure in the litigation often spelt prosperity or ruin. Most businesses were run by individuals, partnerships or families with unlimited liability and limited liability was restricted to the relatively small number of companies brought into existence by Parliament.[33]

In 1837 the Board of Trade acquired the discretion to grant charters with limited liability. Charters were relatively expensive[34] and not available to all applicants as various interest groups had the opportunity to oppose applications.[35] The selective granting of limited liability charters was to prevent 'improper speculation' and was a response to the opposition of traders who feared unfair competition.[36] This discretionary power to grant limited liability was vigorously attacked as encouraging monopolies and it was suggested that '[t]he American and Canadian system of granting charters to all applicants as of public right should be emulated'.[37]

B *The Debate over the Statutory Introduction of Limited Liability*

There was little discussion of limited liability immediately after the passing of the first Joint Stock Companies Act in 1844.[38] It was not until the early 1850s that a vigorous debate developed between advocates of limitation of responsibility and the traditional point of view, which considered that a shareholder

32 *Salmon v The Hamborough Co* (1671) 1 Ch Cas 204; 22 ER 763.

33 See PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979) 229–30.

34 For example, a workman's housing project charter cost over £1,000: see Bishop Carleton Hunt, *The Development of the Business Corporation in England 1800–1867* (Harvard University Press, 1936) 122–3.

35 Leone Levi, 'On Joint Stock Companies' (1870) 33 *Journal of the Statistical Society of London* 1, 14. Between 1837 and 1855 the Board of Trade received 163 applications for charters with limited liability, of which it granted 97.

36 Hunt (n 34) 123, quoting a former member of the Board of Trade who gave evidence to the 1850 Select Committee on Investments for the Savings of the Middle and Working Classes.

37 Ibid.

38 *Joint Stock Companies Act 1844*, 7 & 8 Vict, c 110.

should be liable to 'his last shilling, and his last acre'.[39] This debate can be seen as related to the broader economic and social changes associated with the Industrial Revolution. It was a reflection of the growing importance of rentier investors reflected in the rapid growth of capital-seeking investment and demand for capital from company promoters which especially emerged in the railway boom of the previous decade. There was also concern that class tensions should be reduced after the upheavals of 1848 in various parts of Europe.

The debate surrounding the introduction of limited liability was complex and raised a diverse range of views. The first line of argument that was put in favour of the introduction of limited liability was driven by a 'tinge of social amelioration'.[40] The first proponents of limited liability, led by Robert Slaney, were middle-class philanthropists who loosely called themselves Christian Socialists. This group was instrumental in bringing the debate surrounding limited liability to public and political attention. They sought to improve the conditions of the working class through better education and sanitary conditions. They enhanced the prospects of cooperative production by encouraging workers to invest in their employers' businesses without incurring the risks of the business, thereby diminishing the conflict between labour and capital.[41]

The initial impetus provided by the Christian Socialists led to the establishment in 1850 of a Parliamentary Select Committee chaired by Slaney 'to consider and suggest Means of removing Obstacles and giving Facilities to the safe Investments for the savings of the Middle and Working Classes'.[42] This Committee was established soon after the revolutions of 1848 which had a major impact on class politics and tensions throughout Europe. Hence there was a strong concern that workers should be able to save and invest in suitable businesses, thereby improving their economic situations so that hostility between classes would diminish.[43] The most hostile interest group that opposed this class-based view was large manufacturers.[44]

[39] United Kingdom, *Parliamentary Debates*, House of Commons, 20 February 1851, vol 114, col 846 (Robert Slaney). This often-used phrase is generally attributed to Lord Eldon.

[40] Hunt (n 34) 120.

[41] McQueen, *A Social History of Company Law* (n 16) 67–70.

[42] *Report from the Select Committee on Investments for the Savings of the Middle and Working Classes* (Report No 508, 5 July 1850) ii. For a discussion of the role of Robert Slaney and the Christian Socialists, see John Saville, 'Sleeping Partnership and Limited Liability, 1850–1856' (1956) 8 *Economic History Review* 418, 419–23.

[43] John Stuart Mill, who appeared before the 1850 Committee, expressed the view that the limited partnership would assist workers to cooperate in conducting businesses in which

The 1850 Committee report recommended that charters for limited liability should be cautiously granted at lower cost.[45] A Select Committee on the Law of Partnership was established in 1851 which agreed with its 1850 predecessor in recommending removal of restraints which prevented those of moderate means from 'taking shares in such investments … with their richer neighbours; as thereby their self-respect is upheld, their industry and intelligence encouraged, and an additional motive is given to them to preserve order and respect the laws of property'.[46]

The debate on limited liability during the years 1850 to 1854 was almost entirely carried out in the context of its introduction in partnerships based on the *commandite* partnerships model where providers of capital who took no part in management were able to gain the protection of limited liability. It was during this period that the Christian Socialist arguments, which put forward the ideals of worker cooperative associations and socially useful projects, were very influential. By 1855, these arguments were rarely put forward.[47] However, the debate around the availability of limited liability was initiated by those concerned with policies to encourage working-class participation in their employers' enterprises in order to reduce social tensions. This seems to

they worked and with which they were acquainted. He thought that the introduction of limited liability would enable the rich to lend to the poor: *Report from the Select Committee on Investments for the Savings of the Middle and Working Classes* (n 42) 78 [847]. *The Economist* was also a strong advocate of the introduction of limited liability to help 'eradicat[e] that hostile feeling … between the operative classes and their employers': 'Investment for Savings: Partnership en Commandite', *The Economist* (London, 18 May 1850) 537.

44 An outspoken opponent of limited liability was Edmund Potter, frequently described as 'a Manchester Man': see JB Jefferys, 'Trends in Business Organization in Great Britain since 1856, with Special Reference to the Financial Structure of Companies, the Mechanism of Investment and the Relations between the Shareholder and the Company' (PhD Thesis, University of London, 1938) 27 n 4, 35. He was described by Karl Marx as 'sometime chairman of the Manchester Chamber of Commerce … [and] mouthpiece of the cotton lords': Karl Marx, *Capital: A Critique of Political Economy*, tr Eden Paul and Cedar Paul (JM Dent & Sons, 1930) vol 2, 631–2. Potter claimed the working class was not interested in limited liability or in saving to acquire shares in their employer's business: Jefferys, 'Trends in Business Organizations in Great Britain since 1856' (n 44) 27, 27 n 4, 35.

45 *Report from the Select Committee on Investments for the Savings of the Middle and Working Classes* (n 42) iii. The Committee also argued strongly for the adoption of the limited-liability partnership to enable the working classes to invest small amounts in the enterprises in which they worked and improve themselves: at iv.

46 *Report from the Select Committee on the Law of Partnership* (Report No 509, 8 July 1851) vi–vii. See Saville (n 42) 421.

47 Saville (n 42) 422.

complicate explanations that see the modern limited liability company as a response to the needs of the business sector to raise capital.[48]

A second line of debate centred round the question whether limited liability was in accordance with laissez-faire principles based upon Benthamite ideas of utilitarianism.[49] This was one of the main philosophical arguments used by emerging economic interests in criticising the remaining vestiges of mercantilism and the entrenched groups that it favoured. Two main criteria were put forward in assessing a course of action: 'freedom of the individual and the greatest good of the greatest number'.[50] Robert Lowe, the Vice-President of the Board of Trade in 1855, was the person most closely associated with introducing the 1856 limited liability legislation. He was the main proponent of a laissez-faire approach to company regulation and advocated removal of all obstacles to limited liability on the grounds of the principle of freedom of contract and the right of unlimited association without 'the officious interference of the State'.[51] He declared in his speech on the Bill '[i]t is not a question of privilege; if anything, it is a right'[52] — basing his argument in favour of limited liability on 'human liberty' and 'freedom of contract' — and that it was necessary for the proper functioning of a laissez-faire system.[53]

48 McQueen, *A Social History of Company Law* (n 16) 73.

49 Bentham described the principle of utility as the evaluation of action according to its effect on the happiness of those affected by the action: see Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1907) ch 1. The moral worth of actions is to be determined by what brings 'the greatest happiness [to] the greatest number' of people: Jeremy Bentham, *A Fragment on Government*, ed FC Montague (Clarendon Press, 1891) 93. It has also been suggested that the rise of laissez-faire economic ideas leading to the introduction of limited liability was strongly influenced by shifts in evangelical thought and the effect this had on social and political attitudes: see Boyd Hilton, *The Age of Atonement: The Influence of Evangelicalism on Social and Economic Thought, 1795–1865* (Clarendon Press, 1988) 255–68.

50 Jefferys, 'Trends in Business Organizations in Great Britain since 1856' (n 44) 26.

51 United Kingdom, *Parliamentary Debates*, House of Commons, 1 February 1856, vol 140, col 131.

52 Ibid col 129.

53 Ibid col 129–31. Another leading advocate of limited liability was George Bramwell, who thought that the interests of the community to allow its members 'unrestrained and unfettered exercise of their own talents and industry' were more important than the protection of creditors and investors: *First Report of the Commissioners Appointed to Inquire and Ascertain How Far the Mercantile Laws in the Different Parts of the United Kingdom of Great Britain and Ireland May Be Advantageously Assimilated and Also Whether Any and What Alterations and Amendments Should be Made in the Law of Partnership as regards the Question of the Limited or Unlimited Responsibility of Partners* (Report, 1854) 23 ('*First Report of the Royal Commission on Mercantile Laws*').

