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The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century

by Nicholas Parrillo*

ABSTRACT

The U.S. government has recently moved toward privatizing military services, most noticeably in Iraq, where profit-seeking contractors frequently engage in combat against insurgents. Many observers are shocked and disturbed by these developments, since they violate the governmental monopoly on military combat, which is probably the most accepted and intuitive aspect of the public-private distinction in America today. In fact, however, exclusive governmental control of combat is not an inherent nor even a particularly old part of the American experience. For much of U.S. history, one of the most important options in the nation's military repertoire

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was the use of privateers, that is, privately owned and operated ships, licensed to forcibly capture enemy merchant vessels and pocket the proceeds. Privateering constituted the principal U.S. offensive strategy in the maritime theater of the War of 1812 and was a major part of U.S. contingency planning through the Civil War. But sometime thereafter, the U.S. government ceased to consider the option. Thus far, no scholar has seriously investigated how and why the United States abandoned privateering. This Article fills the gap. It recreates the choice that the government faced, delineating how privateers differed from a public navy in terms of strategic capabilities, financing, technology, and the incentives and rules that operated on the persons who did the fighting, plus the institutions that enforced those rules. The Article concludes that privateering survived for so long—in spite of persistent humanitarian objections that accountability structures were not sturdy enough to control the violence that privateers inflicted—because the American people wished to avoid a large permanent military establishment, fearing that such an institution would be a menace to democracy. It was only in the 1890s, when the nation gave up its anti-militarist tradition and embarked on a program of imperial expansion overseas, that privateering proved functionally inadequate to the nation’s new ambitions and therefore vanished from the realm of possibility.

I. INTRODUCTION

In its occupation of Iraq, the U.S. government has hired private contractors to provide security for U.S. officials; to protect convoys from roadside attacks; to guard U.S. compounds, Iraqi oil fields, and other sensitive sites; to train the Iraqi army and police; and to interrogate detainees at Abu Ghraib prison. Several of these contractors have frequently engaged in combat against insurgents. In April 2004, for example, commandos employed by Blackwater Security Consulting—wielding machine guns and supported by their company’s own helicopters—repelled an attack on U.S. headquarters in Najaf by hundreds of Iraqi militiamen. In the name of the United States, private, profit-seeking enterprises are now fighting and killing on the battlefield and performing other tasks that can only be categorized as military. These developments have elicited shock and dismay from numerous scholars and commentators. The “service side of war,” declares P.W. Singer, was, until the last decade or so, “the one area where there [had] never been a question of states outsourcing or privatizing.


2. AVANT, supra note 1, at 239; Antenor Hallo de Wolf, Modern Condottieri in Iraq: Privatizing War from the Perspective of International and Human Rights Law, 13 IND. J. GLOBAL LEGAL STUD. 315, 333 (2006). Technically, U.S. contractors are not authorized to carry out offensive combat missions, but only to defend persons and property. AVANT, supra note 1, at 239 & n.78; de Wolf, supra, at 320 & n.12, 329-30, 333; see also Laura A. Dickinson, Public Law Values in a Privatized World, 31 YALE J. INT’L L. 383, 385, 391 (2006) [hereinafter Dickinson, Public Law Values].

Even the most radical libertarian thinkers, who tend to think that everything else should be left to the market, made an exception of the military.” The privatization of combat in war breaks down “what have long been seen as the traditional responsibilities of government.”

Indeed, the governmental monopoly on military combat is the most accepted and intuitive aspect of the public/private distinction in the United States today. Without it, it seems hard to understand how violence can be kept within humanitarian bounds, or how brute force can be kept accountable to law and to the democratic electorate. In fact, however, exclusive governmental control of combat is not an inherent nor even a particularly old part of the American experience. For much of U.S. history, one of the most important options in the U.S. military repertoire was the use of privateers, that is, privately owned and operated ships, licensed to cruise the oceans, forcibly capture enemy merchant vessels and cargo, and bring them back to port, where the captured property was auctioned and a share granted to the privateer’s owner, who divided it by contract with the crew. European countries and empires had licensed privateers since the Middle Ages, and the U.S. Constitution of 1787 preserved the practice by authorizing Congress to “grant letters of marque,” i.e., to license privateers. In the War of 1812, the principal U.S. offensive strategy at sea was to interfere with enemy commerce. To execute that strategy, the government relied upon several hundred privateers, compared with a mere twenty-two publicly owned naval cruisers; the private forces captured eight times as...
many enemy vessels as did the public ones. When the European powers 
banned privateering by treaty in 1856, the U.S. government refused to sign, declaring that privateering was crucial to its national security. In the Civil War, Lincoln’s cabinet planned to use privateers against Britain should that nation enter the war on the side of the South. At least through the early 1880s, American observers believed that privateering remained a live option. But sometime thereafter, the U.S. government simply ceased to consider it. Unlike European states, the United States did not formally or officially abandon privateering. Instead, the practice just dropped out of view, setting the stage for the baseline assumption—that the government should take exclusive control of combat—that informs today’s controversy.

Thus far, no scholar has seriously investigated the question of how and why the United States abandoned privateering. We have no specific account of how U.S. warfare went from partly private to exclusively public. This Article fills the gap.

To understand the de-privatization of American warfare, we need to appreciate the choices that successive generations of U.S. policymakers faced. What made privateers distinct from a public navy in terms of financial requirements? How did they differ in their technological needs and constraints? What differences existed in the incentives and rules that operated on the persons who did the fighting—and the institutions that enforced those rules? What were the changing political and strategic goals in light of which policymakers weighed the divergent capabilities and dangers of public and private forces?

The inquiry demands a combined discussion of the nation’s public and private endeavors and capacities in the field of maritime warfare—through the multiple lenses of law, economics, diplomacy, strategy, and politics—from the zenith of U.S. privateering in the War of 1812 through its ultimate disappearance from the nation’s military repertoire, which occurred (as argued below) around 1890. In pursuit of this aim, this Article inte-

7. 2 A.T. MAHAN, SEA POWER IN ITS RELATIONS TO THE WAR OF 1812, at 242 (1905). The exact number of privateers commissioned was 526, but this number is “somewhat misleading,” since some were focused primarily on transporting commercial goods and planned to attack enemy commerce only if a special opportunity arose. C.S. FORESTER, THE AGE OF FIGHTING SAIL: THE STORY OF THE NAVAL WAR OF 1812, at 87 (1956). For a rough estimate of what proportion were primarily focused on transporting commercial goods, as opposed to attacking enemy commerce full-time, see infra note 170. Note that 207 U.S. private armed ships actually took at least one prize in the course of the war. 2 MAHAN supra, at 242.

8. On the failure of the United States (to this day) to accede to the anti-privateering treaty of 1856, see JANICE E. THOMSON, MERCENARIES, PIRATES, AND SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE 177 n.24 (1994); on its failure to accede to a later, somewhat similar, agreement, see CALVIN DEARMOND DAVIS, THE UNITED STATES AND THE SECOND HAGUE PEACE CONFERENCE: AMERICAN DIPLOMACY AND INTERNATIONAL ORGANIZATION, 1899-1914, at 290-91, 299 (1975). Thomson’s book is an overview of the de-privatization of combat on both land and sea, but it focuses mainly on Europe, treating U.S. privateering only peripherally.
grates an assortment of secondary literatures that until now have been largely isolated from one another. These include studies of the U.S. naval officer corps and enlisted service that draw little or no comparison with privateers, studies of U.S. privateers that draw no comparison with the U.S. Navy; accounts of the European anti-privateering treaty of 1856 (the Declaration of Paris) that give no in-depth treatment of the U.S. experience before or afterward; naval and diplomatic histories of the Civil War with privateers; studies of U.S. privateers that draw no comparison with the U.S. Navy; formal histories of the U.S. Navy; accounts of the European anti-privateering treaty of 1856 (the Declaration of Paris) that give no in-depth treatment of the U.S. experience before or afterward; naval and diplomatic histories of the Civil

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9. The few studies which cross the boundaries that generally divide these various literatures are pointed out in the text and/or notes of this paragraph.

10. DONALD CHISHOLM, WAITING FOR DEAD MEN'S SHOES: ORIGINS AND DEVELOPMENT OF THE U.S. NAVY'S OFFICER PERSONNEL SYSTEM, 1793-1941 (2001); PETER KARSTEN, THE NAVAL ARISTOCRACY: THE GOLDEN AGE OF ANNAPOLIS AND THE EMERGENCE OF MODERN AMERICAN NAVALISM (1972); CHRISTOPHER MCKEE, A GENTLEMANLY AND HONORABLE PROFESSION: THE CREATION OF THE U.S. NAVAL OFFICER CORPS, 1794-1815 (1991); JAMES E. VALLE, ROCKS & SHOALS: NAVAL DISCIPLINE IN THE AGE OF FIGHTING SAIL (1980). See also FORESTER, supra note 7, at 85-88, 92-96, which, while focused mainly on naval exploits, includes some useful if brief comparisons with U.S. privateers, specifically the latter's tendency to chase targets of commercial (rather than strategic) value, to be lax in shipboard discipline, to raid commerce solo rather than in roving "wolf-pack" groups, and to insist on taking prizes into port rather than destroying them, even when destruction was more strategically efficient.

11. The most serious study of U.S. privateering is JEROME R. GARITEE, THE REPUBLIC'S PRIVATE NAVY: THE AMERICAN PRIVATEERING BUSINESS AS PRACTICED BY BALTIMORE DURING THE WAR OF 1812 (1977). For serious treatments of colonial North American privateering, see JAMES G. LYDON, PIRATES, PRIVATEERS, AND PROFITS (1970); and CARL E. SWANSON, PREDATORS AND PRIZES: AMERICAN PRIVATEERING AND IMPERIAL WARFARE, 1739-1748 (1991). Note that all three works discuss not only privateers at sea but also the way in which courts governed them. There are also several studies of U.S. privateering which, though not very analytical, contain useful information. GEORGE COGGESHALL, HISTORY OF THE AMERICAN PRIVATEERS, AND LETTERS-OF-MARQUE, DURING OUR WAR WITH ENGLAND IN THE YEARS 1812, '13 AND '14 (New York 1856); JOHN PHILIPS CRANWELL & WILLIAM BOWERS CRANE, MEN OF MARQUE: A HISTORY OF PRIVATE ARMED VESSELS OUT OF BALTIMORE DURING THE WAR OF 1812 (1940); EDGAR STANTON MACLAY, A HISTORY OF AMERICAN PRIVATEERS (photo. reprint 1968) (1899); REUBEN ELMORE STIVERS: PRIVATEERS & VOLUNTEERS: THE MEN AND WOMEN OF OUR RESERVE NAVAL FORCES: 1766 TO 1866 (1975). Though all the studies cited above in this note generally fail to compare privateers with the navy, an unusually integrative analysis of both its private and public forms can be found in ROBERT GREENHALGH ALBION & JENNIE BARNES POPE, SEA LANES IN WARTIME: THE AMERICAN EXPERIENCE, 1775-1942 (1942), which focuses mainly on the receiving end of such warfare (i.e., merchant shipping); the book does not try to explain why privateering disappeared. A recent major analytical work on British privateers is DAVID J. STARKEY, BRITISH PRIVATEERING ENTERPRISE IN THE EIGHTEENTH CENTURY (1990). Finally, Gary M. Anderson and Adam Gifford, Jr.'s, Privateering and the Private Production of Naval Power, 11 CATO JOURNAL 99 (1991), presents an integrated discussion of privateers, navies, and prize law throughout the Western world (with brief reference to the demise of privateering, id. at 117-19), though they treat the U.S. case only in an intermittent and fragmentary way. They recognize that privateers could perform only a subset of the tasks of which naval ships were capable, id. at 104-05, yet they fail to recognize the corollary, that a state relying mainly on privateers greatly restricted its own strategic capabilities; nor do they link privateering's strategic limitations to its abandonment by the United States. The authors recognize the existence of naval prize money, id. at 115-16, but they make little use of it in their analysis, other than to say that competition for prizes helped motivate naval officers to lobby against privateering and thereby contributed to privateering's demise, id. at 118-19—a conclusion undermined by the U.S. case, in which (as this Article demonstrates) the nation abandoned privateering at the same time that it abolished naval prize money. Anderson and Gifford's assertion that governments generally succeeded in regulating privateer abuses, id. at 112, fails to explain why neutral countries singled out privateering as especially deserving of abolition. Their contention that privateers were more efficient commerce raiders than public cruisers, id. at 116-17, is not supported by the U.S. case. See infra text accompanying note 81.

War that address the important role of combat-for-profit in that conflict without linking their insights to the long-term development of the practice, and studies that trace how imperialist aspirations and advancing technology altered U.S. naval strategy in the late 1800s but (with one brief exception) do not specify the implications of those changes for the public/private distinction. In addition, this Article makes extensive use of the secondary literature on how U.S. courts and their British predecessors governed wartime sea captures; these works somewhat integrate the discussion of naval ships and privateers, since they focus on a legal system that applied jointly to both forces. Because of this, however, these judge-focused studies tend to highlight similarities between the two forces while...
glossing over differences. Also, they say almost nothing about U.S. abandonment of privateering, since it was never legally formalized.15

These scattered secondary literatures, when integrated together, provide the groundwork for the story of de-privatization. But to construct a coherent narrative, I have found it necessary also to analyze directly several published primary sources, including judicial opinions, legal treatises, state papers, legislative debates, newspapers, and magazines. Some of these sources are familiar to scholars in this area but deserve fresh scrutiny in light of the particular questions and narrative frame employed here.16 Others are well-known in themselves but so far have not been used to analyze U.S. privateering policy.17 Still others have received little or no


16. For example, U.S. executive messages and correspondence on commerce raiding and privateering from the 1820s to the 1850s, cited infra notes 301-318, 354-372; U.S. congressional debates on privateering in the 1850s and during the Civil War, cited at various points infra notes 365-366, 379, 456-459; the diary of Welles, cited infra notes 454-455, 461; British state papers on Prussia’s privateer-like “volunteer navy” in 1870, cited infra note 496; and the writings of U.S. naval expert Alfred Thayer Mahan in the period c. 1890-1905, cited infra notes 545-553. I also make use of two commentaries on prize law by Joseph Story. The first is On the Practice in Prize Causes, which was printed in 1816 as part of the appendix to volume 1 of Wheaton’s Reports, familiarly known as 14 U.S. (1 Wheat.). The Appendix is paginated consecutively with the rest of volume, and Story’s commentary appears at pages 494-534. (This commentary is hereinafter cited as “Story, 1816 Commentary.”) The second is Additional Note on the Principles and Practice in Prize Causes, which was printed in 1817 as part of the Appendix to volume 2 of Wheaton’s Reports, familiarly known as 15 U.S. (2 Wheat.); the Appendix is not paginated consecutively with the rest of the volume, and Story’s commentary appears at Appendix pages 1-80. (This commentary is hereinafter cited as “Story, 1817 Commentary.”) Neither of the two commentaries is signed. On Story’s authorship of both, see PETRIE, supra note 15, at 204.

17. For example, commentaries by Wheaton (both 1815 and 1836), Kent, and Theodore D. Woolsey, and the Life and Letters of Joseph Story, cited at various points infra notes 325-333; the reports of the Secretary of the Navy and of the Department’s policy boards, cited at various points infra notes 460-554; and certain writings of U.S. naval expert Charles H. Stockton c. 1900, cited infra notes 550,
scholarly attention of any kind until now.\textsuperscript{18}

\textit{A. Summary of the Argument}

The Article begins, in Part II, with an explanation of the nineteenth century's two major maritime war strategies. The first was the \textit{guerre de course}, also known as "commerce raiding," in which cruisers (small, fast, lightly armed ships) scattered themselves along the oceanic trade routes. Each cruiser accosted whatever merchant vessels it could find and searched them. If the merchantman turned out to belong to an enemy national, the cruiser seized it. The same went for the cargo. The second strategy was the \textit{guerre d'escadre}, whose main tactic was the blockade, in which several cruisers clustered off an enemy port and seized any merchant vessels, enemy or neutral, that tried to get in or out. Blockade was more efficient than commerce raiding, since it took advantage of the bottleneck in enemy commerce. But it had an Achilles' heel: the cruisers had to stay at the port, making them sitting ducks if enemy capital ships (big, slow, heavily-armed ships) came to destroy them. To defend itself, a blockading force needed capital ships of its own.