Opposition to reform was strongest in the northern counties and other provincial centres where family-owned enterprises and commercial and personal networks predominated, and business owners had little need to raise capital from external sources. Traditional attitudes to commercial morality and business dealings remained strongly held.[54] A leading opponent of limited liability, who expressed his opinions before the Mercantile Laws Commission. was Lord Curriehill. Lord Curriehill argued that the introduction of limited liability would have a detrimental effect on the nation as a whole as it was contrary to the moral obligation to pay debts, perform contracts and compensate for wrongs. This position was based on the natural justice of individual responsibility expressed in the moral principle that individuals who had access to the benefits of capital should also feel the burden of any debts. He suggested that the introduction of limited liability would encourage frauds, particularly on creditors.[55]

John Ramsay McCulloch put the argument against limited liability from an economist's perspective. While he followed Adam Smith in conceding joint stock companies were appropriate for certain activities such as public utilities, banks and insurance companies, he was strongly opposed to 'all sorts of agricultural, and manufacturing, and commercial businesses' being formed as companies.[56] He extended his argument against reform by claiming the use of limited liability companies would result in excesses of speculation and a greater incidence of bankruptcy: 'Were Parliament to set about devising a scheme for the encouragement of speculation, overtrading, and swindling, what better could it do than carry this project [ie limited liability] into effect?'[57]

A third line of argument was concerned with the effect of limited liability on the recurring economic and financial crises of the first half of the 19th century, especially in the aftermath of the railway boom and bust of the 1840s. Most contemporary analyses of these crises focused on speculation, the occurrence of fraud and over-lending and excessive borrowing. One of the main arguments put forward by opponents of limited liability was that it would encourage excessive speculation through the formation of 'bubble' companies and would expose creditors to a greater risk of fraud because

[54] Jefferys, 'Trends in Business Organizations in Great Britain since 1856' (n 44) 35–6; McQueen, *A Social History of Company Law* (n 16) 87–90.

[55] *First Report of the Royal Commission on Mercantile Laws* (n 53) 15–22.

[56] JR McCulloch, *Considerations on Partnerships with Limited Liability* (Longman, Brown, Green, and Longmans, 1856) 4–5.

[57] Ibid 11.

companies would engage in reckless behaviour with all to win and only a limited amount to lose.[58] Excessive speculation would occur because investors could invest in many ventures in which they did not participate in management and their wealth was not greatly imperilled if any of the ventures became insolvent. In such cases, the risk of reckless gambling would fall on the creditors of the enterprise. The railway boom and bust and the collapse of a large number of insurance companies in the 1840s was seen by opponents of limited liability as an indication of what would happen if limited liability was made easily available.[59] In a pessimistic prediction of what was to come after the introduction of limited liability, *The Law Times* commented that the 1856 *Joint Stock Companies Act* had effectively 'enact[ed] that a man shall not … pay his debts, perform his contracts, or make reparations for his wrongs'.[60] This was in contrast to the partnership structure, which embodied the traditional beliefs of personal responsibility and trust in business dealings.[61] The power of the argument attacking speculation was diminishing in the mid-19th century as speculation came to be increasingly seen as distinct from gambling and a legitimate and reputable commercial activity.[62]

The fourth aspect of the debate on limited liability addressed the economic question of whether industry's capital requirements were being met. In particular, would the introduction of limited liability have the effect of increasing the supply of capital and were there sufficient investment opportu-

[58] 'This Limited Liability Bill ought therefore to be called "An Act for the better enabling Adventurers to interfere with, and ruin, Established Traders, *without risk to themselves*"': Edmund Phillips, *Bank of England Charter, Currency, Limited Liability Companies, and Free Trade* (Richardson Brothers, 1856) 36 (emphasis in original).

[59] See, eg, the evidence of a merchant, James Clark, to the 1854 Royal Commission on Mercantile Laws describing the crisis of 1847–48 as characterised by 'Protean perfidy and shameless chicanery': *First Report of the Royal Commission on Mercantile Laws* (n 53) 105. The Registrar of Joint Stock Companies pointed out in a submission to the Board of Trade in 1850 that he was aware of instances of abuse involving dishonest promoters: PL Cottrell, *Industrial Finance 1830–1914: The Finance and Organization of English Manufacturing Industry* (Methuen, 1979) 48–9. Cottrell refers to J Hooper Hartnoll, proprietor of *Post Magazine*, the insurance trade journal, who said that between 1844 and 1851, 131 insurance companies were formed, of which 78 failed: at 49.

[60] 'Anticipation and Experience', *The Law Times* (London, 27 March 1858) 14.

[61] For discussions of societal views regarding joint stock companies as reflected in Victorian literature, see Rob McQueen, 'Life without *Salomon*' (1999) 27 *Federal Law Review* 181, 189–90; McQueen, *A Social History of Company Law* (n 16) 87–90, 107–8. For a detailed cultural history of speculation as reflected in a variety of literary sources and cartoons and drawings, see Taylor (n 16) ch 2.

[62] David C Itzkowitz, 'Fair Enterprise or Extravagant Speculation: Investment, Speculation, and Gambling in Victorian England (2002) 45 *Victorian Studies* 121, 144–5.

nities available to investors? Up to the mid-19th century, most enterprises in industry sectors apart from those with especially large capital needs such as transport, insurance and banking had been successfully conducted by sole traders or small partnerships. Most owners of established businesses therefore saw that the capital requirements of industry were being met in the traditional way and there was no need for limited liability. The general opposition to limited liability of both large and small manufacturers may also have been due to fear of competition from joint stock enterprises.[63] Those businesses that had no need for external sources of capital — whether those businesses were large or small or conducted as sole traders, partnerships or registered companies — generally opposed conferring the advantage of limited liability on joint stock enterprises which could turn out to be actual or potential competitors.[64] Edward Pleydell-Bouverie, Vice-President of the Board of Trade, claimed that increasing numbers of companies were seeking incorporation in France and the US to gain shareholder limited liability. He drew support for this argument from a memorandum of Thomas Baker to the Royal Commission on Mercantile Laws, which claimed that 20 'English' companies incorporated in France in 1853–54.[65]

The evenly divided debate on limited liability was reflected in the opinions expressed before the Royal Commission on Mercantile Laws in 1854 which, after much discussion, voted 5:3 against change which would 'allow all persons to trade at their own election with limited liability'.[66] Most interpretations of the evidence presented to the Royal Commission noted the wide range of views presented for and against the introduction of limited liability.[67] The Royal Commission itself described the evidence it heard as a 'great contrariety of opinion'.[68] The conclusion of the Royal Commission that it did

63 McQueen, *A Social History of Company Law* (n 16) 81–6.

64 Jefferys pointed out that most Chambers of Commerce, including those of Manchester and Liverpool, opposed the introduction of limited liability: Jefferys, 'Trends in Business Organizations in Great Britain since 1856' (n 44) 41. The 1854 Royal Commission on Mercantile Laws said it was unable to find evidence of a lack of capital available to industry: *First Report of the Royal Commission on Mercantile Laws* (n 53) 5.

65 See *First Report of the Royal Commission on Mercantile Laws* (n 53) 239.

66 Ibid 6.

67 Saville (n 42) 431. See also RA Bryer, 'The Mercantile Laws Commission of 1854 and the Political Economy of Limited Liability' (1997) 50 *Economic History Review* 37, 37–8.

68 *First Report of the Royal Commission on Mercantile Laws* (n 53) 5. Saville took this term to mean 'variety': Saville (n 42) 421. Bryer took the expression to mean 'opposition', thereby concluding that the deliberations of the committee were clearly divided: Bryer (n 67) 38. Bryer's view is more in accordance with *Webster's International Dictionary of the English*

not favour the introduction of limited liability was strongly criticised as showing 'a total disregard of the first principles of political economy'.[69] Public opinion was in favour of introducing limited liability and despite the opposition of the government of the day, a resolution urging the introduction of limited liability was soon after introduced into the Commons. This resolution sought to limit the liability of sleeping partners along the lines of the European *société en commandite* in which directors had unlimited liability and passive shareholders had limited liability.[70] In fact, the limited partnerships proposal proceeded no further but the Limited Liability Bill, which extended limited liability to joint stock companies registered under the 1844 Act, was surprisingly rushed through in 1855. This was particularly surprising because most of the previous discussion concerning limited liability was in relation to limited partnerships and not incorporated companies.

The preceding discussion of the debate surrounding the introduction of limited liability shows that there were a number of complex and unpredictable circumstances that led to the introduction of limited liability into the companies legislation. Firstly, the debate surrounding the desirability of introducing limited liability sprang up suddenly in the early 1850s, to a large extent initiated by advocates of social policies aimed at reducing class tensions by encouraging employees to save and invest in their employers' businesses. Secondly, the debate on limited liability was largely concerned with the introduction of a form of limited partnership based upon a European model rather than the introduction of a new regime allowing for a general right to incorporate limited liability companies. Thirdly, the debate was linked to economic and social developments related to the Industrial Revolution such as the emergence of laissez-faire ideology and a large investor class, however there were strongly held opposing views expressed by various influential commercial interest groups. The debate over limited liability reveals a divide between established individual or family-owned enterprises — which did not stand to gain from external funding and so were largely opposed to limited liability — and the promotors and investors of corporate enterprises emerging to develop the infrastructure necessary for industrialisation, who were in favour.

Language (rev ed, 1907), 'contrariety' (def 1), which defines 'contrariety' as a 'state … of being contrary; opposition; repugnance, disagreement; antagonism'.

69 See, eg, United Kingdom, *Parliamentary Debates*, House of Commons, 27 June 1854, vol 134, col 758 (Robert Collier).

70 For further discussion of this form of hybrid partnership–company, see Cottrell (n 59) 53–5.

The debate over limited liability can therefore be seen in political economy terms as a battle between two different philosophies towards business which pitted competing interest groupings against each other. The traditional approach to business, usually expressed by the owners of established businesses, stressed the importance of dealing with individuals.[71] These successful established businesses were generally partnerships that were able to rely on internal finance and family or network contributions and had no need to utilise the limited liability company form. They opposed the form's introduction as a means of retaining their competitive advantages. The more modern approach to business, exemplified by investment in tradeable shares in railway companies and banks, involved the pooling of investments by largely anonymous rentier investors in large joint stock companies whose shares were traded and so limited liability was an attractive if not necessary feature.[72]

C *The Limited Liability Acts of 1855 and 1856*

The reforms of the years between 1855 and the consolidation in 1862 'mark[ed] a sudden and sharp break' in the evolution of company law.[73] After 1856, joint stock companies could be formed with limited liability by the simple process of registering a memorandum of association signed by seven shareholders. This ease of incorporation of limited-liability companies resulted in the English legislation becoming 'the most permissive commercial law in the whole of Europe'.[74] This relatively unrestricted approach to compa-

[71] William Entwisle, a banker representing the Manchester Commercial Association said before the 1854 Royal Commission on Mercantile Laws: 'It seems to me that we deal, and ought to deal, with men as individuals not with an abstraction called capital, which we are thus called upon to recognise as possessing a separate and independent existence': *First Report of the Royal Commission on Mercantile Laws* (n 53) 109. *The Times* decried that England was becoming 'one vast mass of impersonalities' and '[e]ven private houses of business … will become … impersonal entities with limited liability': *The Times* (London, 19 May 1865) 9.

[72] Bryer saw the introduction of limited liability as consistent with recognition of the wealthy commercial groupings that 'socialization' of capital was in their interests: Bryer (n 67) 39. Ireland suggested that the evolution of the corporate form was a political construct designed to accommodate rentier investors: Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (n 16). Whether limited liability was necessary for raising capital has been disputed: see Acheson, Hickson and Turner (n 11) 269.

[73] Cottrell (n 59) 54. The reasons why such a sudden change in the law occurred are unclear but appear to involve a number of complex social, economic and political factors. For example, Mackie suggests that the unpopular Crimean War played an important role in the rushed passing of the 1855 Act: see Colin Mackie, 'From Privilege to Right: Themes in the Emergence of Limited Liability' (2011) 4 *Juridical Review* 293, 296–300, 313.

[74] Cottrell (n 59) 41.

ny regulation, ultimately culminating in *Salomon's Case*,[75] encouraged large numbers of sole proprietors and partnerships to incorporate as private companies. This may have led to the predominance of partnerships and private companies and the stifling of large corporations in many areas of British industry during subsequent decades.[76]

Limited liability was first introduced by the 1855 Act,[77] which retained the two-stage provisional registration procedure from the 1844 Act: a company was provisionally registered prior to issuing a prospectus with a general prohibition on share trading prior to complete registration.[78] The Act provided for the limited liability of the members of a company upon complete registration.[79] The 1855 Act also retained the minimum capital requirements of the 1844 Act. In order to be registered, companies had to have at least 25 members holding shares of at least £10 paid up to the extent of at least 20% and not less than three-quarters of the nominal capital had to be subscribed. The word 'limited' was required to be part of the company's name to serve as a warning of the dangers faced in dealing with a limited-liability company[80] and the company had to appoint auditors approved by the Board of Trade.[81] A company registered under the 1844 Act could gain the advantage of limited liability for its members if it altered its deed of settlement to provide for limited liability and obtained a certificate of solvency from the Board of Trade.[82] The disclosure requirements of the 1844 Act were retained, requiring filed returns of shareholders and balance sheets.

The 1855 Act was intended to be a temporary measure and so only lasted a few months before it was repealed and replaced by the substantially changed

75 *Salomon v A Salomon & Co Ltd* [1897] AC 22.

76 See Simon P Ville, 'Judging *Salomon*: Corporate Personality and the Growth of British Capitalism in a Comparative Perspective' (1999) 27 *Federal Law Review* 203. On the emergence of the private company, see Ron Harris, 'The Private Origins of the Private Company: Britain 1862–1907' (2013) 33 *Oxford Journal of Legal Studies* 339, 343–52.

77 *Limited Liability Act 1855*, 18 & 19 Vict, c 133.

78 *Joint Stock Companies Act 1844* (n 38) s 26. The law was unclear as to the extent to which a provisionally registered company differed from a fully registered company and partnership: see, eg, *Norris v Cottle* (1850) 2 HL Cas 647, 664–5; 9 ER 1238, 1244–5 (Lord Brougham).

79 *Limited Liability Act 1855* (n 77) ss 7–8.

80 This requirement is now contained in the Australian *Corporations Act 2001* (Cth) s 148(2).

81 *Limited Liability Act 1855* (n 77) s 14.

82 Ibid s 2.

Joint Stock Companies Act 1856.[83] The 1856 Act reflected a strong laissez-faire philosophy, allowing incorporation with limited liability but without most of the regulatory requirements and restrictions included in the 1855 Act.[84] The main architects of the 1856 legislation were Robert Lowe, the Deputy President of the Board of Trade, who was an 'ideologue of *laissez-faire*',[85] and George Bramwell, whose view was that those who dealt with companies, knowing that their members had limited liability, had only themselves to blame if they were unable to recover their debts. The requirement of the word 'limited' as part of a registered company's name was intended to ensure those dealing with a company knew of the limited liability of its shareholders. Lowe believed that the government was not able to prevent the institution of fraudulent companies to protect investors as they were better able to protect themselves. Trade was best assisted by conferring a right of unlimited association rather than by trying to prevent unsound companies being formed.[86] While ensuring that companies met some minor disclosure obligations regarding their shareholders, the 1856 legislation implemented Lowe's economic freedom of contract philosophy based on a minimal role of the state.

Under the 1856 Act, all that was necessary was for seven or more persons, who needed to hold no more than one share of no minimum value and on which no money beyond a nominal amount was required to have been subscribed, to sign and register the memorandum of association. Disclosure requirements were reduced and minimum share denominations and share

[83] *Joint Stock Companies Act 1856*, 19 & 20 Vict, c 47. *Gower's* describes this Act as 'the first of the modern Companies Acts': Paul L Davies, *Gower's Principles of Modern Company Law* (Sweet & Maxwell, 6th ed, 1997) 44.

[84] There has been some debate on the extent to which English public policy, during parts of the 19th century, was driven by laissez-faire ideas. Stewart Jones and Max Aiken, 'British Companies Legislation and Social and Political Evolution during the Nineteenth Century' (1995) 27 *British Accounting Review* 61, 64–8 drew upon the early 20th-century analysis of AV Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (Macmillan and Co, 1905) lecture 4 to argue that there was a laissez-faire era between 1825 and 1870 which was replaced by a 'collectivist' era of greater state intervention. They therefore suggested that the companies legislation of the mid-19th century was a product of the dominance of laissez-faire approaches to economic policy. A critique of this argument was made by Stephen P Walker, 'Laissez-Faire, Collectivism and Companies Legislation in Nineteenth-Century Britain' (1996) 28 *British Accounting Review* 305. Walker rejected the laissez-faire–collectivist framework as an overly simplistic basis from which to explain the complexities of the content and timing of the legislation: at 307–12.

[85] McQueen, *A Social History of Company Law* (n 16) 131.

[86] United Kingdom, *Parliamentary Debates*, House of Commons, 1 February 1856, vol 140, cols 123–4 (Robert Lowe).

capital were dispensed with. The 1856 Act perhaps recognised the potential for widespread evasion of the 25-member threshold of the 1844 and 1855 Acts and reduced the requisite number of members of a company to seven. It thus effectively invited sole traders, family-controlled companies and private partnerships to gain the advantage of limited liability by enabling them to easily find sufficient nominees to incorporate a company: *Salomon's Case* provides an example of what had become a very common business practice by the 1880s.[87]

The introduction of limited liability has been seen as the 'victory of the investor classes over the industrialists'.[88] The investor groups included commercial interests and landed gentry and together they comprised a majority in the Parliament.[89] A significantly larger investor class emerged at the time of the railway company booms of the 1830s and especially the 1840s.[90] Even though investors were not as well organised as manufacturers, who had formed Chambers of Commerce, they were arguably the major interest group that favoured the introduction of limited liability as a means of opening up investment opportunities. In particular, rentier investors were largely excluded from most industries as industrialists funded their enterpris-

87 In *Salomon*, Lord Macnaghten observed that '[i]n almost every company that is formed the statutory number is eked out by clerks or friends, who sign their names at the request of the promoter or promoters without intending to take any further part or interest in the matter': *Salomon* (n 75) 50–1. This practice was strongly criticised in the Court of Appeal: *Broderip v Salomon* [1895] 2 Ch 323. Lindley LJ considered that the legislature did not contemplate the extension of limited liability to sole traders or enterprises of fewer than seven persons. In *Salomon's Case*, even though there were seven members in accordance with the legislative requirements, six of them were relatives who were members solely for the purpose of enabling the seventh, Salomon himself, to carry on business with limited liability. Lindley LJ thought the seven members were not associated for a lawful purpose, but to attain a result not permitted or intended by the Act: at 337.

88 Jefferys, 'Trends in Business Organizations in Great Britain since 1856' (n 44) 53.

89 Ireland emphasises the important role of rentier investors: Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (n 16) 842–4.

90 Jenks describes this phenomenon as 'democratization of the money market': Leland Hamilton Jenks, *The Migration of British Capital to 1875* (Alfred A Knopf, 1927) 131. Hobsbawm estimated that by the 1840s there was an annual surplus seeking avenues for investment of £60 million and the economy was not equipped to provide for industrial investment on this scale: EJ Hobsbawm, *Industry and Empire: From 1750 to the Present Day* (Penguin Books, rev ed, 1999) 90–1. A large proportion of this surplus found its way into railway investment: at 91. Share capital raised by railway companies in England and Wales increased from a little over £2 million in 1832 to nearly £30 million in 1840 and over £42 million in 1844: MC Reed, *Investment in Railways in Britain, 1820–1844: A Study in the Development of the Capital Market* (Oxford University Press, 1975) 35.

es through networks or retained profits.[91] While rentier investors stood to gain most from the introduction of limited liability, it is unclear as to their role in pushing for reform. Most of the disclosure requirements introduced by the 1844 Act and retained by the 1855 Act were removed in the 1856 Act. As the removal of disclosure requirements was not in investors' interests, it could be argued that the passing of these legislative changes indicated that the limited liability legislation was not driven entirely by a particular group of investors.[92]

It is difficult to determine whether the intention of the proponents of the 1856 Act was to permit small business enterprises to incorporate with limited liability. On the one hand Robert Lowe and Henry Thring (an adviser to the Board of Trade on the drafting of the 1856 legislation and author of one of the early well-known company law texts) were hostile to the practice of incorporating small business.[93] However, Lowe seemed to be of the view that it was not the role of the state to prohibit such incorporations: this was best left to businessmen themselves. Consequently, the legislation did not prevent or discourage small enterprises from incorporating.[94]

The introduction of limited liability has been seen as representing the application of laissez-faire principles to the regulation of commercial dealings.[95] According to this perspective, the introduction of limited liability

[91] Jefferys, 'Trends in Business Organizations in Great Britain since 1856' (n 44) 43–8; Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (n 16) 841.