For our purposes, the strategies differed in two key ways: (1) commerce raiders operated individually, but blockade required tight coordination; and (2) any fast merchant vessel could be easily converted into a cruiser, but capital ships had no commercial use and were very expensive. These factors meant that the \textit{guerre de course} could be carried out by the private sector, making it ideal for a weak state without a big public navy. But the \textit{guerre d'escadre} could be carried out only by a unified, state-controlled, and state-sponsored force, meaning it was suited to a strong state with a big public navy.

Although international law prohibited the seizure of neutral ships and cargo on the high seas, commerce raiders had to constantly investigate neutral merchantmen to see if they were really disguised enemy merchantmen or were carrying enemy cargo. In such situations, a commerce

\begin{itemize}
\item For example, the writings of John Gallison, cited at various points infra notes 304-309, 321-333; commentaries on the Declaration of Paris in the \textit{Yale Review} and \textit{New York Times}, cited infra notes 380-383; opinions of the British crown law officers on the Declaration of Paris and U.S. privateering in the 1870s-1890s, cited infra notes 460, 495-496; and writings concerning the continued viability of privateering in the \textit{New York Times}, infra note 464, by Theodore S. Woolsey, infra note 465, in \textit{United Service}, infra note 467, and by Clemenceau, infra note 505. In addition, most of my primary sources on U.S. naval prize money have received no scholarly attention. The few secondary treatments of the abolition of prize money, Arnold W. Knauth, \textit{Prize Law Reconsidered}, 46 COLUM. L. REV. 69, 70-74 (1946); and Harold D. Langley, \textit{Windfalls of War}, NAVAL HISTORY, May-June 1998, at 27, offer only brief conjecture as to the reason for abolition, Knauth, supra, at 70-74; Langley, supra, at 30-31. The explanation that I offer, infra Section V.A and Part VII, differs completely from theirs. Of the primary sources on which I rely (which include cases, congressional debates and documents, and media discussions), see especially infra notes 395-399, 401-419, 555-575, many do not appear in Knauth or Langley's accounts.
\end{itemize}
raider—armed, acquisitive, and unsupervised—might rob, threaten, or otherwise harass people and property that the raider's government did not intend to target. Private commerce raiders were especially notorious for such abuses. Still, for an administratively weak state with a small navy (like the early United States), privateering was too useful to renounce.

It must be emphasized, however, that it was not the profit motive per se that gave private commerce raiders their reputation for abuse. To be sure, private commerce raiders were entitled to a share of the ships and cargo they legitimately seized. But public naval ships also could, and did, engage in commerce raiding, and their personnel, like the owners of a privateer, were entitled to a share of the seizures, known as prize money.\(^9\) (They also enjoyed a share of any vessel or cargo they caught trying to run a blockade.) Despite this common profit motive transcending the public/private divide, people in the nineteenth century often found privatized commerce raiding to be more abusive than its public version. To explain why, Part III systematically compares the accountability structures imposed on public and private commerce raiders—something that no previous scholar has attempted. It does so mainly through a case study of the War of 1812, in which the U.S. government both licensed privateers to raid commerce and employed public naval ships to do the same thing. Though public naval ships profited from seizures, their personnel also faced competing incentives—related to rank, promotion, discipline, and honor—that reduced their tendency to cause collateral damage. The structure of accountability for privateers was weaker, consisting mainly of civil remedies in the admiralty courts of the captor's home country. Particularly in the British colonies of the eighteenth century, the poor institutional design of these courts made it hard for victims to get justice. In the War of 1812, the process was administered far more rationally by the U.S. federal courts, which were better-designed than their British forebears. Nevertheless, the evidence that stronger judicial regulation stemmed abuse is at best equivocal. The thick internal constraints of military units—rank, promotion, discipline, and honor—seem to have been more certain guarantors against abuse than was civilian judicial supervision.\(^20\)

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9. That the profit motive during this era played a role both in the private sector and in the public navy must be kept constantly in mind, since today we take for granted that the absence of the profit motive is a defining feature of public military force (and, indeed, of government more generally). This assumption is evident in the literature on present-day military privatization. E.g., Dickinson, Government for Hire, supra note 5, at 212-14; Clifford J. Rosky, Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States, 36 CONN. L. REV. 879, 939-43 (2004); Vernon, supra note 5, at 394.

20. Scholars of present-day military privatization have similarly noted the strength of internal accountability structures within the public U.S. military, which private firms cannot match. See Dickinson, Government for Hire, supra note 5, at 208-14; Michaels, supra note 1, at 1084-98. On the importance of this sort of "internal" or "managerial" accountability in American administrative agencies more generally, see Jerry L. Mashaw, Recovering American Administrative Law: Federalist Foundations, 1787-1801, 115 YALE L.J. 1256, 1261-65 (2006).
In the decades after the war, as will be explained in Part IV, Americans engaged in a political and moral debate over privateering. The United States' traditional position as a neutral power—combined with the rise of liberalism, market utilitarianism, and religious humanitarianism—caused U.S. officials in the 1820s to advocate the abolition of all commerce raiding, whether carried out by privateers or naval ships. As early as the 1820s, some American humanitarians singled out private commerce raiding as particularly abusive and deserving of abolition. Yet the United States refused to sign the Declaration of Paris of 1856, in which the nations of Europe banned privateering but still allowed commerce raiding when conducted by a public navy. If Europe could still use its public navies to attack American commerce, then the United States needed weapons of its own, and privateers seemed indispensable, unless the nation were to replace them with a large navy. But that was dangerous, for, according to the Jeffersonian ideology that dominated U.S. policy in this area for most of the nineteenth century, a democratic republic was a very delicate plant: if infected with militarism, it might die. A large military establishment entailed numerous dangers to civic life: a quasi-aristocratic officer class; an aggrandized federal government and executive branch; high taxes and high public debt, which benefited financial elites at the expense of the virtuous agrarian masses; and—especially in the case of a big navy—entanglement in the balance of power between the European global empires, subjecting the United States to foreign manipulation and tempting it to become an imperial oppressor itself. Fearful of such outcomes and clinging to the anti-militarist alternative, some Americans simply denied the injuries that privateering inflicted on innocent people and property, while others acknowledged the humanitarian costs but found them justified by the need to preserve Jeffersonian innocence. No previous scholar has seriously examined the trade-off between humanitarian and democratic values presented by U.S. privateering and its abandonment.

Though the U.S. government traditionally relied on the weak-navy strategy of the guerre de course, the tables were suddenly turned in the Civil War (the subject of Part V), when the Union faced, in the Confederacy, a naval power even weaker than itself, one whose ports might be vulnerable to blockade. As noted above, privateers were useless for blockade duty, so the Union rapidly expanded its public navy to strangle the South, though after the war it immediately sold off its new fleet, reverting to the Jeffersonian guerre de course. Significantly, the war revealed new problems with naval prize money, whose individualized incentives—though suited to the solo commerce-raiding missions of the War of 1812—undermined the coordination necessary to blockade duty. Finally, the war confirmed that privateering remained an important option for the U.S. government against a stronger naval power. When Britain indirectly aided the Confederacy, the Union responded with an indirect threat of its own,
one that deliberately exploited the abusive tendencies of privateering: if Britain did not conform to Union wishes, the U.S. government would authorize privateers to prey on Confederate commerce, which was largely carried in British merchant ships, thus subjecting the whole British merchant marine to harassment. Plus, the Union planned to use privateers in the event of an actual war against Britain.

Part VI explains how privateering finally ceased to be taken seriously as a U.S. option—a question never specifically addressed at any length in the literature. By the 1880s, the practice seemed somewhat less effective, due to changes in technology, foreign pressure, and the decline of U.S. merchant shipping. But the nation might well have continued to rely on the practice had it been willing to accept the status of a second- or third-rate naval power in order to maintain its Jeffersonian tradition. Starting around 1890, however, the United States made a political choice to abandon Jeffersonian foreign policy and enter the arena of global imperial competition. To do so, it replaced its traditional guerre de course with the guerre d’escadre, which, as noted above, required governmental provision, in the form of the first big peacetime military budgets. Around the same time, as detailed in Part VII, Congress abolished naval prize money. There is no adequate scholarly treatment of this abolition measure, but I suggest it likely arose from the clash between (1) naval prize money’s individualized incentives and (2) the coordination needed to prosecute blockades and to fight the fleet-on-fleet battles necessary to maintain them. Overall, it seems, the nation’s new imperial ambitions and consequent strategic imperatives not only banished privateering from the realm of possibility, but also transformed the Navy itself into a “not-for-profit” organization.

B. Implications

This historical narrative illuminates the present debate over U.S. military privatization in several ways. Perhaps the most basic point is that each privateer vessel—though engaged in combat in the name of the United States—acted as an autonomous unit, in relative isolation, and was not expected to coordinate with its fellow privateers or with the public military. This aspect of privateering contrasts with present-day U.S. military privatization in such a way as to point up the unique dangers and opportunities of today’s situation. Many U.S. contractors now operate in the same areas or neighborhoods as the public military and even take part in coordinated operations with public forces, sometimes in the combat zone. Such joint operations require all participants to adapt quickly as the commander adjusts the game plan to meet evolving conditions. This can cause problems, since the contract between the government and the firm is often

21. See text supra note 18.
too rigid for this kind of midstream adjustment (in contrast to more adaptable arrangements like direct public employment or the chain of command). The parties might of course draft their contracts in very general terms, providing that contractor personnel shall do whatever the government says, but then they effectively become like public employees, and it is hard to see why the function has been privatized at all, especially if the contractor understandably demands reimbursement for the cost of obeying unpredictable directives.22 When our forebears required coordination in maritime combat (e.g., in a blockade), they tended simply to bring the participants in-house. At the same time, the physical proximity of today's contractors to the public military presents an opportunity: it places the military in a good position to monitor and regulate the contractors, if empowered to do so. This may be what Congress had in mind when it very recently subjected at least some contractors in Iraq to the jurisdiction of courts-martial.23 But then again (and especially if the recent legislation is construed to require contractors to obey military orders), tighter regulation may offset the supposed benefits of privatization, such as the ability to specify and price services in advance so as to control costs. This once again raises the question of why the function has been privatized in the first place.

Another issue is democracy. Critics today warn that it can be subverted if war is privatized: the mobilization of private forces does not require the same level of congressional review and public debate as the commitment of public forces would,24 private military firms may influence governmental decisions about military and foreign policy,25 and privatization generally undermines the conception of security as a collective good to which all citizens possess an equal right.26

In the nineteenth century, however, it was just the opposite: following Jeffersonian ideology, Americans dreaded the advent of a large permanent governmental military as a threat to democracy, and they considered the small merchant firms and commercial seamen who engaged in privateering to be less dangerous to the republic than a large navy, since the privateers inflicted violence in a totally decentralized way, were strategically
incapable of acquiring or defending a European-style global empire, had no permanent stake in war, and could melt back into civil society when their services were no longer needed.\(^{27}\) For many Americans, it seems, the clause of the Constitution authorizing "letters of marque" had a purpose not unlike that of the Second Amendment, which guaranteed citizens the right to "bear arms" in a "militia" composed of laypersons organized in local communities, as opposed to professional warriors identified with the central state.\(^{28}\)

Thus, whether democracy is best protected through public or private provision—even in the extreme case of military combat—depends upon, and changes with, historically contingent institutional circumstances.\(^{29}\) What potentially renders today's military contractors threatening to democracy is not their private status \emph{per se}, but rather the particulars of the institutional situation. In contrast to the merchants and seamen who temporarily converted their ships into privateers during wartime, today's firms specialize in combat-related services and view such services as their primary means of profit over the long run,\(^{30}\) are sometimes owned by large corporations wielding concentrated political influence,\(^{31}\) and are intertwined in complex and opaque ways with the vast U.S. military establishment,\(^{32}\) rather than serving as a categorical alternative to that establishment.

That nineteenth-century Americans often viewed privatized warfare as the healthiest option for a democratic republic posed a dilemma for humanitarian liberals concerned about the control of violence against private
rights. These humanitarians were forced to choose between a more controlled but less democratic public mode of warfare and a less controlled but more democratic private one. Significantly, those who opted for greater control in the interest of humanitarianism failed to persuade the electorate. Humanitarian pleas to end privateering for the sake of protecting innocent people and property fell on deaf ears from the 1820s onward. When privateering was finally excluded from the realm of possibility in the 1890s, it was not because the people’s representatives decided that the humanitarian benefits of controlling violence outweighed the costs of relinquishing the Jeffersonian vision. It was, rather, because the people’s representatives decided to reject the Jeffersonian tradition out of hand and to adopt a new imperialist program whose strategic imperatives incidentally entailed the control of violence. The de-privatization of American warfare was not the handiwork of liberal humanitarians, but of the emerging national security establishment. The present tendency toward privatization thus poses a distinct and especially daunting challenge for its humanitarian critics, since the trend enjoys substantial support from today’s national security establishment.

Finally, critics of combat privatization today warn that it weakens the legitimacy of the military by undermining the popular belief that military professionals use their lethal expertise solely in disinterested service to the state.33 In one sense, the story of this Article confirms this view. The advent of a bigger, more professional, and more centralized navy in the 1890s coincided with the abolition of naval prize money, which terminated naval officers’ for-profit status. The end of naval profit-seeking may have caused the new Navy to seem more disinterested and therefore easier for Americans to accept. But at the same time, it must be noted that, prior to 1890, Americans often viewed their (safely small) navy as more honorable and less abusive than privateers, even though naval officers and seamen received shares of captured ships comparable to those enjoyed by their private counterparts. Public understanding of the Navy’s distinctiveness depended not upon the absence of the profit motive, but on the tempering of the profit motive via competing incentive structures (rank, promotion, discipline, honor, etc.). The forging of a disinterested, public-spirited, and legitimate government can depend as much on giving service providers positive incentives besides the profit motive as on taking away the profit motive.

II. STATE MILITARY OBJECTIVES AND THE POSSIBILITY FOR PRIVATE PROVISION

This Part describes the maritime combat services sought by the U.S.

33. Singer, supra note 4, at 204-05; Michaels, supra note 1, at 1084-91.
government and the relative capability of the private and public sectors to provide them—subjects on which historians of naval strategy and privateering normally assume knowledge. Here I provide an accessible introduction for the uninitiated reader primarily concerned about the sovereign’s interest in optimal institutional design.

A. An Overview of Naval Strategy, Late 1700s to Early 1900s

The primary objective of war at sea, typically, was to reduce the maritime imports and exports of the enemy nation, thereby forcing it to surrender. The exact mechanism by which the reduction of commerce was thought to cause surrender varied depending on the context. For example, one nation might have so little domestic industry that it needed finished products from abroad to keep up the fight. This was true of the colonies during the American Revolution and of the Confederacy during the Civil War. Alternatively, a nation might have a politically powerful merchant class that could be expected to pressure its government to sue for peace if the economy became sufficiently depressed. This was true of Britain in the Napoleonic Wars and the War of 1812, and of the Union during the Civil War. Another possibility was that a nation might become so industrialized that it came to depend on imports for food. Britain matched this description by the late nineteenth century. The final possibility was that, once a nation became industrially advanced, it depended on raw materials from abroad—such as oil, which did not occur naturally in Europe—to sustain the war effort. This was true of every major European power in World War I.

To reduce the commerce of its enemy, a nation had several types of ship at its disposal. For our purposes, only two broad types need be described. The first was the capital ship, known during the age of sail as the “ship of the line” and during the age of steam as the battleship. This was the largest warship, with the heaviest artillery. It was originally made of wood and then, starting in the mid-nineteenth century, of iron or steel, with heavy armor. Whether wood or metal, sail or steam, its size and guns always rendered it relatively slow—slower than a typical merchant vessel. The second type was the cruiser. It was smaller than the capital ship, with lighter artillery. It was originally wood and later steel, sometimes with armor. In both its sail and steam versions, the cruiser was faster than a

34. See ALBION & POPE, supra note 11, at 110, 149, 203.
35. Id. at 26.
37. ALBION & POPE, supra note 11, at 32-33, 203-04. It should also be noted that, during the age of mercantilism, stealing property could be a war aim in itself. See, e.g., SWANSON, supra note 11, at 20.
38. ALBION & POPE, supra note 11, at 21-22, 186-87.
capital ship and capable of giving chase to a merchant vessel. If a capital ship and a cruiser went head-to-head, the former could pulverize the latter, but that would not happen, since the cruiser could use its speed to run away.

How did a government use these ships to interfere with enemy commerce? There were several ways. First, consider that ports were limited in number and that the routes between them (known as the sea lanes) were firmly established by shortness of distance and wind patterns. In light of that, it was easy to predict where an enemy’s merchant vessels—or neutral vessels carrying enemy property—were located. A common method, therefore, was to scatter a bunch of cruisers far and wide over the sea lanes, allowing each one to search for, chase, and capture (or destroy) merchant vessels individually. Cruisers could also lurk along the coast in areas where merchant vessels were likely to pass by. Either way, the name of this approach was “commerce raiding.” Alternatively, or simultaneously, a cruiser could fulfill a commerce-defending role by patrolling the sea lanes in search of the enemy’s cruisers, chasing and capturing (or destroying) them whenever the opportunity arose. When assigned to these tasks, it was not unusual for two cruisers to encounter one another on the sea lanes and fight one-on-one. This was known as a sea duel. Besides patrolling, another way for a nation to counteract commerce raiding was to require its own merchant ships to travel in a convoy defended by warships. But this was costly for merchants, since it required them to wait in port for the convoy to assemble and then to travel at the speed of the slowest vessel in the group.

Another way to interfere with commerce was to assemble a cluster of cruisers off an enemy port and order them to chase and capture any merchant vessel that tried to get in or out. This was a blockade. It was more efficient than commerce raiding in that it took advantage of the narrowest bottleneck in enemy shipping. The disadvantage was that enemy capital ships could mass together (typically with their own cruisers to help them), advance on the port, and give the blockading cruisers a choice between being destroyed or running away. Either way, the blockade would be broken. Hence, if the blockading force were to remain in place, it would not only require cruisers fast enough to chase the merchant ships, but also

39. Id. at 22, 187.
40. Id. at 26.
41. A.T. MAHAN, FROM SAIL TO STEAM: RECOLLECTIONS OF NAVAL LIFE 270-71 (1907).
42. See, e.g., MACLAY, supra note 11, at 504.
43. ALBION & POPE, supra note 11, at 22.
44. For examples, see id. at 81-82; and SEA POWER: A NAVAL HISTORY 100 (E.B. Potter ed., 2d ed. 1981) [hereinafter SEA POWER].
45. ALBION & POPE, supra note 11, at 26, 198.
capital ships of its own, sufficient in number to counter an enemy fleet.\textsuperscript{46}

A similar need for capital ships characterized other operations not directly related to commerce reduction. If ships were to bombard a coastal city with artillery or unload men for coastal raids, the ships could be forced to disperse if enemy capital ships massed against them, meaning that a protective force of capital ships would, again, be necessary.\textsuperscript{47} In the case of an amphibious invasion, the transports used to move troops were likewise vulnerable to capital ships, so they, too, required their own fleet, led by capital ships, to secure their passage.\textsuperscript{48}

Hence, a fleet centered on capital ships, once assembled, had many uses. Therefore, it was not unusual for each warring nation preemptively to concentrate its own fleet so as to prevent the opposing fleet from concentrating,\textsuperscript{49} or, failing that, to attempt to destroy the enemy fleet once it had concentrated. This led to climactic fleet battles like Trafalgar in 1805, when Admiral Horatio Nelson sank or captured more than half of Napoleon's forces.\textsuperscript{50} When one nation destroyed its enemy's fleet, or when it possessed a fleet so powerful that its enemy dared not engage in fleet-related operations like blockade or amphibious invasion, the nation was said to have achieved "command of the sea."\textsuperscript{51}

The various methods outlined above could be employed in any number of combinations. When a nation relied primarily on commerce raiding, it was said to follow a strategy known as the \textit{guerre de course}, literally a "war of chase." When a nation sought mainly to obtain command of the sea, it was said to follow the \textit{guerre d'escadre}, literally a "fleet war." The former required only cruisers, whereas the latter required both cruisers and an expensive fleet of capital ships. For most of modern history, the \textit{guerre d'escadre} was the favorite strategy of Britain. This was because Britain, as an island, invested heavily in its maritime industries and naval forces. What is more, its unmatched financial system allowed it to make the huge state expenditures necessary for the Royal Navy.\textsuperscript{52} (It should be noted, however, that Britain also frequently employed commerce raiding as a supplementary mode of attack.) France was unlike its traditional adversary Britain in that it never possessed the foremost financial system and was obliged to expend resources on the defense of its long borders. Most of the time, then, it primarily followed the \textit{guerre de course}, though in the

\textsuperscript{46} Id. at 21-22, 118; SPROUT \& SPROUT, supra note 14, at 84-85, 204.

\textsuperscript{47} This can be inferred from the events and policies described in DAVIS, supra note 14, at 98; SPROUT \& SPROUT, supra note 14, at 83.

\textsuperscript{48} ALBION \& POPE, supra note 11, at 86; SEA POWER, supra note 44, at 75.

\textsuperscript{49} E.g., ALBION \& POPE, supra note 11, at 86.

\textsuperscript{50} PAUL M. KENNEDY, THE RISE AND FALL OF BRITISH NAVAL MASTERY 124, 126 (1976).

\textsuperscript{51} The classic example of this phenomenon is Britain's performance in the Napoleonic Wars, id at 124; SEA POWER, supra note 44, at 80-81.

mid-nineteenth century it invested more in naval power and moved toward the *guerre d'escadre.* The United States, possessing the weakest central state and military establishment of the North Atlantic powers, was almost exclusively dedicated to the *guerre de course* from its independence until about 1890. This was the strategy that it planned to employ in any war with a major European maritime power. It was used against Britain in the Revolutionary War and the War of 1812. The one exception to this rule was the Civil War. In that conflict, the U.S. government faced, in the Confederacy, a foe even weaker in naval power than itself, so it relied on one major feature of the *guerre d'escadre*—blockade—to strangle Confederate commerce.

**B. Commerce Raiding: Its Methods, Effects, and Potential for Abuse**

Let us now focus more specifically on commerce raiding and, in particular, on the exact manner in which a cruiser went about capturing enemy ships and cargo. In the typical scenario, the cruiser came upon what appeared to be an enemy merchant vessel. It fired a warning shot. More often than not, the merchantman responded with immediate surrender. If instead it tried to run or fight, the cruiser countered with artillery and moved alongside the merchantman so that its crew could attack with sniper fire and force their way onto the ship with pistols and swords. Once the merchantman was subdued, it was known as a prize. Its crew was locked away below deck or confined by some other means and replaced with some members of the cruiser’s crew (known as the prize crew), who then sailed the prize to a friendly port. There, a prize court made a factual determination as to who owned the ship and cargo. Any property—whether ship or cargo—found to belong to the nationals of an enemy country was condemned. Any property—whether ship or cargo—found to belong to the nationals of a neutral country was returned to the owners or their agents.\(^53\) Also, it should be noted, not every prize was taken to port. If the cruiser could not spare the men for a prize crew, or if the prize was too small to be worth the effort, or if there was no accessible port nearby, the cruiser captain had the right to destroy the prize then and there, seizing whatever cargo he could. He was obligated to save the

\(^{53}\) Albion & Pope, supra note 11, at 28-30; Cranwell & Crane, supra note 11, at 20-21; Garitee, supra note 11, at 148. The legal concept of an owner’s *nationality* was distinct from citizenship and was determined in part by the identity of the nation to whose economy the owner primarily contributed. See Bourguignon, Scott, supra note 15, at 115-71. Note that property would also be condemned if it were under contract to become enemy property on arrival at an enemy destination. Story, 1817 Commentary, supra note 16, at 32. Whereas British and U.S. courts understood international law to authorize condemnation of enemy goods on neutral ships but not of neutral goods on enemy ships, French courts understood it to authorize the converse: condemnation of neutral goods on enemy ships but not of enemy goods on neutral ships. Malkin, supra note 12, at 20; Hamilton, supra note 12, at 167-70.
crew, taking them on board his own vessel. 54

Alternatively, the cruiser might come upon what appeared to be a neutral merchant vessel. Such a ship was obligated under international law to submit to inspection by any passing warship. 55 (If the neutral tried to run or fight, it was presumed to be lawful prize and could be subdued just like an enemy. 56) An officer of the cruiser boarded the merchantman to examine the papers indicating the ship's ownership, the ownership of its cargo, its destination, and so forth. If the officer had "probable cause" to believe the ship in fact belonged to nationals of an enemy country, or that some of its cargo belonged to such nationals, or that the vessel itself intended to enter a blockaded port, 57 or that some of its cargo was contraband (for example, munitions) headed for an enemy port, 58 then, following the familiar ritual, the crew was confined and replaced by a prize crew, who sailed the prize to a friendly port. As usual, the prize court condemned whatever property belonged to enemy nationals, whether the ship itself or all or part of the cargo. 59 If it was proven that the ship intended to run a blockade, the ship and all its cargo were condemned. 60

The foregoing description paints commerce raiding in its ideal form, as the authorizing nation intended it to be. In this ideal form, commerce raiding did serious injury to the owners and crews of enemy merchant vessels and to anybody who bought or sold enemy property transported on them. That was the point. But, even in its ideal form, commerce raiding had the unavoidable side effect of injuring the owners and crews of neutral merchant vessels that carried enemy property, since it took away their business. Because neutral ships were not marked for condemnation and destruction in wartime, war had the potential to give them a big competitive advantage, 61 but this side effect of commerce raiding threatened to take it away. What is more, the practice unavoidably injured anybody who bought or sold neutral property that happened to be carried on board enemy merchant ships, since the cargo might be diverted and delayed. Even if all was ideal, the economic harm of commerce raiding went far beyond its intended targets.

Plus, all was not ideal. When under inspection, a merchant captain had every incentive to convince the cruiser captain that his ship and cargo be-

54. See, e.g., ALBION & POPE, supra note 11, at 28-29; GARITEE, supra note 11, at 168; PETRIE, supra note 15, at 44-45.
55. PETRIE, supra 15, at 148.
56. BOURGIGNON, SCOTT, supra note 15, at 175.
58. BOURGIGNON, SCOTT, supra note 15, at 186-201.
59. ALBION & POPE, supra note 11, at 29-30; PETRIE, supra note 15, at 148-51. The French courts had a different rule for enemy cargo on neutral ships. See supra note 53.
60. PETRIE, supra note 15, at 107.
61. ALBION & POPE, supra note 11, at 16, 65.
longed to nationals of a neutral or ally rather than an enemy. Since businessmen could buy ships from foreigners, hire foreigners to operate those ships, or hire foreign ships to carry their goods, one could not necessarily tell the nationality of the owner of a vessel or its cargo from the ship’s design or from the nationality of the officers and crew. Rather, ownership was supposed to be determined by the papers appertaining to the ship and cargo. But these were easily and often faked. Because the cruiser captain knew that the merchant captain might try to deceive him, he might react with suspicion even when hearing the truth, or seize upon anything out of the ordinary as “probable cause” to bring the captive into port. Worst of all, a commerce raider, if not held accountable, had the practical power to commit all sorts of extra-legal abuse. Among the most familiar forms: disposing of the ship or cargo without condemnation, which was particularly egregious if it was not legally subject to capture in the first place; taking the personal property of the crew and passengers (which was never subject to condemnation); mistreating the crew and passengers, as by putting them in chains even when they did not resist (harsh treatment being a way to coerce the revelation of evidence to support condemnation); taking the prize to a port inconvenient for its crew and owners without justification; other forms of unnecessary delay in getting the prize adjudicated; and negligence in handling the prize. Of all the elements of naval strategy, commerce raiding may have been most liable to collateral damage.

C. Commerce Raiding: How It Was Provided

As discussed above, naval strategy assigned numerous possible functions to the cruiser: commerce raiding, patrols, sea duels, blockade duty, and fleet support. For some of these functions—especially patrols and sea
duels—it was advantageous for the cruiser to be built to carry heavy armament relative to other ships of its class. The celebrated U.S.S. Constitution, for example, was specially designed to carry unusual firepower for a cruiser. It was much to be feared in a sea duel. 71 However, if a cruiser was focused solely on the function of commerce raiding, it did not need such heavy armament. A pure commerce raider, after all, had no reason to get into a fight with a warship. If confronted by one, it could simply run away. 72 Pure commerce raiding required no more artillery than was necessary to overwhelm a typical merchant vessel, which was not much. While merchantmen might carry a few guns to protect themselves, a commerce raider could still consistently overwhelm them if equipped with firepower that was somewhat greater than theirs yet still a mere fraction of what the standard all-purpose cruiser possessed. 73 Aside from such modest artillery, the commerce raider needed only one other thing: speed. It had to be fast enough to catch a substantial number of merchant vessels. By definition, therefore, a comparatively fast merchant vessel could do the job. Such a vessel, mounted with some artillery, proved itself an effective commerce raider during the age of sail, 74 and, in the view of many observers, remained somewhat effective well into the age of steam. 75

Thus, commerce raiding met an important condition for private provision of a wartime combat service: it could be carried out using physical assets (merchant vessels) that had a peacetime commercial use and therefore had received healthy investment from the private sector in the years leading up to the war. 76 Indeed, war increased the risk of commerce and thereby made it less attractive, inclining merchants to look for alternative employment. 77

Commerce raiding was suited to private provision for other reasons, as

71. ALBION & POPE, supra note 11, at 112-13; PETRIE, supra note 15, at 84.
72. ALBION & POPE, supra note 11, at 22-24; GABRIEL CHARMES, NAVAL REFORM 62 (J.E. Gordon-Cumming trans., London, W.H. Allen & Co. 1887); CRANWELL & CRANE, supra note 11, at 30; GARITEE, supra note 11, at 120.
73. On armed merchant vessels, see for example, STARKEY, supra note 11, at 51-52. The Comet, one of the two most successful privateers out of Baltimore in the War of 1812, see GARITEE, supra note 11, at 271-74, carried twelve guns, id. at 120, whereas the typical heavy naval cruiser of the period carried twenty-eight to thirty-eight, and a super-cruiser like the Constitution had forty-four, ALBION & POPE, supra note 11, at 22.
74. GARITEE, supra note 11, at 111-17.
75. See infra text accompanying notes 471-484, 503-508.
76. See ALBION & POPE, supra note 11, at 22-24 (explaining that most privateers were converted merchant vessels); STARKEY, supra note 11, at 36 (same). This point is elaborated in Anderson & Gifford, supra note 11, at 114-15.
77. GARITEE, supra note 11, at 209. It should also be noted that a merchant ship could undertake to ship goods and capture enemy merchant vessels simultaneously. Such a ship was normally lighter-armed than one focused solely on commerce raiding and carried its guns as much for defensive purposes as offensive; its seamen were paid wages and so did not rely solely on captures; and it typically captured other ships only as an incident to defending itself from capture. See ALBION & POPE, supra note 11, at 24-25; CRANWELL & CRANE, supra note 11, at 21-22; STARKEY, supra note 11, at 48-52; see also supra note 7.
First, it was a strategy of diffusion, in which each ship performed independently. In other words, it did not require the kind of coordination or centralization—suited to state provision—that was necessary for blockade duty or fleet action. Accordingly, private ships hired to make war were expected solely to raid commerce. No government seriously asked them to maintain a blockade or guard a convoy. Second, commerce raiding produced condemned property that could be distributed directly to the merchant ships hired to do the service, providing them with profit to induce entry (not to mention a direct and individualized incentive to capture as much property as possible) and relieving the state of the need to construct a taxation-and-disbursement mechanism. At the same time, however, the need for profit inducement limited the services that the private sector would provide. It was far more profitable to overhaul lightly armed merchantmen than to fight fully armed cruisers. Engaging a warship—whether an enemy naval ship or an enemy privateer—entailed a much higher risk of loss than overhauling a merchantman. To save one's own skin, it might be prudent to aim at destroying the warship altogether, in which case there would be no property to take afterward. And even if capture was successful, the warship carried no cargo and had fewer potential buyers than a merchant ship. For these reasons, a government generally did not expect a private ship to carry out patrols, or engage the enemy navy in any other way. Commerce raiding represented the subset of maritime combat services that the private sector could provide.