[92] McQueen, *A Social History of Company Law* (n 16) 96–8. Cottrell saw the 'problem' facing investors as being a 'declining rate of return on low-risk securities' as a result of the high 'volume of savings' seeking reduced investment opportunities: Cottrell (n 59) 46. He thought that the advent of limited liability did not solve this problem: at 47.

[93] PW Ireland, 'The Rise of the Limited Liability Company' (1984) 12 *International Journal of the Sociology of Law* 239, 242–4. See Henry Thring, *The Law and Practice of Joint-Stock and Other Public Companies: Including the Statutes, with Notes, and the Forms Required, in Making, Administering, and Winding Up a Company* (V & R Stevens and Sons, 1861).

[94] See McQueen, *A Social History of Company Law* (n 16) 108–9. This was almost immediately noticed by Edward Cox, who also authored an early company law text. In this book Cox discussed at some length how individual traders and partnerships could 'avail [them]sel[ves] of limited liability' by giving a share to relations, friends or servants so as to meet the statutory requirement of a minimum of seven shareholders: Edward W Cox, *The Law and Practice of Joint Stock Companies and Other Associations as Regulated by the Companies Act 1862* (John Crockford, 6th ed, 1862) 23–9.

[95] This view was based upon the thesis put forward by Dicey in the early 20th century that there were three broad periods in the making of public policy during the nineteenth century that could be precisely demarcated: Old Toryism (pre-1825), Benthamism (1825–70) and Collectivism (1870–1900): see Dicey (n 84) lecture 4. Hunt stated that the mid-19th century 'marked the high tide of laissez-faire, and at its crest this alteration of the law [limited liability] was

recognised the need to create a new legal framework in response to economic development which resulted in the growth in the number of joint stock companies and passive rentier investors. Contemporaries noted that the increasing numbers of larger industrial enterprises seeking pooled investments from large shareholder bases were assisted by the introduction of limited liability.[96] There was a large increase in the number of company registrations after 1880 indicating the perceived usefulness of limited liability to meet the needs of a broad range of enterprises.[97]

Notwithstanding the eventual widespread adoption of limited liability in commercial practice, England was slow to accept limited liability compared to a number of jurisdictions in the US.[98] At first glance this appears puzzling because in the first half of the 19th century, England possessed a far more developed and powerful economy that would appear to have been better suited to derive the benefits of pooled investment enterprises and limited liability. It has been suggested that the introduction of the *Bubble Act* in 1720[99] and the bursting of the South Sea Bubble resulted in a widely held negative perception of the joint stock company in Britain which lasted for much of the 19th century.[100] The joint stock company form was seen by many as the cause of speculative bubbles and the means by which unscrupulous promoters duped gullible investors. It was thought that the solution to containing share speculation and fraudulent practices was to prohibit those companies that were not sanctioned by Parliament or royal charter. This stigma may well have

sought and granted in the name of "perfect freedom"': Hunt (n 34) 116. This framework has been highly influential for many years: see, eg, Jones and Aiken (n 84) 64–8. In more recent times Dicey's thesis has come under strong attack: see Walker (n 84) 307–12.

96 Maitland wrote that '[i]f the State had not given way, we should have had in England joint-stock companies unincorporated, but contracting with limited liability': Frederic William Maitland, *The Collected Papers of Frederic William Maitland*, ed HAL Fisher (Cambridge University Press, 1911) vol 3, 392. *The Economist* suggested that the benefits and disadvantages of limited liability would not be as great as suggested by proponents of both cases: 'Limited or Unlimited Liability', *The Economist* (London, 1 July 1854) 699.

97 *The Times* claimed in the mid-1860s that 'of late years Limited Liability has invaded most departments of mercantile and manufacturing business': *The Times* (London, 24 May 1866) 8.

98 Kevin F Forbes, 'Limited Liability and the Development of the Business Corporation' (1986) 2 *Journal of Law, Economics, and Organization* 163, 164. Limited liability was introduced in New York in 1811, New Hampshire in 1816, Connecticut in 1818 and Massachusetts in 1830: at 172.

99 *Bubble Act 1720*, 6 Geo 1, c 18.

100 This negative perception is evident in the sources cited at nn 58–63. See also Ron Harris, 'The Bubble Act: Its Passage and Its Effects on Business Organization' (1994) 54 *Journal of Economic History* 610, 611–12.

been promoted by traditional economic interests and lingered for well over a century. It was still apparent during debates over the introduction of limited liability in the 1850s, where one of the most strongly held and frequently aired arguments against limited liability was that it would lead to increased speculation. It was not, however, apparent in the US, where the various states competed against each other to introduce limited liability in order to maximise charter revenue.[101]

Towards the end of the 19th century, US corporations were 'larger and more capital-intensive', and therefore had greater capital requirements, than English corporations, necessitating pooled investment and more innovative capital-raising methods in the US.[102] England had greater wealth but it was distributed more unevenly. This relatively uneven distribution enabled the raising of capital from fewer wealthy individuals who were often personally known to each other, resulting in the partnership form and in later private companies retaining greater relative importance in England. Economic development was further advanced in England than in the US, allowing the capital requirements of many English businesses to be met from internally generated profits without the need to tap the capital markets. It was thus less important from an economic perspective to confer limited liability on shareholders in England. In the US there were fewer established firms capable of generating sufficient internal capital so limited-liability corporate structures played a relatively greater role.[103]

Other possible factors that delayed the introduction of limited liability have been put forward. Britain had experienced a long period of relative stability for over a century from early in the 18th century and the effect of stability on national economies is that networks and coalitions develop which limit entry of newcomers and inhibit innovation.[104] The businessmen of the emerging industries such as iron and steel, coal and cotton were concentrated in the North and so were geographically separated from the capital providers of the main financial centre in London.[105] As a result, they were forced to become more independent in meeting their capital needs. It is plausible to suggest that the provincial and northern regions in particular would be more likely to have existing networks and coalitions, especially in the established

[101] Forbes (n 98) 172–3.

[102] Ibid 171–6.

[103] Ibid.

[104] See Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* (Yale University Press, 1982) 89.

[105] See Jefferys, 'Trends in Business Organizations in Great Britain since 1856' (n 44) 44.

early Industrial Revolution sectors, and an ability to finance businesses from internally generated finance or from personal connections. These characteristics would lead already-established vested interests to oppose limited liability because they did not stand to benefit to any great extent. In fact, they stood to benefit more from the preservation of the status quo as change could result in increased competition from new sources that would then be able to tap investment capital.

D *The Effect of the Introduction of Limited Liability in England*

The introduction of limited liability with few restrictions and regulatory safeguards in the 1856 Act did not bring about an upsurge of company registrations and the establishment of incorporated companies as the major form for large business enterprise.[106] If limited liability was as advantageous to the ability of business enterprises to raise capital as is now generally assumed,[107] the question arises as to why the introduction of limited liability did not bring about an immediate and sustained surge in the number of company registrations. Perhaps an answer is that there was a lag effect so that it took some 20 years for commercial practice to widely utilise free access to limited liability. In any case, when the number of company registrations did greatly increase from the 1880s, the vast majority had relatively few shareholders and could be considered private rather than public companies.[108] Further, for some time after the introduction of limited liability, companies voluntarily reduced the impact of limited liability by continuing to issue shares of high par value and with large amounts unpaid.[109]

[106] Shannon found that while there was a significant increase in company registrations in the years after the introduction of limited liability, a much greater increase occurred after the mid-1870s: HA Shannon, 'The Limited Companies of 1856–1883' (1933) 4 *Economic History Review* 290, 290–2. There were 4,859 company registrations in the period 1856–65, 6,111 in 1866–74 and 9,551 in 1875–83: at 292. Company registrations increased by 25% in the period 1866–74 compared with 1856–65 and further increased by 55% during the period 1875–83 compared with 1866–74: at 290.

[107] See, eg, Armour, Hansmann and Kraakman (n 3) 9–11.

[108] Ireland found that 87% of the 1,328 companies that were registered in London in the first half of 1890 originally had 10 or fewer major shareholders: Ireland, 'The Rise of the Limited Liability Company' (n 93) 247.

[109] Jefferys claimed that 52% of companies registered between 1856 and 1865, which were still in existence in 1865, had shares of a par value between £10 and £100: JB Jefferys, 'The Denomination and Character of Shares, 1855–1885' (1946) 16 *Economic History Review* 45, 45. More than 30 companies on the Limited Liability Joint Stock Companies List (1864–66) issued shares with a par value in excess of £1,000 including the Liverpool & Philadelphia Steam Ship

The use of high par value shares reflected the widely held perception during this period that investments in joint stock companies were similar to investments in large partnerships, being relatively illiquid. The practice of companies issuing high-denomination shares with large unpaid amounts significantly detracted from the advantages of limited liability because if a company failed, as often occurred in the depressed economic conditions of the second half of the 19th century, the shareholders were liable, in a similar way to partners, for large unpaid amounts on their shares, even though they were shareholders of a limited-liability company.

The crash of 1866 caused promoters and investors to reassess their attitude towards shares of high denomination and large uncalled liabilities as in a number of cases where companies failed, shareholders were liable for very large amounts despite having limited liability.[110] The high-denomination, partly-paid shares which were prevalent in the early 1860s became less common in most industries after 1867.[111] The trend to lower par value shares and smaller unpaid capital can be seen as commercial recognition of the legal differentiation of limited-liability companies from partnerships. Low par value shares became more widely used because they were generally more easily tradeable, they attracted investment from a wider group of investors and the issue of shares as fully paid or with a relatively small amount unpaid enabled shareholders to gain the advantage of limited liability in the event of company insolvency.