This is not to say that effective commerce raiders could be provided only in the private sector. On the contrary, the average cruiser of the U.S. Navy in the War of 1812 captured ships at nearly three times the rate of the average private commerce raider. The likely reason is that the navy cruisers, because their mission was broader than commerce raiding, were heavily armed and in some cases designed with a carefully optimized combination of speed and gun-carrying capacity unnecessary to a merchant ship or a pure commerce raider. These features, whose main purpose was to strengthen the cruiser against a warship, incidentally guaranteed that it utterly outmatched any merchant ship. But while the individual naval cruiser was the superior commerce raider on average, na-
val cruisers in the aggregate were much inferior to their private counterparts, since the United States in the War of 1812 had only twenty-two naval cruisers at sea, in comparison to several hundred privateers. The advantage of the private provision of commerce raiding, then, was not unit-level efficiency, but rather the way it empowered a nation to begin fighting a naval war on short notice even when its government had a very small preexisting navy and financial apparatus.

III. STRUCTURES OF ACCOUNTABILITY FOR COMMERCE RAIDERS, PUBLIC AND PRIVATE, TO 1815

On the one hand, commerce raiding was a dangerous and delicate task, capable of injuring those whom the state did not mean to target, and liable to cause embarrassment with neutral nations. On the other, it was uniquely suited to privatization during a historical period in which the U.S. Navy was far too small to defend national interests. The consequences of this dilemma will be examined in this Part, mainly through a case study of the War of 1812—the only war in which the U.S. government, as framed by the Constitution of 1787, relied on a substantial private armed force to undertake offensive operations in its name. The War of 1812 is all the more interesting because the U.S. government simultaneously employed public naval ships (albeit few in number) in part to perform the same function as the privateers. Hence, the war allows for a direct and systematic comparison between the structures of accountability faced by public and private commerce raiders—something that no previous scholar has attempted. Finally, the war is instructive because it played a key role in the subsequent debate over privateering, since it was the most recent experience of privatized combat in the U.S. government’s institutional memory.

A. Accountability for Public Naval Ships

One might think that the biggest factor distinguishing public commerce raiders from private is that only the latter were motivated by profit maximization. That is not so. For hundreds of years, officers and seamen of

84. See supra note 7; infra note 170.
85. On the ability to launch a large maritime force in war without maintaining it in peace, see infra text accompanying notes 352-383. On the compatibility of privateering with undeveloped state finance, see Symcox, supra note 14, at 695.
86. During the Quasi-War with France (1798-1800), the U.S. government commissioned private ships to capture French vessels, but in contrast to the War of 1812, the commissions were limited to the capture of armed vessels. The purpose of these limited commissions was essentially to encourage U.S. merchantmen on trading voyages to engage in aggressive self-defense against French depredations, not to attack the French merchant marine. Thus, “the American privateer, armed for offensive action,” was “a negligible factor in the fighting of the Quasi-War.” See ALEXANDER DECONDE, THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797-1801, at 126-27 (1966).
the Royal Navy had been entitled to a share in the proceeds from any ship or cargo they captured. This tradition remained alive and well in the eighteenth century. The U.S. Continental Congress adopted it for the ships it owned during the Revolutionary War. When the new federal government began building a navy in the late 1790s, it continued the policy, decreeing that, when a navy ship captured a prize of equal or inferior force, the officers and seamen were to enjoy half the proceeds, and in the case of a vessel of superior force, all the proceeds. The men’s collective take was divided by statute into shares that increased greatly with rank, the largest (fifteen percent) going to the captain. For comparison, consider that the privateer always received all the proceeds of its prize, subject to a tax which, during the War of 1812, was initially forty percent and later twenty-seven percent. The after-tax amount was then divided by contract between the owners, officers, and seamen. Under the most common contractual arrangement, the owners got half of that amount, with the officers and crew receiving the rest.

To appreciate how the incentives of naval personnel and privateersmen compared with one another, imagine that a naval cruiser captured an inferior vessel of value $x$ and that a privateer captured an inferior vessel, also of value $x$. Before taxes, the naval personnel and the privateersmen would each be entitled to the same total reward, since, in the naval case, the government would take $x/2$, and, in the privateer case, the owners would take $x/2$. After taxes, however, the privateersmen would find their total reward further reduced by forty (or later twenty-seven) percent, whereas the naval personnel would suffer no tax bite at all. Now imagine, alternatively, that a naval cruiser captured a superior vessel of value $y$ and that a privateer captured a superior vessel, also of value $y$. In the naval case, the government would relinquish its share altogether, letting the naval personnel take $y$, whereas the privateersmen would still have to give up half to the owners, leaving them with $y/2$, on which they would then have to pay the usual tax. Overall, then, the personnel of a naval commerce raider (as a group) enjoyed very big advantages over their private counterparts, other things being equal. From the perspective of individuals, however, the naval ad-

87. BOURGUIGNON, SCOTT, supra note 15, at 9.
89. BOURGUIGNON, FIRST FEDERAL COURT, supra note 15, at 95.
91. STIVERS, supra note 11, at 116-17. On the tax cut, see An Act for reducing the duties payable on prize goods captured by the private armed vessels of the United States, ch. 49, 3 Stat. 75 (1813).
92. GARITEE, supra note 11, at 139-40, 191. This was also the default rule in court. PETRIE, supra note 15, at 5-6.
vantage could be offset by the fact that a naval cruiser averaged about 200 officers and seamen, whereas a privateer averaged only about 120 or (if it were primarily on a trading voyage) far less. The group that manned a privateer received a smaller chunk of the pie, but it also had fewer members among whom its chunk had to be divided. Even so, it is clear that naval personnel were eligible for profits from raiding that were very much in the same ballpark as those enjoyed by privateers.

Besides granting captors a share of the monetary proceeds of their work, the U.S. government also offered direct payments, out of the public treasury, for the accomplishment of certain tasks. By a statute of 1800, if a U.S. naval ship destroyed an armed enemy ship of equal or greater force, its crew received a bounty, calculated at twenty dollars for every person on board the enemy ship at the start of battle. Congress in 1812 extended this reward system to U.S. privateers, who could theoretically destroy superior armed vessels, though a naval ship was far more likely to do so. Congress also granted bounties to privateers for bringing in prisoners. All of these types of bounties tended to encourage each U.S. naval ship or privateer, upon subduing an enemy armed ship or merchantman, to sink its victim on the spot, rather than sail it into port. From the government’s perspective, this was good, since it avoided the depletion of U.S. crews to man captured ships and reduced the possibility that a prize might be recaptured by the enemy on its way to port.

Given their rights to prizes and bounties, naval personnel were potentially eligible for incentive awards that were (at least) roughly comparable to those of privateersmen. However, unlike their private counterparts, most of whom were paid nothing besides prize money, the employees of

93. See Albion & Pope, supra note 11, at 22 (on naval crews); infra note 170 (on privateer crews).
94. § 7, 2 Stat. at 53.
96. An Act allowing a bounty to the owners, officers, and crews of the private armed vessels of the United States, ch. 55, § 1, 3 Stat. 81, 81 (1813); An Act in addition to an act, entitled “An Act allowing a bounty to the owners, officers and crews of the private armed vessels of the United States,” ch. 27, § 1, 3 Stat. 105, 105–06 (1814). Congress also offered a bounty, in yet another statute, to “any person or persons” who destroyed enemy armed ships. An Act to encourage the destruction of the armed vessels of war of the enemy, ch. 47, 2 Stat. 816 (1813). However, this last statute decreed that the “armed or commissioned vessels of the United States” were ineligible for the award offered therein. The phrase “armed or commissioned vessels of the United States” covered not only U.S. naval ships but also U.S. privateers; this is evident from An Act declaring War between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories, ch. 102, 2 Stat. 755 (1812); and An Act concerning Letters of Marque, Prizes, and Prize Goods, 2 Stat. at 759-64. The apparent purpose of the “Act to encourage the destruction of the armed vessels of war of the enemy” was to incentivize citizens at large—without any commission (naval or privateer)—to destroy enemy armed ships. An interpretation along these lines (albeit without specific reference to privateers) can be found in Parlin v. United States, 2 Ct. Cl. 585, 585-86 (1864) (Loring, J, dissenting).
97. Stark, supra note 12, at 132; see also Forester, supra note 7, at 95-96.
the Navy were not exclusively dependent on such awards, for the officers received a salary and the seamen wages. 98 Let us focus in particular on the officers, whom, in light of the Navy's oppressively hierarchical structure, 99 one would expect to have the most control over how a naval ship treated other ships. While salary surely provided a cushion that kept an officer from getting desperate, prize money could significantly raise his income. The average wartime cruiser captured three prizes per year. 100 Multiplying the median of awards for captures ($2908) 101 by three, and then multiplying by the statutory percentages for independent cruising, 102 the captain would receive $1309 per year compared with a salary of $1008 to $1830, and the lieutenants (whose number varied, though there could be as few as one) would divide $872 compared with a salary of $660. 103 These were major increases, though not necessarily life-altering, since they lasted only during wartime. Some commanding officers truly hit the jackpot: adding up prizes and bounties for the whole war, at least eight won totals greater than five times their salary, sometimes much greater. 104 (The number of officers of command rank was small, ranging from about twenty-six to fifty over the course of the war. 105) The dream of big prizes,

98. ALBION & POPE, supra note 11, at 23 (privateersmen's lack of wages); McKEE, supra note 10, at 331-32 (naval officers); VALLE, supra note 10, at 15 (naval seamen). Those manning a privateer did receive wages if their ship was primarily on a trading voyage and was planning to make captures only if the opportunity arose. See supra note 77. On the proportion of total privateersmen falling into this subcategory, see infra note 170.

99. See generally McKEE, supra note 10, at 219-67; VALLE, supra note 10, passim.

100. 2 MAHAN, supra note 7, at 242 (stating that each cruiser took an average of 7.5 prizes). The war lasted 2.5 years. Mahan's figure is vessels "captured," as opposed to destroyed in exchange for bounty awards.

101. McKEE, supra note 10, at 493. This figure covers "Capture[s]" and presumably does not include bounty awards for ships destroyed; it is therefore comparable to Mahan's figure. Note that bounty awards might swell total naval incomes even further.

102. An Act for the better government of the Navy of the United States, ch. 33, § 6, 2 Stat. 45, 52-53 (1800). If the ship were not cruising independently but was instead part of a squadron, the squadron commander would receive one-third of the ship captain's share. Id. at 52. The mere fact that a ship was part of a "squadron" should not be taken to mean that its actions were much-coordinated with the other ships in the squadron, nor that it even saw the other ships very frequently. E.g., Decatur v. Chew, 7 F. Cas. 322, 322 (C.C.D. Mass. 1813) (No. 3721) (Story, J.) (noting that, when Captain Evans's ship was attached to a "squadron" under Commodore Decatur, Decatur simply directed Evans "to cruise between certain given latitudes and longitudes, and vest[ed] a large discretion in Captain Evans, as to deviations," and that, for the entirety of Evans's ensuing four-month cruise, Decatur's ship was not even at sea). In Forester's naval history of the war, the overwhelming majority of U.S. actions involve solo cruising. FORESTER, supra note 7, passim; see also MAHAN, supra note 41, at 270-71 (noting that ships within a "squadron" tended to be similarly isolated from each other in the era after the Civil War).

103. McKEE, supra note 10, at 490-91. The lower-bound salary for captain is actually that of a master commandant, who was normally a commanding officer. Id. at 29.

104. Id. at 346-47, 494 (prizes), 490-91 (salary). It is possible that these figures do not include bounty money, that is, the actual total earnings of these men might be even higher. Note also that, of the eight commanders, two (Macdonough and Chauncey) owed their entire awards to their position as squadron commanders, rather than commanders of individual ships, and that two more (Rodgers and Bainbridge) won large awards from both positions. Id. at 346-47, 494. On the meaning of "squadron" in this context, see supra note 102.

105. McKEE, supra note 10, at 473 (summing captains and masters commandant).
concludes one historian, was a “major motivator” in the Navy. That is apparent from the aggressive litigation in which officers engaged to secure their shares, in both the War of 1812 and later conflicts. Did all this mean that a naval officer was simply a profit-maximizer who happened to enjoy a cushion of fixed compensation? No, because there was another incentive scheme at work: rank and promotion. Not only did the Navy divide all its officers into the ranks of captain, master commandant (i.e., junior captain, commanding a small ship), lieutenant, and midshipman, but it also put the men within each rank in order from first to last. Each officer was constantly, oppressively aware of his unique spot in the sequence. And no wonder. An officer’s rank determined his salary, the size of his living quarters, the quality of his rations, not to mention his percentage of a prize. And these were only the material things. It also determined his power, prestige, and social standing. It would be carved on his gravestone. How, then, could an officer get himself promoted? In the early nineteenth century, the Secretaries of the Navy, against the strong preference of the officer corps for a seniority system, aggressively used merit as a factor in promotion decisions. Secretary William Jones, who held the post for most of the War of 1812, proved especially ruthless in his devotion to merit (though officers’ lobbying of Congress forced him to give somewhat more respect to seniority late in the conflict). The quintessence of “merit” was “highly noteworthy acts that promoted the national interest.” What got the attention of the Secretary was not a brave act per se, but one of significance to larger military objectives. This policy powerfully incentivized naval officers to divert their efforts away from the types of commerce raiding that targeted interests besides enemy commerce or were likely to embarrass the U.S. government. The Articles of War articulated this policy when they forbade

106. Id. at 341.
107. On the War of 1812, see, for example, Decatur, 7 F. Cas. 322. On the Civil War, see PETRIE, supra note 15, at 127. On the Spanish-American War, see Langley, supra note 18.
108. KARSTEN, supra note 10, at 63; MCKEE, supra note 10, at 29-30, 293-94.
109. KARSTEN, supra note 10, at 63-65; MCKEE, supra note 10, at 296 (describing archives “bulging” with letters begging for promotion); Park Benjamin, The Rewards of Naval Officers, 50 THE INDEPENDENT 528 (1898).
110. KARSTEN, supra note 10, at 63 (room and board); MCKEE, supra note 10, at 333 (servants), 335-36 (salary), 342 (share of prize).
111. MCKEE, supra note 10, at 271; KARSTEN, supra note 10, at 63-65.
112. KARSTEN, supra note 10, at 65.
113. MCKEE, supra note 10, at 275-78, 292-95, 297-302.
114. Id. at 294-95.
115. Id. at 297.
116. Id.
117. Cf. BAUGH, supra note 88, at 127-46, esp. 138-39 (stating that British leaders in the mid-1700s recognized that merit-based promotion would have blunted the perverse effects of prize money in the Royal Navy, but that the dominance of patronage and seniority during that period meant such a system could be realized only to a quite limited extent).
anybody in the Navy to “maltreat persons taken on board a prize” or to “take out of a prize . . . any money, plate, goods, or any part of her rigging . . . before the [captured vessel] shall be adjudged lawful prize by a competent court,” unless the removal was to preserve the prize itself, or was “absolutely necessary for the use of any of the vessels of the United States.”