Another reason for the relatively slow growth in company registrations during the years after the introduction of limited liability was that many of the companies registered in the 1850s and 1860s were of a highly speculative nature and failed.[112] The incidence of insolvency was particularly high during

Co, which in 1850 had shares of £9,000 each: at 45–7. Hunt estimates that less than 10% of issued capital of new companies formed between 1863 and 1866 was paid up in cash: Hunt (n 34) 155 n 49.

110 Jefferys, 'The Denomination and Character of Shares, 1855–1885' (n 109) 45–6; McQueen, 'Life without *Salomon*' (n 61) 191.

111 Jefferys, 'The Denomination and Character of Shares, 1855–1885' (n 109) 45–6; McQueen, 'Life without *Salomon*' (n 61) 191.

112 Shannon found that of the companies registered between 1856 and 1883, just over 30% 'ended in insolvency' and half of the insolvencies occurred in the first five years of the company's existence: Shannon (n 106) 298. 'A large number' of the companies registered in the decade following the introduction of limited liability 'were either speculative or fraudulent … [or] proved abortive': Geoffrey Todd, 'Some Aspects of Joint Stock Companies 1844–1900' (1932) 4 *Economic History Review* 46, 71.

periods of economic downturn.[113] It is a matter of some debate as to whether a large number of company failures were due to fraud or to misfortune or mismanagement in a difficult environment.[114]

From the 1880s there was also a major shift in the type of companies that were registered. The great majority of the company registrations up until the early 1880s were what would now be described as public companies whose shares were traded on stock exchanges. During the period 1875–83, six-sevenths of new company registrations were for 'public' companies. To put the number of company registrations in context, by 1885 limited-liability companies accounted for only 5–10% of all business organisations (excluding one-man concerns and public utilities) and they predominated only in particular industries with large capital needs suited to joint stock enterprise such as shipping, railways, iron and steel, and cotton.[115] The vast majority of English manufacturing enterprises in the mid-1880s continued to be unincorporated family businesses.[116] Huge growth in the number of private limited-liability companies occurred after 1885 to the extent that by 1914, private companies comprised nearly 80% of registered companies.[117]

During the depression of the 1880s it was widely thought that limited liability, by facilitating the formation of companies, had caused 'excessive competition'.[118] The Secretary of the Board of Trade, Sir Thomas Farrer,[119]

[113] Lobban refers to parliamentary papers which indicate that by 1869, 225 companies had been wound up since 1862 and 149 of these were incorporated between 1862 and 1865: Michael Lobban, 'Nineteenth Century Frauds in Company Formation: *Derry v Peek* in Context' (1996) 112 *Law Quarterly Review* 287, 317 n 151. Levi found that of 7,050 companies formed between 1844 and 1868, fewer than 3,000 remained in existence in 1868: Levi (n 35) 37.

[114] Shannon estimates a sixth of company failures were due to fraud: Shannon (n 106) 295. See also Todd (n 112) 71. Barnes and Firman concluded that the lack of experienced accounting and audit professionals and appropriate standards made management and investment fraught with difficulties and risk even in the absence of fraud: P Barnes and RJ Firman, 'Difficulties in Establishing a Limited Liability Company in Great Britain during the 1860s and the Role of Financial Information: A Case History' (2001) 8 *Financial History Review* 143, 159–60.

[115] Jefferys, 'Trends in Business Organizations in Great Britain since 1856' (n 44) 105; PL Payne, 'The Emergence of the Large-Scale Company in Great Britain 1870–1914' (1967) 20 *Economic History Review* 519, 520.

[116] Payne (n 115) 520.

[117] Ireland, 'The Rise of the Limited Liability Company' (n 93) 245. See also Harris, 'The Private Origins of the Private Company' (n 76) 346 (depicting in a logarithmic scale graph the growth of registrations of private companies relative to public companies during the period 1844–2004), 378.

[118] Todd (n 112) 64–5. This suggestion was made by a number of witnesses who gave evidence at the 1886 Royal Commission on the Depression of Trade and Industry and claimed excessive competition occurred in the cotton and shipping industries due to the formation of small

disputed these assertions arguing that even though profits in cotton spinning fell due to increased competition, limited liability enabled small enterprises to compete with large ones and this was beneficial. The Royal Commission did not offer an opinion on whether limited liability was advantageous but did suggest that it encouraged more speculative trading than would be wise for a business with unlimited liability. This could bring about over-production.[120]

In the period 1870–1914 there was an 'appreciable increase' 'in the size of the average British firm in the manufacturing and extractive industries'.[121] Payne identified a period of mergers from the 1880s as the main cause behind the sudden growth in large widely held companies. The number and size of large corporations around this time was far greater in the US where the largest corporations were considerably larger than the largest companies in Great Britain.[122] The long period of time between the 1850s, when limited liability was introduced, and the 1890s wave of mergers appears to indicate that the merger movement was of greater importance than the introduction of limited liability in explaining the appreciable increase in the size of large British companies.

The industrialists involved in the long-established industries of the Industrial Revolution such as cotton and iron and steel were largely opposed to the introduction of limited liability in the 1850s and generally made little use of incorporation, preferring to remain as partnerships. However, by the mid-

companies comprising large numbers of shareholders each contributing relatively small amounts. Such investors were supposedly content to receive a lower return than partners who had unlimited liability: see *Final Report of the Royal Commission Appointed to Inquire into the Depression of Trade and Industry* (Report No C 4893, 1886) xviii [68].

119 Farrer has been described as 'an uncompromising Free-trader of the strictest school': *Encyclopædia Britannica: A Dictionary of Arts, Sciences, Literature and General Information* (Cambridge University Press, 11th ed, 1911) vol 10, 189.

120 *Final Report of the Royal Commission Appointed to Inquire into the Depression of Trade and Industry* (n 118) xviii [68]. See also Lobban (n 113) 317 n 150.

121 Payne (n 116) 519.

122 Payne has set out the largest industrial companies in Great Britain in 1905 and the largest United States companies that achieved market dominance through merger in 1895–1904: ibid 539–41. The largest relevant American corporation at this time was US Steel, with a capitalisation of approximately £282 million. The largest listed British company was Imperial Tobacco Co, with a capitalisation of approximately £17 million. There were seven US corporations with larger capitalisations than the largest listed British company. Notably, the listed British companies were 'confined to … a … limited range' of industries: eighteen of the top 52 British companies by size of capital were brewers (at 520, 527) while the next largest categories were textiles and steel-related industries (at 527, 532). Even accounting for any slight inaccuracies in the data underlying this comparison, it is clear that US companies were generally far larger than their British counterparts: at 541.

1880s many companies had been formed in these industries. The main reasons for this development were the greatly increased need for capital to finance the required technological changes and the increased scale of the businesses, and the need for the owners of family businesses to protect themselves against the risks of insolvency in the uncertain economic environment of the second half of the 19th century. By 1900, after a relatively slow start, limited liability was so completely accepted that a commentator said 'the principle of limited liability … is now so familiar that it is difficult to realise how modern it is — in fact not yet fifty years old'.[123] Despite acceptance of limited liability as an integral part of the commercial environment, many businessmen felt an unsettling moral ambiguity in the shift from traditional personal responsibility to a more nebulous morality stemming from the corporate personality and limited liability.[124]

We have seen in this Part that the impact of limited liability was relatively modest at first: businesses were largely conducted as sole traders or partnerships and, where companies were formed, they often continued to issue shares with large unpaid amounts, thereby largely negating the advantages of limited liability. The commercial and legal benefits of limited liability were at first mainly recognised by proprietors of small enterprises.[125] Large joint stock enterprise was mainly restricted to sectors such as railways and other infrastructure where large capital costs were necessary. It was not more widely used in a broad range of industries until the 1880s. Investors and promotors seeking to raise capital for large listed enterprises only formed widely held companies in large numbers once lower-denomination shares became widely issued. The growth in the number and size of large companies in the 1890s appears to have been more the result of a merger wave driven by the need for the efficiencies of larger-scale enterprises rather than the introduction, some 30 or 40 years prior, of limited liability.

123 Montague Barlow, 'The New Companies Act, 1900' (1901) 11 *Economic Journal* 180, 180.

124 An anonymous merchant wrote that '[m]erchants, brokers and clergy all agreed that the absence of responsibility felt by men associated together in a corporate capacity acted as a powerful incentive to immoral behaviour': Taylor (n 16) 28. See generally Johnson (n 16) 227–31.

125 An example of a company used in this way can be seen in the famous case of *Salomon* (n 75).

III The Introduction of Limited Liability in the Australian Colonies

Legislation introducing limited liability was passed in the Australian colonies before this occurred in England. During the 1840s and 1850s there were several attempts in New South Wales and Victoria to introduce limited liability as a means of encouraging the development of companies, especially in banking and in the mining industry. The New South Wales Parliament passed several Acts in the period 1848–53 which incorporated some of the leading banks, such as the Bank of New South Wales, and later some mining, insurance and shipping companies as limited-liability companies. In most cases, the liability of shareholders was limited to twice the nominal value of shares held despite the fact that in Britain a general right to limited liability had not been introduced and this type of extended limited liability was rarely used.[126] These incorporations led to increased company activity in Sydney where investors favoured shares, especially shares in the large banks, which paid regular dividends.[127]

Sole traders and partnerships were by far the most common forms of business organisation and both New South Wales and Victoria introduced legislation which recognised limited-liability partnerships in the early 1850s.[128] These early forms of limited-liability enterprises were little used.[129] They were repealed by the Companies Acts introduced in Victoria in 1864 and New South Wales in 1874 which provided for the incorporation of companies with limited liability. Although the limited-liability partnership Acts had little commercial impact, they nevertheless reflected a preparedness

[126] *The Sydney Morning Herald* opposed the introduction of double nominal share value liability and favoured partnership and shareholder liability limited to the nominal amount of the shares: 'Limited Liability', *The Sydney Morning Herald* (Sydney, 21 June 1853) 2. Double nominal value liability was also adopted by banks in Canada and the US: see John R Vincens, 'On the Demise of Double Liability of Bank Shareholders' (1957) 12 *Business Lawyer* 275; RCB Risk, 'The Nineteenth-Century Foundations of the Business Corporation in Ontario' (1973) 23 *University of Toronto Law Journal* 270, 295–8.