The promotion ladder ended with the rank of captain, for Congress did not create the rank of admiral before the Civil War. What did this mean for the incentives faced by a commanding officer? For one thing, smaller navy cruisers were headed by men holding the rank of master commandant, one step below that of captain. For these commanding officers, the carrot of further promotion was still available. As for captains themselves, those commanding medium-sized cruisers might hope for assignment to a large cruiser, which came with a salary increase of about thirty-five percent. Further, in 1814 Secretary Jones strongly urged Congress to create the rank of admiral, noting that it would spur every good captain to “aspire to the highest qualifications.” Congress seriously considered the proposal, though the war ended before it acted. Still, assuming navy captains knew that this proposal was likely or pending, the incentive may have been the same as if the rank of admiral had been created. Also, when at peace, the Navy usually laid off some of its captains at reduced pay. It may be that pleasing the leadership was a way to win favor in the layoff process. Despite all this, it does appear that, once an officer reached the rank of captain, the leadership might allow him to engage in some indiscretions, particularly if he were generally effective. Captain David Porter, in the midst of a long and very well-executed cruising mission, captured some specie, distributed it to his crew without legal condemnation, yet was offered a more important command on his return.

118. An Act for the better government of the Navy of the United States, ch. 33, § 1, art. 8, 2 Stat. 45, 46 (1800).
120. MCKEE, supra note 10, at 29.
121. McKee implies that merit played at least some role in promotion from master commandant to captain. Id. at 289.
122. Id. at 490-91 (salary increase of $1260 to $1704 up to 1814 and of $1350 to $1830 after 1814).
123. CHISHOLM, supra note 10, at 106-07.
124. Id. at 106-08. Note that Congress insisted on designating the particular men to be promoted. Id. at 108. It is unclear whether Congress would have chosen on the basis of merit.
125. MCKEE, supra note 10, at 332, 336-37.
127. PETRIE, supra note 15, at 143-44 (stating that U.S. Navy was “tolerant of [its] commanders in such matters”). On Porter’s cruise, see FORESTER, supra note 7, at 203-12. Forester notes that the
The role of the U.S. Navy's internal criminal justice system also deserves examination. Viewed solely in terms of the official sanctions that it imposed on officers, this legal system did not play much of a role in preventing the abuse of commerce raiding. Although it was a crime to take property from a prize without adjudication or to mistreat a captured crew, actual sanctions against officers were apparently rare: for example, prior to 1860, officers were almost never prosecuted for (and never convicted of) mistreating or pillaging prisoners. Such acts were part of a larger category of proscribed misconduct that tainted "the professional and personal honor of the service," which category also included cowardice, failure to join battle, premature surrender, desertion of one's post, and sedition. None of these crimes was handled by courts-martial with much severity or consistency. Despite this dearth of formal legal accountability, there did exist a less formal but stronger network of cultural accountability that punished such behavior. For instance, although no officer was convicted of cowardice during the early nineteenth century, when two men were accused of the crime, it "was the stigma of cowardice, not the legal finding of it, which remained with them for the rest of their lives." One of them—a captain who made a questionable decision in battle and, after conviction on a lesser charge, was suspended for five years—returned to the Navy only to find himself baited and humiliated by one of his fellow captains, until he finally challenged the man to a duel and killed him. It was an era in which "even the rumor of dishonor could ruin a man's prospects for the rest of his life." The lack of formal prosecutions for cowardice, concludes one historian, was the result "of the fear and dread and awe that naval officers held" for such accusations. Granted, the pillage and maltreatment of a prize were not the same as cowardice. But it seems possible that they shared the same odor of dishonor. The usual principle of commerce raiding, as one observer described it later in the nineteenth century, was "to fall without pity on the weak" and "with all possible speed, to fly from the strong"—a principle whose venality seemed even worse in the case of, say, a commerce raider who stretched the rules to plunder an innocent neutral. In the Royal Navy during the late eighteenth...

128. VALLE, supra note 10, at 144-45; cf. HILL, supra note 15, at 235 (noting sanctions in the British navy for injudicious capture of a neutral ship).

129. VALLE, supra note 10, at 143.

130. Id.

131. Id. at 160, 184.

132. Id. at 160.

133. Id. at 147-48. Both captains are referred to as "commodores," but this was only a courtesy title. MCKEE, supra note 10, at 29.

134. VALLE, supra note 10, at 180.

135. Id. at 160.

136. CHARMES, supra note 72, at 62.
and early nineteenth centuries, several senior officers mocked and scorned colleagues who, they thought, were allowing the desire for prize money to detract from their focus on defending their country.\footnote{137} Considering that the early U.S. Navy consciously modeled its culture on that of the Royal Navy,\footnote{138} it would not be surprising had its members practiced a similar kind of shaming. Indeed, it would be consistent with the well-known fact that members of the U.S. Navy viewed privateers with contempt.\footnote{139}

Overall, the distinguishing feature of the U.S. Navy was not the absence of the profit motive. Rather, it was the tempering of the profit motive with the carrot of promotion and the stigma of dishonor. Such was the background for policy debates for the remainder of the century: naval personnel remained eligible for prize money until 1899,\footnote{140} honor and glory remained central to naval culture,\footnote{141} and promotion for meritorious service remained an opportunity in wartime.\footnote{142}

**B. Accountability for Privateers**

In reaction to potential abuses of commerce raiding, the U.S. government promulgated the naval regulations discussed above, as well as a distinct set of instructions applicable to privateers. These instructions expressed the government’s goal that a commerce raider should interfere as much as possible with enemy commerce but as little as possible with international relations, law and order, and private rights more generally:

2. You are to pay the strictest regard to the rights of neutral powers, and the usages of civilized nations; and in all your proceedings toward neutral vessels, you are to give them as little molestation or interruption as will consist with the right of ascertaining their neutral character, and of detaining and bringing them in for regular adjudication, in the proper cases. . . .

3. Towards enemy vessels and their crews, you are to proceed, in exercising the rights of war, with all the justice and humanity which characterize the nation of which you are members.\footnote{143}

\begin{itemize}
  \item \footnote{137} Hill, supra note 15, at 62-63. See also Arthur Herman, To Rule the Waves: How the British Navy Shaped the Modern World 316 (2004) (stating that, in the Royal Navy of the late 1700s, to steal “from captured prizes” was “especially shameful for a flag officer”). But see Forester, supra note 7, at 93 (stating that during the early 1800s “[e]ven in the Royal Navy there were continuous hints and complaints that captains and flag officers were tempted to neglect military duties in order to seek prizes”).
  \item \footnote{138} Mckee, supra note 10, at 210-15.
  \item \footnote{139} Stivers, supra note 11, at 102, 123-24.
  \item \footnote{140} See infra text accompanying notes 555-568
  \item \footnote{141} Karsten, supra note 10, at 255-63.
  \item \footnote{142} Promotion for meritorious service in battle again became the rule early in the Civil War. Chisholm, supra note 10, at 284-94, 305-06. It was also the rule during the Spanish-American War. \textit{1 Annual Reports of the Navy Department for the Year} 1898, at 57-58 (1898).
  \item \footnote{143} The passage is taken from the \textit{President's Instructions to Private Armed Vessels}, which were
Some violations of these instructions required the active participation of the privateer captain or perhaps his tacit permission, meaning they were problems of high-level misconduct. Others, especially isolated acts of theft or violence, could be committed without his permission or even his knowledge, meaning they were problems of shipboard discipline.

1. Criminal Sanctions

To analyze the criminal law of privateering, we must introduce the concept of the "law of nations." This was a set of rules, developed through tradition over the centuries and analyzed by treatise-writers such as Grotius and Vattel, to govern international conflicts and international commerce. In principle, the rules were uniform across all "civilized nations." They were not applied by international courts, for none yet existed, but rather by the national courts of individual countries. For the law of nations to serve its purpose, a judge had to apply it impartially, even in a dispute between a native and a foreigner.\textsuperscript{144} Though not followed in every instance, the law of nations governed many disputes in Europe, its colonies, and the United States.\textsuperscript{145}

Piracy—robbery at sea—was a capital crime under the law of nations and could therefore be prosecuted in any competent court in any country.\textsuperscript{146} One advantage of this rule was that the victims of piracy could get justice in their home courts. However, the commission granted by national authority to every naval ship and privateer protected its recipients against criminal prosecution under the law of nations, not only for acts which the commission authorized, but also for all acts exceeding the commission.\textsuperscript{147} Even if a commerce raider robbed a merchantman owned by nationals of a country friendly to its own government, the commission remained a complete defense under the law of nations.\textsuperscript{148} Legally, the acts of a commerce raider were the acts of its commissioning government. If

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\textsuperscript{144} HENRY WHEATON, A DIGEST OF THE LAW OF MARITIME CAPTURES AND PRIZES 266 (R. M'Dermut & D.D. Arden, New York 1815).

\textsuperscript{145} The law of nations is the ancestor of today's customary international law, which is still applied by the U.S. federal courts. RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 753-55 (5th ed. 2003).

\textsuperscript{146} 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 171-72 (New York: O. Halsted, 1826-1830); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW: WITH A SKETCH OF THE HISTORY OF SCIENCE 107 (Philadelphia: Carey, Lea & Blanchard, 1836).

\textsuperscript{147} 1 KENT, supra note 146, at 178-79; HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 192 n.81 (Richard Henry Dana, Jr., ed., Boston, Little, Brown, and Co. 8th ed. 1866) (qualifying the statement, in an editor's note by Dana, by saying that acts exceeding the commission must still be "under color of" the commission to retain the exemption from piracy prosecution).

\textsuperscript{148} THEODORE D. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW, DESIGNED AS AN AID IN TEACHING, AND IN HISTORICAL STUDIES 314 (photo. reprint 2004) (1860).
the victims of a U.S. privateer wanted their rights vindicated by criminal prosecution, they had to complain to the U.S. government (or to their own government, in the hope of putting diplomatic pressure on the United States to act). Either way, the question of punishment was aggregated into the overall calculus of state-to-state relations. If commerce raiders of one nation committed enough depredations against citizens of another, it might prompt the victims’ government to declare war, carry out reprisals short of war, or bargain with the aggressors’ government for ad hoc compensation. But there was no direct individual criminal accountability.

Besides the law of nations, there was also “municipal law,” the law of an individual country, enforced in its own courts. A state could use its municipal law in its own courts to punish persons acting under a foreign commission, but only if (1) those persons were the state’s own citizens, or (2) their acts were committed within the state’s own territorial waters, not the high seas. Relatedly, nations could authorize each other by treaty to prosecute acts by each other’s citizens. The British government during the American Revolution defined American privateering as criminal, on the ground that the governments issuing the commissions were not legitimate. However, the British never actually prosecuted any American privateersmen on this basis. Similarly, the Union during the Civil War defined Confederate privateering as criminal, but while a few men were convicted, it seems that all of them were ultimately treated as prisoners of war. The legal scholar Alfred P. Rubin notes that Britain and France at times threatened to criminally punish citizens of one foreign country who committed depredations under a commission from another foreign country, but he says the U.S. government rejected such threats as inconsistent with international law, and he does not suggest that they were ever carried out. For its part, the U.S. government never criminalized high-seas attacks against U.S. interests conducted under commission from a legitimate state, unless the attackers were U.S. citizens, or if they (1) were citizens of a state with whom the United States had a treaty defining piracy and (2) committed piracy as defined under that treaty. For the purposes of our case study, the British government in the War of 1812 treated all captured U.S. privateersmen as prisoners of war.

While nations generally did not use municipal law to criminally punish depredations by commissioned foreigners against their own citizens, they

149. WHEATON, supra note 146, at 114, 260-63.
150. E.g., ALBION & POPE, supra note 11, at 80-83.
151. WHEATON, supra note 146, at 114; WOOLSEY, supra note 148, at 315.
153. WHEATON, supra note 147, at 196-97 n.84 (editor’s note by Dana).
154. RUBIN, supra note 152, at 155-56.
155. Id. at 154-56.
156. STIVERS, supra note 11, at 129.
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did frequently use municipal law to criminally punish depredations by their own citizens against foreigners. Each government, it seems, was to keep its own house in order, or risk retaliation from its fellow nations. Starting in 1744, the British government subjected its privateersmen to the same strict regulations that governed the Royal Navy.157 At least one British privateer captain was executed by the British government for robbing a neutral merchantman (this occurred in 1759).158

U.S. privateersmen were subject to federal civilian criminal law, but apparently only in extreme cases where they committed a whole attack with no intent to permit the merchantman or anything taken from it to be adjudicated or shared with the owners; Congress in 1812, presumably recognizing that civilian law—confined to extreme cases and enforced by juries from privateer-friendly ports—was inadequate, copied the British policy by subjecting all U.S. privateersmen to the courts-martial and criminal code of the U.S. Navy,159 which, as we have seen, proscribed any taking of uncondemned property and any mistreatment of captured crews. On its face, this seems like a big step. Crucially, however, court-martial proceedings could be initiated only by the privateer captain,160 meaning that the provision was aimed at shipboard discipline, not at high-level misconduct or tolerance for misconduct. To be sure, shipboard discipline did play a significant role in preventing the abuse of commerce raiding: crewmen might commit depredations on their own, or they might pressure their captain to take property without authorization.161 Some cases directly concerned the pillage and mistreatment of neutrals (which was pun-

157. SWANSON, supra note 11, at 37. This provision was renewed in 1793 and 1803. STIVERS, supra note 11, at 122 n.*, 442 n.23.

158. STARKEY, supra note 11, at 28. Starkey says the merchantman was Dutch, which means it was neutral as of 1759. See Alice Clare Carter, The Dutch as Neutrals in the Seven Years' War, 12 INT'L & COMP. L.Q. 818 (1963).

159. An Act concerning Letters of Marque, Prizes, and Prize Goods, ch. 107, § 15, 2 Stat. 759, 763 (1812). The statute is miscited in STIVERS, supra note 11, at 442 n.22, and VALLE, supra note 10, at 304 n.61. According to Cranwell and Crane, privateersmen were subject to the naval criminal justice system only when they served on board vessels that raided full-time, as opposed to those (known informally as "letters-of-marque") that were focused mainly on commercial shipping and raided only if an opportunity arose. CRANWELL & CRANE, supra note 11, at 22. I think Cranwell and Crane are mistaken. The distinction they draw—for which they cite no source—has no basis in the statute that brings privateersmen within the naval criminal justice system, 2 Stat. at 759-64, nor in the other statutes governing privateers, An Act declaring War between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories, ch. 102, 2 Stat. 755 (1812); An Act in addition to the act concerning letters of marque, prizes, and prize goods, ch. 13, 2 Stat. 792 (1813), nor in any other statute that I can find. Further, Garitee—whose study is generally more detailed and documented than that of Cranwell and Crane—says that the so-called letters-of-marque "used the navy courts on occasion." GARITEE, supra note 11, at 216-17. On the subjection of privateersmen to civilian criminal law in extreme cases, see United States v. Jones, 26 F. Cas. 659, 660-61 (C.C. D. Pa. 1814) (No. 15,496); United States v. Jones, 26 F. Cas. 653, 655-57 (C.C. D. Pa. 1813) (No. 15,494).

160. § 15, 2 Stat. at 763.

161. FORESTER, supra note 7, at 93-94 (on the War of 1812); PARES, supra note 15, at 44 (on British wars of the 1700s).
ished, in at least one case, by flogging and brief imprisonment). Yet many others concerned "internal" offenses like mutiny, striking an officer, disobeying orders, or neglect of duty,\(^{162}\) which were related only indirectly, if at all, to the protection of innocent civilian persons and property. What is more, the marginal effect of naval justice on privateers' shipboard discipline was limited, since it had been lawful for generations prior to 1812 for the master of a merchant vessel (and also, presumably, a privateer captain) to discipline disobedient sailors by "moderate and due Correction," including flogging.\(^{163}\) Privateers had acquired their reputation for abuse despite the longstanding existence of this power. Admittedly, a naval court-martial could potentially impose much harsher sanctions. Still, the lash was not new to privateer seamen.

Furthermore, enforcement of the naval code against U.S. privateersmen was problematic. Though a proceeding was to be initiated by the privateer captain, it was to be carried out by a court-martial of at least five naval officers holding at least the rank of lieutenant.\(^{164}\) This meant that proceedings could take place only when a privateer happened to encounter a naval ship at sea or entered a port, and even then, only when five relatively senior officers could be spared. The problem was that, during the War of 1812, the number of such officers was very small compared to the number of privateersmen.\(^{165}\) (The point of privateering, after all, was to supplement a small navy.) This meant that accused privateersmen were sometimes confined for long periods awaiting trial. In light of this, Navy Secretary Jones insisted that the regulation of privateers by the Navy was impractical and pleaded with Congress to adopt some other approach,\(^{166}\) to no avail. Further aggravating the problem was the fact that naval officers considered the regulation of privateers to be beneath their dignity.\(^{167}\) Con-

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162. For sentences of flogging, imprisonment, and forfeiture of shares imposed variously on four men for pillaging a neutral ship and mistreating persons thereon, see Naval Court Martial, 8 NILES WEEKLY REGISTER, Supplement, 185 (1815); see also VALLE, supra note 10, at 93 (mentioning prosecution for plundering a neutral). For prosecution of other offenses, see CRANWELL & CRANE, supra note 11, at 234 (striking an officer); GARITEE, supra note 11, at 216-17 (disobeying orders, neglect of duty); VALLE, supra note 10, at 93-94 (mutiny, treason, neglect of duty, firing into a friendly vessel); Monica Lynn Everett, The Social History of Privateersmen During the War of 1812, at 63 (1992) (unpublished M.A. thesis, Univ. of Houston at Clear Lake) (on file with author) (cowardice).


164. § 15, 2 Stat. at 763. A court-martial consisted of at least five commissioned officers, see VALLE, supra note 10, at 50, with "commissioned officers" defined for this purpose as lieutenants and above, see MCKEE, supra note 10, at 33.

165. The number of naval officers eligible to sit on courts-martial at the height of war mobilization was around 200. Calculations are based on the chart in MCKEE, supra note 10, at 473, plus the discussion of eligibility for courts-martial, id. at 33. For an estimate of the number of privateersmen, see infra note 170.


167. STIVERS, supra note 11, at 123-24.
sistent with these factors, it seems that privateersmen—despite their reputation for abuse—were prosecuted at a much lower rate than were naval personnel. For example, in the period 1813-14, during which prosecutions of privateersmen were at their peak, the U.S. Navy conducted a total of 101 courts-martial or courts of inquiry, of which only thirty-two involved privateers. How do these figures stack up against the total populations of the public and private forces? Available data do not furnish an exact answer. Total naval and marine personnel during the years 1813 and 1814 fluctuated between 6,116 and 8,672, though presumably not all these men were at sea in cruisers at any given time. We have no exact totals for U.S. privateersmen. Given quite limited data, the best we can do is to consider the two different types of privateer vessels, estimate the crew size for each type, estimate the total number of each type that operated in the course of the war, multiply the two estimates for each of the two types, and add the two products, which yields a total of about 26,000. But the true number of men who served on privateers in the course of the war, or who were serving at any given moment, was undoubtedly lower, since each privateer was at sea for only part of the war, and an individual seaman might serve on different privateers at different times. Even so, it seems safe to say that prosecution was much less probable for a seaman
who spent the war as a privateersman rather than in the Navy. 172

2. Civil Judicial Remedies

Ownership of a prize and its cargo and the proceeds therefrom could not be lawfully transferred to the captor—whether naval ship or privateer—until the prize court made a decree of condemnation. If the original owner of a captured ship or cargo believed that it was not lawful prize, the prize court was the forum in which to prevent a wrongful transfer. That court was also the venue in which anybody injured by the captor was to enjoy a civil remedy. Under the law of nations as practiced in Britain and the United States, a prize court had the power to award damages to compensate for injury to property resulting from the captor’s negligence; for the captor’s personal torts against the people on board; for losses due to capture without probable cause (in which case the captor might have to pay its opponent’s legal expenses, as well); and for other wrongs. 173 Damages were also available if the captor delayed in adjudicating the case. 174 In a case of gross irregularity, severe neglect, or attempted disposal of property without condemnation, the court could impose a penalty by making the captor forfeit the prize, even if it were otherwise lawful. 175 The prospect of such remedies ideally deterred improper depredations, either by operating directly on the minds of the officers and seamen, or, in the case of a privateer, on the minds of the owners, who might then press their employees to toe the line. 176 The prize court was the primary instrument of accountability for the private commerce raider.

Under the law of nations, the courts possessing jurisdiction over a given prize were those located in the nation that commissioned the captor, or in an allied nation. 177 (Notably, a captor had the option, while litigating the case in the proper court, to store the actual prize in the port of a neutral country and eventually sell the prize there if the case were won, though the neutral government had the option to prohibit storage and sale. 178) Thus,
in every prize case, the captor faced a judge of his own country or a friendly country, employed by the state that had commissioned him to raid in its name, or by an allied state. The captive, by contrast, faced at best a stranger and at worst an enemy. In light of this potential for bias, the American legal scholar Henry Wheaton cautioned that, although prize courts were established “in the belligerent country,” they bore a solemn obligation “to administer with indifference that justice which the law of nations holds out, without distinction, to independent states, some happening to be neutral and some to be belligerent.” A prize judge had to decide all questions “exactly as he would determine the same questions if sitting in the neutral country whose rights are to be adjudicated.”

Neutral nations, explained the legal scholar G.F. de Martens in a treatise first published in English in 1801, felt that the typical prize judge fell short of this obligation, and they often accused him “of inclining in favour of the privateer.”

We can get an idea of the basis for such complaints by considering the institutions that governed prize-taking in the British Empire during the War of the Austrian Succession and related conflicts (1739-1748) and the Seven Years’ War (1756-1763).

Prizes taken to Britain itself were adjudicated in the High Court of Admiralty (HCA) at London. This body reasonably approached an ideal of independent professionalism in the service of a supposedly uniform supranational law. The judge held his post during good behavior with irreducible salary. He was drawn from the close-knit and insular clan of highly specialized lawyers (known as “civilians”) who practiced before the court. The court was consistent in its procedures and conscientious in its collection of evidence.

Numerous prizes, however, went not to the HCA but to vice-admiralty courts scattered throughout the colonies of North America and the West
Indies. The judge of a vice-admiralty court operated in an institutional setting far different from the HCA. He was officially appointed by the Admiralty (an executive department in London) and served at its pleasure. But in fact, his incumbency typically depended on the favor of the local colonial governor and often on the influence of local merchants. Merchants were, of course, normally the largest investors in privateers. The governor might himself be an investor, or at least sympathetic to the most powerful economic actors in his community.

The specific forms of vice-admiralty judges’ compensation varied over time and between colonies. At least in some instances (probably most), they received no fixed salary. Typically, much or all of their income came in the form of percentages on the property they condemned, and/or fixed fees per case. This caused each judge to compete with his counterparts in other colonies to induce privateers to choose his court. Up to 1759, judges themselves were permitted to invest in privateers.

Further, captors “usually sent their prizes to their own headquarters,” so “they often had... public opinion on their side in the colony where the trial took place.” Condemnations “brought money into the community” and made a judge popular with the local population, as well as the local mariners. More pointedly, the colonial legislature had the power to fix the exact percentages and fees-per-case received by the judge. (Colonial statutes altering fee schedules could be overridden by the Privy Council in Britain, but this process took an average of three to four years, and legislatures sometimes reenacted invalidated laws.)

Taken together, these factors strongly pressed the vice-admiralty judge to lean in favor of condemnation irrespective of the merits. Was there

187. PARES, supra note 15, at 84.
188. Id. at 84-85, 132; UBBELOHDE, supra note 15, at 7-8.
190. PARES, supra note 15, at 128-29 (recounting accusation that governor of Bahamas in 1760s, who “appointed and removed judges very freely,” invested in privateers).
191. See UBBELOHDE, supra note 15, at 6-7 (stating that no vice-admiralty judge received a salary as of 1763); see also LYDON, supra note 11, at 122 (stating that “apparently an annual salary was no longer assigned” to the vice-admiralty judge in New York after 1708).
192. See UBBELOHDE, supra note 15, at 6-7; see also LYDON, supra note 11, at 122 (referring to fees graduated to vessel size in New York); E. ARNOT ROBERTSON, THE SPANISH TOWN PAPERS: SOME SIDELIGHTS ON THE AMERICAN WAR OF INDEPENDENCE 59-60 (1959) (referring to percentages of the value of prizes condemned in Jamaica).
193. SWANSON, supra note 11, at 45; UBBELOHDE, supra note 15, at 6-7.
194. LYDON, supra note 11, at 119, 125; SWANSON, supra note 11, at 45.
195. PARES, supra note 15, at 127.
196. Id. at 81.
197. SWANSON, supra note 11, at 38.
198. LYDON, supra note 11, at 107.
199. BARROW, supra note 15, at 155-56.
200. Id.
201. ELMER BEECHER RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL 210-12, 216-17, 222 (1915).
anything to counteract this pressure? The Admiralty, for its part, did little
to monitor or instruct the judges. Nor could they partake of the juris-
prudence and professional culture of the HCA. During the eighteenth cen-
tury, HCA decisions were delivered orally; they were never published and
usually were not even written out by the judge, but instead were re-
corded in the collective memory and personal notebooks of the London
civilians, making it impossible to export this rich source of prize law to
the periphery of the Empire. Not only were the vice-admiralty judges cut
off from the specialized law of the HCA, but some of them had no legal
background of any kind. Out of all the vice-admiralty courts operating
in the period 1739-63, the judges in only two—a small minority—"seem
to have consulted the precedents of their own or of other Admiralty
courts." Generally, then, the vice-admiralty judges often had little to
guide them intellectually, except the prize statute itself, which set forth
procedures but inevitably "left open and obscure many points at issue," and a small treatise literature, which was often internally inconsistent.

Significantly, losing parties could appeal the prize decisions of the vice-
admiralty courts (and of the HCA) to a body in London known as the
Lords Commissioners of Prize Appeals. The body’s actual composition
varied from case to case depending on which of dozens of eligible mem-
bers chose to attend. Among the eligibles were some of the most emi-
nent judges of Britain’s central common-law courts, and in any given case
one of these judges was usually present. Though none of these judges
were civilians officially, one—Lord Mansfield, who served from 1756—
was learned in the law of nations. Besides the one common-law judge,
the other officials attending were typically non-lawyers, usually "minor
politicians." The Lords Commissioners thus leaned heavily on judges
who already had full-time jobs presiding over other courts, which meant

203. BOURGUIGNON, SCOTT, supra note 15, at 244-46; PETRIE, supra note 15, at 130-31. On the
later advent of publication, see HASKINS & JOHNSON, supra note 15, at 449.
204. BOURGUIGNON, SCOTT, supra note 15, at 244-45.
205. PARES, supra note 15, at 131-32 (stating that the judges generally knew no law and that only
two in the period 1739-63 consulted any precedent). But see SWANSON, supra note 11, at 40 (stating
that "many" of the judges were "admirably suited for the bench"); UBBELOHDE, supra note 15, at 8 &
n.9 (stating that "usually" the judges were "experienced lawyers," though admitting "there were ex-
ceptions," some of them merchants).
206. PARES, supra note 15, at 131-32.
207. For analysis of the prize statute, see BOURGUIGNON, FIRST FEDERAL COURT, supra note 15,
at 139-60.
211. Id. at 105.
212. BOURGUIGNON, FIRST FEDERAL COURT, supra note 15, at 162 n.61.
213. Id. at 162-63; PARES, supra note 15, at 105. The quote is from Pares.
that the body seldom met and that a prize appeal often took years.\textsuperscript{214} Appeals were also notoriously expensive,\textsuperscript{215} not least because the dominance of common-law judges meant that each party had to hire both a common lawyer and a civilian.\textsuperscript{216} The Lords Commissioners gave at most a "brief statement" of the reasons for their decisions and usually none at all; nothing was published.\textsuperscript{217} Overall, the process was handled by a "clique" of London lawyers similar to that which practiced before the HCA and isolated from the colonies.\textsuperscript{218} Even when a victim won before the Lords Commissioners, the decree had to be executed back in the vice-admiralty court, where the vice-admiralty judge could obstruct it.\textsuperscript{219}

How frequently did losing parties in the HCA and vice-admiralty courts exercise their right of appeal? We know that the Lords Commissioners in 1751-1766 decided 234 appeals, of which approximately forty-one arose from the HCA and the rest from the vice-admiralty courts.\textsuperscript{220} Unfortunately, however, the secondary literature tells us nothing specific about the number of disputed cases in those inferior courts.\textsuperscript{221} So it is not possible to estimate the rate of appeal.

In any case, though the Lords Commissioners apparently provided justice for some fraction of parties who could afford the expense and delay of an appeal, it does not seem that they articulated general expectations or enforced professional norms in a way that would have inspired vice-admiralty judges regularly to withstand the heavy pressures in favor of condemnation. Vice-admiralty judges frequently bent or broke rules meant to protect captives, even bright-line ones.\textsuperscript{222} They seldom awarded damages in 1739-63 for "anything much short of criminality."\textsuperscript{223} Perhaps most important, vice-admiralty judges often broke the rules on the admission of evidence in prize cases, allowing testimony or exhibits attesting to the general prevalence of improprieties in certain areas of commerce—for example, "the frauds of the Dutch in general"—that might justify condemnation.\textsuperscript{224} There were several accusations of bias, bribery, and other

\begin{thebibliography}{9}
\bibitem{214} \textit{Pares, supra} note 15, at 144-47.
\bibitem{215} \textit{Lydon, supra} note 11, at 123; \textit{Pares, supra} note 15, at 141-44.
\bibitem{216} \textit{Bourguignon, Scott, supra} note 15, at 28-29.
\bibitem{217} \textit{Bourguignon, First Federal Court, supra} note 15, at 169.
\bibitem{218} \textit{id.} at 161-62, 168-69.
\bibitem{219} \textit{Id.} at 176; \textit{Lydon, supra} note 11, at 124.
\bibitem{220} \textit{Bourguignon, Scott, supra} note 15, at 28 n.60.
\bibitem{221} Data on the number of vessels taken (but not on the number of disputed cases) in certain colonies can be found in \textit{Lydon, supra} note 11, at 144, 152-59; \textit{Swanson, supra} note 11, at 181, 228. Data on the number of undisputed condemnations at London can be found in \textit{Starkey, supra} note 11, at 137, 178, 289.
\bibitem{222} \textit{Swanson, supra} note 11, at 30 (general point), 41 (noting failure to abide by twenty-day waiting period to allow time for claims in more than half the cases in several North American colonies from 1739 to 1748).
\bibitem{223} \textit{Pares, supra} note 15, at 52.
\bibitem{224} \textit{Id.} at 111-15.
\end{thebibliography}
forms of corruption. Even Lewis Morris of New York—one of the most learned vice-admiralty judges—was “decidedly partial” and employed a “perverse subtlety . . . wholeheartedly in the interest of the privateers.”

When the North American colonies broke away from the Empire in 1776, each one established its own admiralty court, which generally followed the practice of its vice-admiralty predecessor. Plus, in a spasm of republican enthusiasm, the new states took the unprecedented step of allowing juries to decide the facts in prize cases. During the few years it lasted, this experiment aggravated preexisting problems, for the jury “frequently ignored traditional admiralty rules and awarded prizes on the basis of local sentiment.” Fearful that the depredations of American privateers would cost it the favor of allies and neutral countries, the Continental Congress created various legal bodies to review the decrees of state prize courts, implementing rules more friendly to neutrals and allies than was the law of nations. This centralizing program was precarious, since it depended on the voluntary cooperation of the states.