[127] In 1858 there were over 20 dividend-paying companies in New South Wales and Victoria and this increased during the 1860s: see Stephen Salsbury and Kay Sweeney, *The Bull, the Bear and the Kangaroo: The History of the Sydney Stock Exchange* (Allen & Unwin, 1988) 40, 46.

[128] *An Act to Legalize Partnerships with Limited Liability 1853* (NSW); *An Act to Legalize Partnerships with Limited Liability 1854* (Vic).

[129] According to the *Victoria Government Gazette* only 14 partnerships, of which 6 were mining enterprises, were registered under the Victorian Act: Ralph W Birrell, *Staking a Claim: Gold and the Development of Victorian Mining Law* (Melbourne University Press, 1998) 36.

of colonial governments to experiment in adopting business forms suited to local business interests.[130]

To encourage investment in the mining industry, Victoria passed legislation in 1855 that introduced registration and limited liability for mining companies which at this time were a type of hybrid form with features of companies and partnerships based upon the Cornish 'cost-book' system.[131] This type of company proved unsuited to deep lead mining with its high capital demands and in the colonial environment where shareholders moved frequently from one goldfield to another. However, it did allow for the formation of companies that were able to raise capital from up to 80 shareholders who were usually miners or providers of mine machinery or materials. The shares in these companies soon came to be traded at the early stock exchanges which developed in Ballarat and Bendigo from the late 1850s.[132]

Further legislation was introduced in Victoria in 1858 and 1860 adopting limited liability and share capital rules for mining companies.[133] This legislation represents an early introduction of limited liability to mining companies very soon after the introduction of limited liability in England. Similar legislation was adopted in New South Wales soon after, although gold had much less impact in New South Wales and the mining industry was less influential than in Victoria. By the early 1860s the regulation of mining companies in Victoria was ad hoc and complex as companies could be registered under a number of different Acts. Despite these shortcomings, a large number of limited-liability mining companies were formed under this system that were successful in raising substantial amounts of capital, extracting large amounts of gold and facilitating high-volume stock exchange trading, especially in mining company shares.[134]

Soon after the consolidation of the companies legislation in England in 1862,[135] much the same legislation was passed in the Australian colonies.[136]

130 Lipton, 'A History of Company Law in Colonial Australia' (n 9) 812.

131 Birrell (n 129) 36–7. See *An Act for the Better Regulation of Mining Companies 1855* (Vic). This Act was often referred to as '*Haines' Act*' after the Colonial Secretary who introduced it into the Legislative Council: Birrell (n 129) 36.

132 Birrell (n 129) 63–4. Birrell said that in 1859 there were 27 Bendigo mines, 10 Castlemaine mines and 10 Maldon mines quoted on various stock exchanges: at 112.

133 See *Mining Associations Act 1858* (Vic) (often referred to as '*Ireland's Act*'); *An Act to Limit the Liability of Mining Partnerships 1860* (Vic) ('*Pyke's Act*').

134 See Lipton (n 9) 811–14.

135 *Companies Act 1862*, 25 & 26 Vict, c 89.

136 *Companies Act 1874* (NSW); *Companies Act 1863* (Qld); *Companies Act 1864* (SA); *Companies Act 1869* (Tas); *Companies Statute 1864* (Vic).

The main features of this legislation were adopted from the English 1856 Act discussed in Part II. Within six months after passage of the English 1862 *Companies Act*, a version of that legislation was introduced into the Victorian Parliament, although it took several further months before it was finally passed. Other colonies adopted virtually the same legislation between 1863 and 1874.

The gold mining industry benefitted from the passing of the Companies Act in Victoria as it enabled companies to be incorporated more easily, conferred limited liability on shareholders and imposed relatively few compliance requirements. In particular, the ease with which a limited-liability company could be incorporated facilitated the listing of gold mining companies, enhancing their attractiveness for capital raising. There was already 'by the 1860s … significant and growing share market activity, especially in gold mining shares, which led to the establishment of several flourishing stock exchanges'.[137] This strongly indicates that the transplant of company law legislation and limited liability in particular, together with the rapid development of the gold mining industry, had the effect of encouraging the promotion of stock-exchange-listed mining companies and trading in their shares. Apart from the mining industry, initially there did not appear to be 'strong local demand' for company incorporation and it was not for another 20 years that the company form became more widely used in non-mining sectors.[138] This slow growth in the number of company incorporations outside the mining sector is consistent with developments in England, where it also took several decades after the introduction of limited-liability legislation for company registrations to increase appreciably. The Australian economy and business sectors were much less sophisticated, were smaller and were far less diversified than in Britain, so the development of companies outside the mining industry took longer than in England.[139]

A characteristic feature of most early gold mining companies was the issue of high par value, partly paid shares, adopting a practice prevalent in England at the time. 'The ability to tap the market for capital' on a regular basis 'was particularly important because it was the nature of quartz mining that considerable expense had to be incurred, and development work undertaken,

137 Lipton (n 9) 816.

138 AR Hall, *The Stock Exchange of Melbourne and the Victorian Economy 1852–1900* (Australian National University Press, 1968) 43.

139 DT Merrett, 'Capital Markets and Capital Formation in Australia, 1890–1945' (1997) 37 *Australian Economic History Review* 181, 182–3.

before any profit could be earned and dividends paid'.[140] These industry characteristics made widely held, listed companies the most efficient means of financing and limited liability was a crucial factor in encouraging investment. The predominance of the limited-liability mining company resulted in the demise of cooperatives. Cooperatives had been the prevalent form of business organisation in the mining industry when it was mostly engaged in alluvial mining; however, members had unlimited liability and among other disadvantages, their shares were not readily tradeable on a stock exchange.

Limited liability was also important because of the highly speculative and risky nature of the mining industry. This would probably have encouraged diversification of portfolios of gold mining companies on the expectation that for every successful company there would be several that would become worthless, making the introduction of limited liability a very important feature of the legislation. While it is certainly true that the vast majority of businesses outside mining continued in the form of sole traders and partnerships, this was largely because the undeveloped nature of the colonial economies limited demand for long-term capital outside the mining industry. It is also consistent with developments in England, where sole traders and partnerships remained the predominant types of business organisation, and where it took some time after the introduction of limited liability for the company form to gain widespread acceptance in the commercial community.

While the Australian colonies adopted the English companies legislation in almost unchanged form, early innovation in Victoria enabled mining companies to be incorporated as no-liability companies.[141] This new form of limited liability facilitated the raising of capital by gold mining companies when quartz mining, with its very high capital requirements and commercial risk, was becoming the dominant mining activity.[142] The distinguishing feature of no-liability companies is that their shareholders, unlike those of other limited-liability companies, are not under a contractual obligation to pay calls on partly paid shares or contribute to the debts and liabilities of the company. They may choose instead to forfeit their shares, in which case the shares must be offered for sale by the company at public auction. Upon the sale of the

[140] Lipton (n 9) 817.

[141] *Mining Companies Act 1871* (Vic) pt 4. The *Corporations Act 2001* (Cth) still provides for the registration of no-liability mining companies: ss 112, 254M(2), 254Q(1). There are currently about 1,000 no-liability companies registered in Australia: Phillip Lipton, Abe Herzberg and Michelle Welsh, *Understanding Company Law* (Lawbook, 18th ed, 2016) 84.

[142] The background to the no-liability legislation is discussed by Hall (n 138) 75–7. See also Lipton (n 9) 818–22.

shares, the company becomes entitled to the proceeds instead of the right to recover the unpaid call from the shareholders.

The introduction of the no-liability company form addressed the difficulty companies faced in pursuing shareholders who failed to pay calls where the costs involved often did not justify taking legal proceedings. Shareholders were often miners, or providers of services to miners, who regularly moved between goldfields and were difficult to trace. Some shareholders sought to avoid the liability to pay calls by use of the common practice of 'dummying' — using false names in registering themselves with the company. This served as a type of insurance for shareholders who could choose to pay calls if a company's prospects looked favourable or to 'disappear' if its prospects looked bleak or if it went into liquidation. This situation created difficulties for the company, which still had to meet the claims of creditors despite some shareholders reneging on their liabilities. It also resulted in shareholders withholding payment of calls unless and until the company became profitable, at which point they would pay the outstanding calls and become entitled to dividends and the benefit of a higher share price. These difficulties tended to discourage investment in mining companies because if a mining company failed, the burden of meeting its debts fell disproportionately on those shareholders still holding partly paid shares who were traceable or who were wealthy. The no-liability legislation allowed a mining company to forfeit and auction shares on non-payment of a call and to receive the proceeds of the sale of forfeited shares rather than seek recovery from a large number of hard-to-trace shareholders.

We can see that the introduction of limited liability into the Australian colonies bore similarities to its introduction in England. The legislation was initially identical to the English statute and there were sectors of the economy that welcomed its introduction and utilised the limited-liability company form. It should also be noted that there were differences in the environments into which limited liability was introduced. The economies and business environments of the Australian colonies were far less developed and diversified than in England. In particular, the gold mining industry of Victoria was a very important part of the Victorian economy. This was also reflected in its strong political influence. As a result, mining interests were able to successfully push for early forms of limited liability — before these were introduced in England — and the no-liability type of company. These innovations coincided with the rapid development of the gold mining industry and stock exchange trading, mostly in mining company shares. Outside the mining industry, apart from banks, few businesses utilised the limited-liability company form. This experience was consistent to some extent with the adoption of limited liability in England and also reflected the unsophisticated nature of the Australian economy and business environment and the inflow of capital into a very narrow range of industries.