Such was the regulatory heritage of the United States when it set out to govern its privateers during the War of 1812. By this time, it should be noted, Britain had at least attempted to clean up the most dangerous features of its vice-admiralty system, resolving in 1801 that vice-admiralty judgships would receive a salary, have their earnings from percentages and fees capped, and be filled by lawyers trained in admiralty. The U.S. ambassador to Britain welcomed this reform as “the best means of putting a stop to depredations on our commerce,” which was then neutral. The legislation produced results in at least one instance: the appointment at Halifax of an experienced admiralty lawyer who defied the efforts of local elites to circumvent regulations and won the esteem of both

225. Id. at 47, 127-29.
226. LYDON, supra note 11, at 110, 125.
227. Id. at 118; see also id. at 124.
228. PARES, supra note 15, at 132.
229. BOURGUIGNON, FIRST FEDERAL COURT, supra note 15, at 177.
231. BOURGUIGNON, FIRST FEDERAL COURT, supra note 15, at 97-99.
232. Id. at 281 (neutrals), 288-89 (allies).
234. On the limited and relatively unimportant privateer commissions issued by the U.S. government during the Quasi-War against France (1798-1800), see supra note 86.
British and American observers for his learning and impartiality.237 (Whether there were similar results beyond Halifax is unclear.238) 

The U.S. government in 1812 had the opportunity to make similar improvements in its own prize law, equipped as it was with the new federal judiciary. In contrast to the old vice-admiralty judges, who served at the mercy of local elites and lived by fees on court business, the new federal judges enjoyed tenure during good behavior and a guaranteed salary. And they made use of these advantages. Of the seventeen district judges who sat in maritime states during the War of 1812 and thus had the power to decide prize cases during wartime, thirteen served in their posts until death, while the remaining four resigned at an average age of seventy-five (the youngest was sixty-six).239 It would seem that these men had few career ambitions once they reached the bench, instead identifying themselves with the judiciary for the remainder of their professional lives. These conditions allowed them to do something besides please local interests. For example, when the Jeffersonian Congress in 1807 banned all foreign trade and caused the New England economy to crash, the Federalist elite of Massachusetts expected that District Judge John Davis—drawn from their own ranks—would find the legislation unconstitutional. In a Salem courtroom packed with unemployed sailors expecting him to send them back to work, Davis defied his compatriots in “one of the most striking illustrations of judicial impartiality rising above the influence of partisan [pressure],” as the historian Charles Warren called it.240 During the war, Davis had jurisdiction over two of the nation’s four largest privateering ports.241

Thus, the new U.S. prize judges were insulated from the surrounding port communities that had so much influenced their predecessors. To whom were they accountable, then? The answer involves an interesting interaction between British and American legal culture. William Scott, appointed as judge of the HCA in 1798 (and also a member of the Lords Commissioners242), sought to clarify, systematize, elaborate upon, and

238. In the most serious study of the British prize system during the French Revolution and Napoleonic Wars, Richard Hill admits that the quality of the courts was varied, with some instances of outright corruption and incompetence, yet he concludes (in a discussion without many specifics) that “so far as fairness under the law was concerned, most [vice-admiralty courts] conducted their affairs reasonably.” HILL, supra note 15, at 97-98, 104, 239. Strangely, Hill discusses the reform legislation only very briefly. Id. at 97.
241. For a list of the largest ports, see GARITEE, supra note 11, at 242.
242. BOURGUIGNON, SCOTT, supra note 15, at 248.
publicize prize law—which, as noted above, had hitherto been obscurely and informally maintained in the memories and private notebooks of the London civilians and in often vague and conflicting treatises. With one minor exception, Scott’s decisions were the first of the HCA to appear in published reports. Six volumes of them were available by the time of the War of 1812. They won him an international scholarly reputation. Scott spoke eloquently of the rights of neutrals and generally sought to uphold their rights when left to his own devices. Admittedly, he followed orders from the British government in 1807 that drastically curtailed neutral rights in defiance of the law of nations. However, despite initially skirting the issue, he ultimately refused to silently assimilate these departures into his ordinary doctrines and instead defined them as extraordinary measures in retaliation against France’s prior departure from the law of nations, which came back into effect in Britain’s prize courts when its government repealed the orders in 1812. Scott’s treatment of the orders made it possible for Americans, who thought of themselves traditionally as neutrals, to admire and use the ordinary system Scott devised, even if they felt betrayed by his concession.

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243. Id. at 153, 161, 243-52, 257-62.

244. The “initial [published] reports of English admiralty cases appeared in 1801, edited by Sir George Hay and Sir James Marriott”; they covered the period from 1776 to 1779, prior to Scott’s tenure. HASKINS & JOHNSON, supra note 15, at 379 n.19. Hay and Marriott’s reports are now collected in 165 Eng. Rep. 1-73. Next came six volumes of Scott’s decisions, reported by Charles Robinson, all available in print by 1812. These are now collected in 165 Eng. Rep. 74-1010. As the page numbers make clear, Hay and Marriott’s reports were less one-tenth the length of Robinson’s.

245. See supra note 244.

246. See WHEATON, supra note 144, at v-vi.


249. Id. at 219 & nn.174-75.

250. The Fox, Edw. 311, 312-16, 165 Eng. Rep. 1121, 1121-22 (Adm. 1811) (Scott, J.); see also HILL, supra note 15, at 51. Bourguignon contends that Scott, by justifying the orders as retaliatory measures in The Fox, acted like a servant of the government and violated his own (albeit unattainable) ideal of judicial independence. BOURGUIGNON, SCOTT, supra note 15, at 264-73. This may be correct as to the results involved, but Scott deserves credit for cordoning off the new policy as a special retaliatory measure to preserve the intellectual integrity of ordinary prize law for use in future conflicts. To be sure, Scott legitimized the power of a government to officially suspend neutral rights, and he furnished a strong military explanation for the British government’s 1807 policy decision, ignoring its possibly venal ulterior motives. See id. at 222. But my interest is in Scott’s contribution to intellectual norms that promoted accountability between inferior-court judges and their respective governments, not in whether those governments—at the highest level—had the power to make official departures from the law of nations. The judge/government connection had major implications for the accountability of privateers as compared with a public navy, since civil lawsuits were the primary tool by which a government controlled its privateers. By contrast, the government’s general power to suspend neutral rights affected privateers and naval ships equally.

251. On repeal, see BOURGUIGNON, SCOTT, supra note 15, at 223.

252. On American resentment of Scott, see 1 LIFE AND LETTERS OF JOSEPH STORY 226 (William W. Story, ed., Boston, Charles C. Little & James Brown 1851) (photo. reprint 2000); WHEATON, su-
Meanwhile, Joseph Story—a policy entrepreneur if ever there was one—ascended to the U.S. Supreme Court on the eve of the War of 1812 and appointed himself the federal judiciary’s resident expert on prize law, taking Scott as his guiding light. In a postwar letter discussing their respective wartime decisions, Story told his onetime enemy counterpart of “my unfeigned respect for your private and public character, and for your services to the world at large, by promulgating the rational and consistent doctrines of the Law of Nations.”

Story’s own prize decisions, he told Scott, “were made under an anxious desire to administer the law of Prize upon the principles which had been so luminously pointed out by yourself.”

This was not mere flattery; Story’s prize decisions cited Scott more than any other authority. For his part, Scott wrote to Story that it was “highly gratifying... to see the same principles to which we think we owe so much in England still adhered to in America.”

The institutional structure of the early federal courts provided Story with a unique opportunity to spread his brand of Scott’s jurisprudence across the country. The federal judiciary of this period was like a machine with interlocking parts. A prize case was tried in the district court. It could then be appealed to a two-judge appellate court, conveniently located in the same state, composed of the original district judge and whichever of the six Justices of the Supreme Court was assigned to the circuit in which the district court was located. This system facilitated the speedy flow of ideas from the district judges to the Supreme Court and back, in contrast to the unbridgeable divide between the old vice-admiralty courts and the Lords Commissioners. For prize law, the brain of this nervous system was Story, whose plan to rely upon Scott’s jurisprudence commanded a majority of the Supreme Court. (The minority view, held by Chief Justice Marshall, was that while Scott was even-handed in applying the rules he articulated, those rules were sometimes insufficiently protective of neutrals, which meant that U.S. prize law ought to be even more...
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restrictive toward privateers than was Scott.) Story’s opinions—both on the Circuit Court and Supreme Court—were written as references for bench and bar nationwide. He would pre-write in-depth explanations and wait for appropriate fact patterns to which to attach them.261 He aggressively sought publication of the opinions of the Supreme Court and of his Circuit, even putting up some money himself at one point.262 District Judge William Van Ness, who oversaw New York City (the second-largest privateering port), admired and cited Story’s opinions.263 When Henry Wheaton published his first two volumes of Supreme Court reports shortly after the war, Story appended an anonymous mini-treatise on prize law to each one.264 Although U.S. prize law did not track British law in every respect,265 this emerging judicial infrastructure created the potential, at least between the United States and Britain, for a relatively transparent and uniform set of standards which the nations would enforce when they went to war and which would afford them some protection when they were neutral. On its face, it surely seemed a better way to control private warfare than the localistic and intellectually opaque system of the eighteenth-century British Empire. In light of this, it was understandable for a New England writer to proclaim that, compared with the “rapacity and injustice of the French and British courts of vice-admiralty,” there was “nothing to complain of in the administration of the prize law of this country.”266

Understandable, but not entirely accurate. Story’s effort was a response to grave challenges. U.S. prize law in the War of 1812 developed rapidly, but it began from a standing start.267 At the outbreak of the war, many U.S. judges and lawyers were plagued by the same ignorance of prize law that had covered all manner of sins in the previous era. “In some of the district courts,” announced Story in one of his anonymous treatises just after the war, “great irregularities have crept into the practice in prize causes.”268 Perhaps most worrisome, courts too frequently allowed the

261. Zobel, supra note 240, at 529.
262. Letter from Joseph Story to Henry Wheaton (May 25, 1816), in 1 LIFE AND LETTERS OF JOSEPH STORY, supra note 252, at 281; Zobel, supra note 240, at 529.
264. For citation information on both works and confirmation of Story’s authorship, see supra note 16.
265. HASKINS & JOHNSON, supra note 15, at 449 (stating that Scott’s work had “enormous influence” on U.S. law, but was used pragmatically and not always followed); see also id. at 452 (“while American prize law might be similar in most major respects to English precedents, there were a sufficient number of differences to justify a treatise [i.e., Wheaton’s of 1815] directed to the American legal community”); WHITE, supra note 15, at 916 (stating that the Supreme Court’s prize law was based largely on British prize law and that the Court scrupulously upheld the “technicalities of prize practice”).
266. Book Review, 8 N. AM. REV. 253, 259 (1819) (reviewing a collection of Story’s opinions).
267. 1 LIFE AND LETTERS OF JOSEPH STORY, supra note 252, at 223-30.
captor to transgress the rules of evidence—a practice known to cause unjust condemnations. This lapse, wrote Story in private, was especially common in "the Southern States," where it threatened to cause "the most mischievous irregularity."

Story's motivation was in large part to regulate privateers. "It has been the great object of every maritime nation," he wrote in 1814, "to restrain and regulate the conduct of its privateers: They are watched with great anxiety and vigilance, because they may often involve the nation, by irregularities of conduct, in serious controversies, not only with public enemies, but also with neutrals and allies." Did the federal judiciary succeed in compensating the unintended targets of privatized warfare? We cannot know, at least not without extensive archival studies that have never been conducted and that might prove inconclusive if they were. Did it succeed in altering privateer behavior? It is questionable, in part because the war lasted only thirty months, and it may have taken time for the seriousness of federal judges to become known and thereby affect the conduct of privateers. If, as one historian concludes, U.S. prize law was "clearly defined" within about three years of the end of the war, how can we be confident that privateers reacted to it during the war?

Yet if we conclude that regulatory change had no effect, a puzzle remains unsolved. In the only comprehensive study of an American privateering nest in the War of 1812, Jerome R. Garitee's book on Baltimore, there is a remarkable anomaly, albeit one that Garitee fails to recognize or analyze. On the one hand, Garitee's exhaustive archival research turned up relatively few records of depredations by privateers from Baltimore during the War of 1812, although it was the largest U.S. privateering port. Garitee recounts three serious incidents, one involving the plunder and destruction by one ship of twenty-seven houses in a British colony, another involving the robbery of some neutral vessels at sea by one ship, and another in which a privateersman tried to smuggle cargo ashore without ad-

269. Id. at 499.
270. See supra text accompanying note 224.
273. Contracts in the War of 1812 typically stated that if a man violated regulations, he would forfeit his share. GARITEE, supra note 11, at 139-40. Still, for American privateers, this in itself may have been nothing new. In his study of privateering during the Revolution, Morse notes that every contract required the men to abide by regulations, though he does not state the penalty for violations. Sidney G. Morse, New England Privateering in the American Revolution 62 (1941) (unpublished Ph.D. thesis, Harvard University) (on file with Harvard Archives, Harvard University).
274. WHITE, supra note 15, at 916. I take White to mean that U.S. prize law had become "clearly defined" by the end of the period 1813-1818, during which, he says, an "overwhelming number of prize adjudications" had come before the U.S. Supreme Court, "dwindl[ing] to a few in the 1820s."
judication. Yet "[m]ost Baltimore vessels," he concludes, "had no such controversies" and were "worthy of" the contemporary comment that "the conduct of our privateersmen is in general so correct and liberal as . . . to afford no room for the clamor of those opposed to the system of privateering." Indeed, one can find testimonials from British subjects thanking American privateersmen for treating them so nicely. On the other hand, after the war, Baltimore merchants and seamen—several of the very same people who engaged in privateering during the War of 1812—became involved in privateering ventures commissioned by the revolutionary republics of Latin America to privateer against Spanish vessels. From 1816 to 1821, these privateers committed frequent and outrageous abuses, attacking ships of almost any country. As a result, the U.S. State Department was flooded with complaints and conducted an investigation. American public opinion soured on privateering generally. In a debate on tightening the neutrality laws, one congressman joked that the proposed bill was "for making peace between His Catholic Majesty [of Spain] and the town of Baltimore.

What can explain the difference between Baltimore privateers in the war against Britain from 1812 to 1815 and the Latin American revolutions from 1816 to 1821? Cultural norms among investors or seamen seem insufficient. Too many of the same people participated in both endeavors. Criminal sanctions are an unlikely explanation, since, as discussed above, they did not aim at high-level misconduct and were rather weakly enforced. U.S. prize law, which came into its own at this time, may have contributed to the difference, especially considering that the regulatory institutions of the revolutionary Latin American states appear to have been weak. Still, we cannot be sure. The hypothesis requires Maryland's U.S. District Judge (James Houston) and Circuit Justice (Gabriel Duvall) to have been effective regulators. I have found very little published material by or about Houston. Duvall, for his part, was an intellectual non-entity.

275. GARITEE, supra note 11, at 92-93, 171.
276. Id. at 93 (citation omitted); see also id. at 98, 239.
277. Id. at 98; see also MACLAY, supra note 11, at 16, 460-61.
278. See GARITEE, supra note 11, at 224-28. Of fifty major investors in Baltimore privateers during the War of 1812 (listed in GARITEE, supra note 11, at 265-70), six were "probable shareholders, agents, or suppliers" of the abusive privateers of the Latin American revolutions, id. at 225, another was a surety for a defendant in a U.S. piracy prosecution against a Latin American raider, id. at 228, and another refused to testify on the matter against his fellow merchants, id. at 226. Of course, it is possible that others were involved but not found out. As many as 3,500 American seamen participated in the privateering of the Latin American revolutions. CHARLES CARROLL GRIFFIN, THE UNITED STATES AND THE DISRUPTION OF THE SPANISH EMPIRE, 1810-1822: A STUDY OF THE RELATIONS OF THE UNITED STATES WITH SPAIN AND WITH THE REBEL SPANISH COLONIES 102 (1937). Considering that ordinary commercial employment was much reduced for Baltimore seamen during the War of 1812, it is likely that many of these men were on privateers at that time. On how the Latin American-commissioned privateers attacked ships of almost any country, see id. at 103.
279. 30 ANNALS OF CONG. 732 (1817) (statement of Rep. Randolph); see also GARITEE, supra note 11, at 224.
who authored very few opinions for the Supreme Court. But this tells us little about whether he administered prize law competently and impartially. More relevant is the fact that, for nine years (1802-1811) prior to his appointment as a Justice, he served as Comptroller of the U.S. Treasury, running the Department’s Washington office and supervising the customs collectors in the various ports, often construing federal maritime legislation. He stuck to this post despite an offer in 1806 to be Chancellor of Maryland. This is consistent with a commitment to national policy over provincial interests.