IV The Relationship of Legal Change and Economic Developments: Functionalist and Historicist Approaches

Functionalist approaches to the study and analysis of legal history have been the dominant paradigm over a long period of time.[143] Such approaches are based on the idea that law is linked to society, and that it is linked in a particular way; that is to say, it performs a 'functional' role serving the needs of society generally, or the needs of particular groups in society. The functionalist paradigm encompasses a very broad range of sometimes-conflicting perspectives from different political viewpoints. It embraces ideas and methodologies from a number of social science disciplines including economics and finance. These diverse perspectives have in common the notion that the function of law is to facilitate the natural and proper evolution of a 'progressive' society and that 'law' and 'society' are linked but also mutually independent.[144]

Functionalist approaches tend to assume that society has various needs such as stability, efficient organisation for production and preservation of continuity in the midst of change.[145] A central need is for society to develop along a supposedly natural social evolutionary path. This path is determined by the impersonal historical forces which produce the most economically efficient evolutionary development. On this view, progress towards the model

143 An early example of a functionalist approach to writing legal history was adopted by Max Weber writing in the early 20th century. Weber's focus was on the emergence of modern capitalism in Europe, and the role of law in this development. He concluded that European law possessed features that made it conducive to capitalism as compared with legal systems found elsewhere: see generally David M Trubek, 'Max Weber on Law and the Rise of Capitalism' [1972] *Wisconsin Law Review* 720, 721–5.

144 Harris lists a diverse range of writers who he categorises as adopting a functionalist approach: Harris, *Industrializing English Law* (n 22) 6–7. They include political economists and social theoreticians such as Karl Marx and Max Weber, left-wing writer EP Thompson, American realists J Willard Hurst and Morton Horwitz, the law-and-economics writer Richard Posner and new institutional economists Douglass C North and Oliver Williamson. Gordon describes the 'dominant vision' of American historiography as 'evolutionary functionalism' which encompasses a widely diverse range of perspectives: Gordon (n 16) 59, 65–6.

145 But see Gordon (n 16) 61–4, 71–87. Gordon questioned whether it was possible to define what the needs of society were when there were in fact many different interest groups in society with diverse and often contradictory needs.

we have today was inevitable. It follows, then, that functionalist histories are generally concerned with the responsiveness of legal systems and legal change to social needs.[146] Functionalist analyses also tend to assume that there are clear determinate relationships between law and the economy or society, so that if a legal system possesses certain characteristics it will have a predictable impact on economic development or on society. An example of a functionalist analysis that has been controversial and has provoked a substantial literature is the 'legal origins' thesis that puts forward the argument that the role of law in the protection of creditors is the critical factor in the development of financial markets and that the common law system provides a better framework for financial development and economic growth than does the civil law system.[147]

Approaches that view law as operating in a functionalist way tend to be optimistic because they generally assume that law will somehow ultimately adapt to changing social and economic needs even though there may be periods where the law lags behind or may be dysfunctional or inefficient for periods of time. Functionalist analyses are also often based upon the teleological assumption that law progressively improves towards the form that is best suited to its function or purpose.[148] Such narratives are described as 'teleological' because they assume that change occurs as if by design to serve an end purpose. Teleological statements imply that an impersonal process has particular goals and that change occurs in order to achieve these goals. A simplistic example of such a statement is that the introduction of limited liability was a necessary precondition for the accumulation of capital, the growth of capital markets and the development of large corporate enterprises.

[146] Ibid 63–4.

[147] See, eg, Rafael La Porta et al, 'Legal Determinants of External Finance' (1997) 52 *Journal of Finance* 1131; Rafael La Porta et al, 'Law and Finance' (1998) 106 *Journal of Political Economy* 1113; Rafael La Porta et al, 'Investor Protection and Corporate Governance' (2000) 58 *Journal of Financial Economics* 1. La Porta, Lopez-de-Silanes and Shleifer later elaborated on their theory and addressed a number of critiques which had been made of their approach and conclusions: Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 285. For examples of the many critiques of the 'legal origins' argument, see Michael Graff, 'Law and Finance: Common Law and Civil Law Countries Compared' (2008) 75 *Economica* 60; Ruth V Aguilera and Cynthia A Williams, '"Law and Finance": Inaccurate, Incomplete, and Important' [2009] *Brigham Young University Law Review* 1413; Katharina Pistor, 'Rethinking the "Law and Finance" Paradigm' [2009] *Brigham Young University Law Review* 1647.

[148] See Curtis J Milhaupt and Katharina Pistor, *Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (University of Chicago Press, 2008) 17–21.

These supposedly inevitable economic developments ultimately led to society becoming more economically developed and efficient.[149] Teleological statements generally look at history backwards from the perspective of the present and do not usually withstand close historical analysis because the relationship between changes in society and legal responses are rarely neat and clear-cut; nor do legal and economic developments necessarily lead to inevitable predetermined outcomes anticipated by the proponents of legal change. The links between law and the economy are usually too complex, contradictory and indeterminate to allow for such reductionist generalisations.

The most widely accepted approach to explaining the dominance of the corporation around the world and the role of limited liability is a functionalist perspective that draws upon law-and-economics methodologies. According to this perspective, the fundamental structural characteristics of the corporation — separate legal personality, limited liability, transferable shares, separation of ownership and control and shareholder primacy — are driven by inevitable economic efficiency imperatives so corporations and corporate law are structured in very similar ways in almost all countries.[150]

A number of economic analyses have considered the impact of limited-liability rules on companies and capital markets.[151] These analyses emphasise the efficiency advantages of limited-liability rules, including reduced transaction costs and avoidance of exposure, to risks of the company's business, of passive investors who do not participate in management.[152] This ability of shareholders to avoid risk by holding limited-liability shares encourages investment in very large enterprises, where ownership and control are separated, the diversification of investor share portfolios and enhanced liquidity for the shares of limited-liability companies.[153] Shareholders are

[149] See David Sugarman and GR Rubin, 'Introduction: Towards a New History of Law and Material Society in England, 1750–1914' in GR Rubin and David Sugarman (eds), *Law, Economy and Society, 1750–1914: Essays in the History of English Law* (Professional Books, 1984) 1, 114–17. See also Gordon (n 16) 75–81.

[150] Armour, Hansmann and Kraakman (n 3) 5. Hansmann and Kraakman argue that there has been 'convergence' towards the shareholder-oriented model of the corporation, the defeat of alternative models and thus the '[e]nd of [h]istory': Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 *Georgetown Law Journal* 439, 439.

[151] See, eg, Orhnial (n 4) 179; Easterbrook and Fischel, 'Limited Liability and the Corporation' (n 4); Blumberg (n 5) 611–16; Hansmann and Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (n 6).

[152] Orhnial (n 4) 186–7; Blumberg (n 5) 612–13.

[153] These widely accepted advantages of limited liability have been disputed: see Acheson, Hickson and Turner (n 11).

spared the need to form judgments as to the wealth of other shareholders because, in the absence of limited liability, creditors of an insolvent company would first look to pursuing the wealthier shareholders and this would impair the efficient operation of capital markets.[154]

Several disadvantages of limited liability have also been noted by a number of law-and-economics writers. The efficiency advantages largely apply to investors and voluntary creditors such as contract creditors. These advantages largely disappear when the position of involuntary creditors such as tort creditors is considered.[155] In such cases, limited liability enables a company to avoid the full costs of its business activities by shifting its tort liabilities to outside parties such as tort victims or the government, thereby undermining the deterrent objective of tort law and encouraging undesirable excessive risk-taking. A similar situation arises in the case of employee entitlements. These disadvantages are particularly apparent in the case of corporate groups where 'layer upon layer of insulation from liability can result'.[156]

This article contends that the statutory introduction of limited liability may better be seen as a 'genealogical' process which implies that change continually occurs along 'a rutted and rough road that has innumerable twists and turns and no particular destination; any particular route taken has been chosen from among the countless and constantly proliferating possibilities for change'.[157] The present is linked to the past in an evolutionary historical process and can be described as a 'carrier[] of history'.[158] Outcomes may comprise 'odd arrangements and funny solutions' as they are determined by particular historical factors, chance occurrences and unexpected outcomes rather than by inevitable progress towards a predetermined design.[159] Even seemingly small events and chance circumstances can determine

154 Blumberg (n 5) 614.

155 Ibid 616–19. Hansmann and Kraakman saw shareholder liability as a problem of tort law rather than corporate law: Hansmann and Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (n 6) 1916–23.

156 Blumberg (n 5) 623.

157 Hutchinson (n 16) 15. See also Johnson (n 16) 230–2.

158 See Paul A David, 'Why Are Institutions the "Carriers of History"?: Path Dependence and the Evolution of Conventions, Organizations and Institutions' (1994) 5 *Structural Change and Economic Dynamics* 205.

159 Gould so described the panda's thumb: Stephen Jay Gould, *The Panda's Thumb: More Reflections in Natural History* (WW Norton, 1980). He saw this evolutionary outcome not as ideal but as a 'contraption, not a lovely contrivance' that served its purpose well enough: at 24. The panda's thumb can be seen as a metaphor for unexpected or sub-optimal legal outcomes that work well enough.

path dependencies and solutions which may not be optimal nor efficient, nor continue to remain so as society changes and new commercial practices evolve.[160]

Legal change viewed from a historicist rather than functionalist perspective recognises that the relationship of legal change and economic and social developments is complex and dynamic. A particular legal outcome is not necessarily optimal or the only possibility. Rather, law can be seen as a product of human interaction and political dimensions and so 'in order for law to perform any useful function in support of markets, it must fit local conditions and thus must continuously evolve in tandem with economic, social, and political developments'.[161] If the law can be shown to be deficient and failing to address particular social or economic problems, it should be changed to better resolve these problems. It should not be retained simply because it somehow represents an inevitable progression towards the best design.

V Functionalist and Historicist Approaches to the Evolution of Limited Liability

As discussed in Part IV, functionalist approaches tend to assume that there are clear determinate relationships between law and the economy or society, so that if a legal system possesses certain characteristics it will have a predictable impact on economic development or on society. In broad terms, functionalist approaches, while offering diverse variations on a theme, tend generally to agree that the development of capitalism and large-scale business enterprises necessitated the raising of very large amounts of capital from a rapidly growing investor class. The most efficient mechanism for pooled investment was the joint stock company and one of its critical features was the advantage of limited liability bestowed on its shareholders. The legal frame-

[160] The concept of path dependence has been utilised in various disciplines to provide an explanation for why inefficient outcomes may persist: see generally Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990) ch 11. See also Lucian Arye Bebchuk and Mark J Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52 *Stanford Law Review* 127. Bebchuk and Roe argue that corporate rules including corporate law and securities law are affected by earlier corporate ownership structures which created a path dependency. For a discussion of chaos theory and path dependence in the context of law and economics, see Roe (n 15).

[161] Milhaupt and Pistor (n 148) 22. Johnson described the market of the 19th century as a human construct that can be shaped and reshaped rather than as a natural or neutral phenomenon: Johnson (n 16) 233. This decription remains applicable.

work responded to this need in the mid-19th century by undergoing reform which introduced limited liability as a right, thereby enhancing the efficiency and reducing the transaction costs of the company form and later facilitating the dominance of the modern corporation. In this way, law can be seen from a functionalist perspective as progressing towards its modern, most efficient form and thereby playing its necessary role in facilitating economic development.

This approach to explaining the relationship of legal change and economic development runs into difficulties when the history of the statutory introduction of limited liability is analysed in detail. Firstly, it assumes that law influences the economy in a linear way and in a single direction so that the introduction of laws which protected investors was a necessary precondition for economic development which followed after the law was introduced. A historicist perspective, on the other hand, would leave open the possibility of alternative causation sequences so that a change in the law may itself be the result of previous economic changes which enabled emerging business interests to successfully translate their increasing economic power into political pressure for legal change. The changed law may then assist these interests to more effectively utilise joint stock companies, the legal, economic and political spheres thus influencing each other in a 'co-evolution[ary]', interactive way.[162] The Australian experience may well have played out in this manner. In a less-developed economy marked by skewed capital accumulation and where fewer established business interests opposed the introduction of limited liability, the politically influential gold mining industry successfully had a number of innovative laws introduced which made it easier for investors to gain the advantage of limited liability.

Secondly, functionalist interpretations of this period implicitly assume that law changed to better meet the 'needs' of society. In England in the 1840s and 1850s there was no unified call by business interests to reform company law and introduce limited liability on a universal basis. In fact, as discussed in Part II, in the period that led to the introduction of limited liability, an evenly balanced and vigorous debate — involving a diverse range of issues, arguments and opposed interest groups took place over a short period of time in a complex, unpredictable and fluid environment. The business community was sharply divided in its attitudes to the joint stock company and especially in relation to the introduction of limited liability. The growing investor and professional classes may have felt a need for legal reform in order to further

162 Deakin and Wilkinson (n 22) 32; see also at 29–32.

their own interests but established industrialists generally opposed reform. Established industrialists had little need for limited-liability companies, which they saw as encouraging competition and leading to excessive speculation and unethical business practices. It is therefore overly simplistic to think in terms of law changing to meet 'society's needs' or 'the needs of business' when proposals for legal change are often strongly contested by various interest groups, some of whom are advantaged by the preservation of the status quo while others favour change.

Thirdly, the limited-liability legislation of 1855 and 1856 did not itself represent a unified response to the needs of business or society. Each of the Acts reflected a very different approach to company law regulation. The 1855 Act, while introducing limited liability, retained those features of the 1844 Act which adopted an interventionist regulatory approach with regards to minimum capital requirements, disclosure obligations and the imposition of restrictions on full incorporation. These restrictions and requirements aimed to protect investors by attempting to withhold incorporation from fraudulent and unsound companies or at least to provide prospective investors with the means of determining whether they were about to invest in a 'bubble' company. The 1856 Act implemented a very different regulatory approach, which was based upon a laissez-faire–freedom-of-contract philosophy. It abandoned the attempt to protect investors by removing many of the capital and disclosure requirements and restrictions of the 1844 Act, making incorporation and limited liability freely available to all companies, irrespective of size.

The different regulatory approaches taken by each of these Acts represented divergent responses to changes in the economic and financial environment. It is necessary to examine the history of the legislation and its context in order to explain these shifts in the nature of regulation. Such an examination shows the importance of historical contingencies and chance events in the evolution of company law, specifically the introduction of limited liability, and undermines the teleological assumption that the present design of company law was an inevitable progression. The chance appointment of Gladstone to the Board of Trade was an important factor in the introduction of the 1844 Act with its disclosure requirements and restrictions. Equally, the appointment of Lowe as Vice-President was an important driver of a laissez-faire approach which saw the removal of restrictions in the 1856 Act. Both the 1844 and 1856 Acts were at least partly the result of contradictory chance historical events which placed particular personalities with strongly held views in positions of influence.

Neither of these legislative responses was inevitable: conceivably the 1844 legislative approach could have remained with the result that only larger enterprises could utilise the company form. Had this approach endured, company law today may possibly have been more investor-protection focused and a stronger path dependency of disclosure could have been established. At various points, alternative paths presented themselves and historical choices were made. For example, the 1867 Select Committee on the Operation of the Limited Liability Act heard strong criticism of the companies legislation and especially limited liability from a number of those who appeared before it to argue for the reintroduction of the 1844 disclosure requirements and the removal of limited liability. The Committee declined to make such recommendations on the grounds that such changes may have discouraged initiative in business.[163] Instead, the 1856 Act, based on laissez-faire principles and adopting a minimalist regulatory approach, became entrenched and continues to this day as the basis of modern company law.[164]

Fourthly, the introduction of limited-liability legislation in 1855 and 1856 did not have the immediate effect of encouraging joint stock enterprise in the way a functionalist perspective would suggest. In fact, as discussed in Part II, the introduction of the legislation in England had a relatively minor impact for some decades, although, as discussed in Part III, the introduction of limited liability in the Australian colonies preceded its introduction in England and the form was immediately utilised by the gold mining industry. Legal and economic changes often do not occur in the same way in different socio-economic environments or in precise harmony or synchronisation because they influence each other over a long period of time in complex and sometimes unexpected ways. Joint stock companies were not a feature of most industries where family businesses continued to predominate both in Britain and the Australian colonies. In Britain this may have been caused by cultural factors relating to the importance of family-owned businesses and in the Australian colonies by the immature nature of the local economies. Joint stock enterprise was important in certain sectors such as infrastructure, banking

163 McQueen, *A Social History of Company Law* (n 16) 166, 271. Cottrell describes this period of the 1860s and 1870s as a lost opportunity as the legislation was still quite new and the vested interest groups and commercial practice developed around it had not yet become entrenched: Cottrell (n 59) 61–2. See also McQueen, *A Social History of Company Law* (n 16) 174.

164 McQueen argues that this has created an 'asocial' framework of corporate regulation which places a higher priority on shareholder interests than long-term community interests: McQueen, *A Social History of Company Law* (n 16) 174–5. Ireland similarly argued that limited liability and the concept of separate corporate personality are 'political construct[s]' that 'institutionalise[] [corporate] irresponsibility': Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (n 16) 838.

and finance, and gold mining in Australia, but did not become widely used in a broad range of industries until the 1880s in England and some time later in Australia. The widespread use of the private company form and corporate group arrangements did not occur until the end of the 19th and early 20th century.

Fifthly, even though there was an upsurge in company registrations after 1880, most of these companies were private companies so registrations did not take advantage of those attributes of incorporation that facilitate the formation of listed public companies. The vast majority of these companies did not have freely traded shares or outside shareholders. In most cases private companies were formed to take advantage of limited liability as a protective device in the event of business failure while continuing to operate as quasi-partnerships or family businesses.[165] The notion that the introduction of limited liability was part of an inevitable functionalist process leading to the efficient corporate capitalist system we have today is therefore highly questionable. In fact, limited liability has been adopted to a large extent for purposes quite different to those contemplated at the time it was introduced.

VI Conclusion

By examining the historical contingencies behind the introduction of limited liability in England and the Australian colonies in the 1850s, we can see that it came about suddenly and unexpectedly and in England was strongly opposed by influential business groups. This indicates that it was far from an inevitable historical process. At various points before and after the introduction of limited liability, alternative paths presented themselves and significant choices were made. It has been claimed that the form of limited liability adopted in the mid-19th century created an 'asocial' framework of corporate regulation which placed a higher priority on shareholder interests than long-term

[165] Ireland has noted that in the first half of 1890, 1,328 companies were registered in London, and '[i]n 87 per cent of these companies the bulk of the shares were originally held by ten shareholders or less': Ireland, 'The Rise of the Limited Liability Company' (n 93) 247. This is still the situation that prevails today. In Australia, there are around 2.1 million registered companies: '8165.0: Counts of Australian Businesses, Including Entries and Exits, Jun 2012 to Jun 2016', *Australian Bureau of Statistics* (Web Page, 21 February 2017) <www.abs.gov.au/ausstats/abs@.nsf/mf/8165.0>, archived at <https://perma.cc/GB4X-NUPY>. Of these, around 2,200 are listed on the ASX: 'Corporate Overview', *ASX* (Web Page, 2017) <www.asx.com.au/about/corporate-overview.htm>, archived at <https://perma.cc/E9QM-4KMM>.

community interests[166] and that it has 'institutionalis[ed] corporate [social] irresponsibility'.[167] Evidence for these claims is provided by the controversies that have surrounded attempts by corporate groups to structure their inter-company boundaries to gain the protection of limited liability to the detriment of mass tort claimants and the use of phoenix companies to evade employee entitlements, taxation liabilities and consumer rights. Rather than an unquestioned, indispensable and inviolate attribute of the modern corporation, as suggested by law-and economics-perspectives, we should see limited liability as a commercial construct that serves useful purposes in facilitating the raising of pooled capital and the rise of the modern corporation while recognising that its unrestricted application may result in undesirable social and economic consequences that should be rectified.

This article contends that recognising the complexity of significant historical developments surrounding the introduction of limited liability is more likely to lead to a preparedness to adopt a critical approach in considering whether the limited-liability concept should be more restricted in its application to problematic areas such as tort liabilities in corporate groups and phoenix companies.[168] This is because a historicist perspective accepts that the law may develop in a sub-optimal or unpredictable way and so it implicitly recognises that the law should be changed when necessary in order to better meet changing economic and social concerns.

[166] McQueen, *A Social History of Company Law* (n 16) 175.

[167] Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (n 16) 838.

[168] The problems raised in these two areas are outlined in Part I.