3. Licensing, Bonds, and Sureties

To avoid prosecution for piracy, a privateer needed a commission. The state’s power over commissions was a significant, if limited, instrument of accountability. During the eighteenth century, commissions had been easy to obtain from the British Empire. That was because Parliament in 1708, in a move to stop officials from demanding favors, ordered that a commission be granted to anyone who gave the required bond. Later concluding that this utter lack of discretion promoted abuse, Parliament in 1759 made the issuance discretionary for small vessels, which were thought to commit more violations. Congress in 1812 authorized the Executive to issue commissions to those who gave bond, with sureties, that they would obey regulations and pay lawful damage claims; bonds were five or ten thousand dollars, depending on the size of the crew. (In fact, privateers invariably selected crews that required the lower amount.) The statute allowed the Executive to revoke commissions “at pleasure,” suggesting the power to refuse issuance in the first place. The officers responsible for granting commissions were the collectors of customs in the various ports. They discriminated according to the solvency of the sureties, but apparently not in any other way, such as the “good character” of the own-

282. WHITE, supra note 15, at 323.
283. On the other hand, Houston at one point dismissed a libel against a privateer and was affirmed by a circuit court composed of himself and Duvall, The Anna Maria, 15 U.S. (2 Wheat.) 327, 329-30 (1817) (describing the unreported decisions of the district court and circuit court), but then was reversed (without dissent or recusal) by the Supreme Court, which, per Chief Justice Marshall, referred to the privateer’s treatment of the detained vessel as a “wanton marine trespass,” id. at 334.
284. SWANSON, supra note 11, at 34-35.
287. GARITEE, supra note 11, at 91-92.
288. § 1, 2 Stat. at 759.
ers or captain, or the like.\textsuperscript{289} Even if there had been a “good character” requirement, it might have done little good, since several leading merchants who doubled as civic leaders still became involved with privateers that committed serious violations, particularly in the Latin American revolutions.\textsuperscript{290}

A commission might be revoked ex post, by the Executive or by a prize court, for gross misconduct.\textsuperscript{291} The Executive did revoke the commission of the Baltimore privateer who burned and plundered houses in the Bahamas, perhaps in part due to a threat of British retaliation. (However, when the owners—who included the plundering captain—asked for a second commission, they got it, though the former captain, while still an owner, was no longer in command of the ship.)\textsuperscript{292} Perhaps most importantly, the commissions for a whole class of vessels might be revoked if they caused problems as a group. About two-thirds of the way through the war, the Secretary of State revoked the commission for every vessel with a crew under twenty,\textsuperscript{293} suggesting that small vessels had done something to confirm their reputation for abuse.

Finally, the size of the bond was significant in that, if privateersmen accosted a merchantman unlawfully (without intending to bring it in for adjudication) and did so entirely for their own profit (not intending to let the owners share in anything they took from the ship), the owners’ liability was capped at the sum of the bond and the privateer vessel’s value, which sum might not cover the loss of a full-fledged merchant ship, much less the entirety of a valuable cargo.\textsuperscript{294}

4. The Problem of Monitoring

The prize court, no matter how conscientious, mattered not at all if a cruiser committed depredations but never came (or was never brought) before it. Although the captor had some incentive to bring the prize ship to court in order to clear title so it could be sold at full value, fungible cargo—which could be more valuable than the ship—might easily be sold

\textsuperscript{289} See GARITEE, supra note 11, at 92 (referring to discrimination on the basis of solvency but not otherwise).

\textsuperscript{290} See supra text accompanying notes 278-279.

\textsuperscript{291} On courts, see Story, 1817 Commentary, supra note 16, at 9.

\textsuperscript{292} GARITEE, supra note 11, at 92-93.

\textsuperscript{293} Events of the War: Miscellaneous, 5 NILES WKLY. REG. 423, 423-24 (1814).

\textsuperscript{294} On the liability cap, see Dias v. The Revenge, 7 F. Cas. 637, 640-42 (C.C. D. Pa. 1814) (No. 3877). The required bond was $5000 for a privateer with a crew up to 150 and $10,000 for a privateer with a larger crew. In Baltimore, at least, privateers invariably refrained from having crews over 150, thereby keeping the required bond at $5000. GARITEE, supra note 11, at 91. As for the value of captured ships and cargo, consider a few examples. The average full-size merchant ship in this period was 250 tons. ALBION & POPE, supra note 11, at 19. The Braganza, a prize of 400 tons (60% larger than the average), was sold at auction in 1812 for about $10,000 and its cargo for about $60,000. GARITEE, supra note 11, at 176, 178. Garitee also mentions captured vessels being sold in the United States during the War of 1812 for as little as $600 and as much as about $27,000. Id. at 180.
at full value without condemnation.\footnote{PETRIE, supra note 15, at 143-45. On the possibility of cargo more valuable than the ship, see supra note 294.} The regulation of privateers was "inevitably limited by the problems of detecting offences committed at sea."\footnote{STARKEY, supra note 11, at 27.} Britain’s large navy gave it some advantage on this score, for public ships might act as a kind of police force, apprehending privateers against whom complaints were lodged or conducting random stops at sea,\footnote{Id.} perhaps to check the journal of activities that all British privateers had been required to keep since 1739.\footnote{SWANSON, supra note 11, at 32-33.} Congress in 1812 likewise ordered all privateer captains to keep an accurate journal, under penalty of a thousand-dollar fine and revocation of the commission, in the hope of solving this monitoring problem.\footnote{An Act concerning Letters of Marque, Prizes, and Prize Goods, ch. 107, §§ 10-12, 2 Stat. 759, 761-62 (1812); see also STIVERS, supra note 11, at 121.} Still, even in the case of Britain, with its enormous navy, the efficacy of regulation had to remain "uncertain, for those who were successful in bending or breaking the rules left little trace of their extra-legal activity."\footnote{STARKEY, supra note 11, at 31.} This was only more so in the case of the United States, which possessed a "sea police" that was a small fraction of the size of Britain’s yet still had hundreds of privateers to watch. Thus, it was perpetually uncertain whether the regulatory system was working. Even Garitee’s conclusion that Baltimore privateering was mild during the War of 1812 must be read with the proviso that many depredations may never have been recorded in the archives that he searched. While one possible response to the increased regulatory efforts of the federal courts was to comply with the law, another was to invest more in avoiding detection.

**IV. THE MORAL AND POLITICAL DEBATE OVER PRIVATEERING, 1815-1860**

In the mid-nineteenth century, nearly all the European powers renounced privateering, but the United States retained the right. The position of the U.S. government and the attitudes of the American public during this period involved the mixture of several different, and at times contradictory, ideologies.

**A. The Critique of Commerce Raiding in General**

One cannot understand the debate over privately conducted commerce raiding without first appreciating the broader debate over commerce raiding in general. Though people had complained about commerce raiding
for centuries, the nineteenth century witnessed the rise to dominance of three intertwined lines of thought that gave special force to the critique. The first was liberalism, which posited a private sphere in which individuals might pursue their own ends, unmolested by public authority. That two public authorities went to war with each other provided no excuse to invade the private sphere. An individual’s property rights should not be violated, regardless of whether the violator was another person, the state in which the right-holder lived, or an opposing state. John Quincy Adams considered it “unjust . . . that any private property of individuals should ever be destroyed or impaired by national authority for national quarrels.” It was “unjust and disgraceful,” proclaimed the Unitarian reformer John Gallison, invoking Locke’s labor theory of value, “to gather by violence the fruits of another’s industry.”

The second line of thought was market utilitarianism. The mercantilist ideology of the seventeenth and eighteenth centuries had envisioned rival empires competing against each other through war and protectionist regulation to win the biggest slice of a fixed economic pie—an outlook that fit hand-in-glove with commerce raiding. According to utilitarianism, however, barriers to trade, whether caused by war or regulation, ought to be reduced, enlarging markets and thereby making them more efficient, increasing the wealth of all. From this perspective, imperial rivalry and war did nothing but divide markets and misallocate resources. Taken to its logical culmination, this ideology rejected not merely commerce raiding but economic warfare more generally (including blockades) or, for that matter, warfare itself, so long as it directed resources out of the market and into states. Indeed, there was much overlap between free trade and pacifism. Peace allowed people to enter exchange relations, which fostered benign and mutually enriching connections between them, which in turn provided a further guarantee of peace. As Gallison wrote in a petition

301. BOURGUIGNON, SCOTT, supra note 15, at 173.
302. See generally STARK, supra note 12, at 13-45; O’Malley, supra note 12, at 256-57.
303. Letter from John Quincy Adams, Sec’y of State, to Richard Rush, Minister in Great Britain (July 28, 1823), in 1 CARLTON SAVAGE, POLICY OF THE UNITED STATES TOWARD MARITIME COMMERCE IN WAR 303, 309 (1934) (emphasis omitted).
304. John Gallison, Privateering, 11 NORTH AM. REV. 166, 190 (1820). Gallison refers here to privateering, not commerce raiding generally, but he did wish to abolish commerce raiding more generally, see id. at 193, and his reasoning clearly applies to the broader practice, as well as the narrower. On Gallison’s authorship of the article (which is unsigned), see WILLIAM CUSHING, INDEX TO THE NORTH AMERICAN REVIEW, VOLUMES I-CXXV, 1815-1877, at 89 (Cambridge, John Wilson & Son 1878).
305. SWANSON, supra note 11, at 16-21.
306. SEMMEL, supra note 12, at 51-56, 68-74. On the rise of free-trade ideology to dominance among British intellectuals from the 1700s to the 1820s, see DOUGLAS A. IRWIN, AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE 75-98 (1996). Consider that Gallison, one of the most articulate early American critics of commerce raiding, was also a member of the peace movement, rejecting all wars of aggression. JOHN GALLISON, ADDRESS, DELIVERED AT THE FOURTH ANNIVERSARY OF THE MASSACHUSETTS PEACE SOCIETY, DECEMBER 25TH, 1819, at 13-14, 17 (Cam-
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criticizing commerce raiding—signed by the moral philosopher William E. Channing and the famous lawyer Daniel Webster (at this point Webster was still a free-trader)—"Commerce is in the interest of the world; it connects distant regions, multiplies and distributes the fruits of every climate, and makes every country a sharer in the natural, intellectual, and moral wealth, of all others."³⁰⁷

The third line of thought was religious. The early nineteenth century saw economic growth without precedent, not to mention the return of lasting international peace in 1815 after more than a century of frequent warfare between the North Atlantic powers. To many people, it appeared that the millennium was gradually arriving. This notion drew upon and reinforced a change in the view of the human condition. In previous centuries, Protestant theology had been dominated by original sin—the notion that human beings were inherently estranged from God—which, from a cosmic perspective, made all kinds of suffering seem justifiable and inevitable. By the early nineteenth century, belief in original sin was receding, giving credence to the notion that human beings could (indeed must) reform the uncivilized and imperfect aspects of their institutions and behavior. The exact institutions or behaviors most capable or needful of reform varied depending on the beholder; they might include the slave trade (or even slavery itself), sanguinary punishments, dueling, alcoholism, or war.³⁰⁸ In this conception, commerce raiding—a mode of warfare viewed as particularly inhumane because it victimized non-combatants—was on the wrong side of history.³⁰⁹ "History," attested Adams, showed "that the influence of Christianity has been marked in a signal manner by the gradual establishment of rules in the hostile conflicts of nations tending to assuage the evils of war." According to Adams, any nation that renounced the slave trade—as had Britain in 1807 and the United States in 1808—should also renounce commerce raiding.³¹⁰


³⁰⁹E.g., Gallison, supra note 304, at 190 (stating that commerce raiding wears “the cloak” of “law and custom” and that it has been “handed down from age to age” but is still “founded in violence, and only one of the few remains [i.e., remainders] of the right of the strongest”).

³¹⁰Letter from John Quincy Adams, Sec’y of State, to Richard Rush, Minister in Great Britain,
With all these lines of thought "in the zeitgeist," as it were, the U.S. government in the 1820s seriously aspired to end commerce raiding. The House Committee on Foreign Relations, as part of a larger wish to "confine the immediate injuries of war to those whose sex, and age, and occupation, do not unfit them for the struggle," hoped to ensure "the security of fair and harmless commerce from all attack," achieving "the mitigation of a barbarous code."311 "The statesman who shall induce the nations to... denounce... the right of warfare on private property on the high seas," announced the House Naval Affairs Committee, "will be the greatest benefactor of mankind."312 President Monroe in 1823 spoke of the "amelioration of the condition of the human race which would result from the abolition of private war [that is, war against private victims] on the sea."313 His administration tried to negotiate an agreement to that effect with Britain, France, and Russia,314 but failed.

If the U.S. government could not end all commerce raiding, it could at least mitigate the practice by getting an exemption for vessels of neutral countries, of which the United States itself was traditionally one. "[J]udging from the slow progress of civilization," explained Henry Clay, "it would be too much to indulge any very sanguine hope of a speedy, universal concurrence in a total exemption of all private property from capture," yet "[s]ome Nations may be prepared to admit the limited... principle" that neutral ships be permitted to sail unmolested in wartime, even if they carried enemy cargo.315 Though all private parties of every nation should ideally have their rights respected, one could at least work to ensure (as one official phrased it in later years when discussing a related issue of neutral rights) that "Nations which preserve the relations of peace, should not be injuriously affected in their commercial intercourse by those which choose to involve themselves in war."316 Though its dream of ending all commerce raiding faded temporarily around 1830,317 the U.S. government continued to advocate the second-best solution of expanding neu-
B. The Critique of Privatized Commerce Raiding in Particular

There was something awkward about the U.S. stance against commerce raiding and in favor of neutral rights. Because the country traditionally had a small navy, it necessarily had to practice the guerre de course when it entered a conflict. In other words, the strategy that it was committed to abolishing worldwide was the very strategy on which it relied for its own security. U.S. officials had a way around this problem, however. The only conceivable reason that the nation might enter a maritime war, they argued, was to protect its merchant shipping. Thus, if the world powers renounced commerce raiding, the United States would have no possible reason to go to war (at least on the water), so it would have no need for the guerre de course, or any other strategy. In the meantime, commerce raiding had to be accepted as a necessary evil. But there was still another problem. While the United States waited for other nations to adopt its enlightened attitude toward commerce raiding, the strategy that it kept in reserve in case of war was not merely a guerre de course, but a privatized guerre de course, even though privateers were considered (in some circles) to be the most abusive commerce raiders, victimizing non-combatants and especially neutrals more frequently and flagrantly than did public cruisers, making themselves the bête noire of the very interests which the U.S. government professed to champion.

This negative view of privateers was shared by some contemporary Americans. Of course, privateering had been widely criticized for hundreds of years before the nineteenth century. The criticism is not surprising, given that European empires as late as the 1710s had licensed “professional pirates” to raid commerce on their behalf. By 1812, however, privateers were owned by merchants and manned by merchant seamen. Scott, Story, and their colleagues were more conscientious regulators than those who came before them. Yet some of their fellow citizens insisted that the regulation of privateers had failed—indeed, that it could not be made to work. Gallison, who, as stated above, wanted to ban commerce raiding altogether, considered it particularly urgent to end privatized commerce raiding, as this was the worst manifestation of the practice. Privateering, he declared, was “inseparable from abuse and licentiousness” and “little under the control of wholesome laws,” ever exciting the “ill

318. Id. at 70 (noting Marcy’s statement that this had always been U.S. policy).
319. See, e.g., the authorities quoted in Gallison, supra note 304, at 180, 184-86.
320. PARES, supra note 15, at 42-43; see also DE MARTENS, supra note 63, at 28-30. On the close relationship between privateering and piracy, see A.T. MAHAN, The Hague Conference: The Question of Immunity for Belligerent Merchant Shipping (1907), in Some Neglected Aspects of War 157, 158-60 (1907); and THOMSON, supra note 8, at 54.
Although "[m]any of the evils connected with privateering are equally to be feared from public [naval] captures," privateering was still worse, since "[p]owers, in their nature oppressive, ought not to be committed to instruments so certain to make them more odious by abuse." While he conceded there was no distinction "in principle" between privateering and naval commerce raiding, Gallison did emphasize that the structures of accountability differed: for privateers, prize-taking was "the moving cause and chief design of the enterprise," whereas for naval ships it was "but accessory," since "the character and education of the officers" and "the elevated generous feelings they regard as the ornaments of their profession" could probably be trusted to "secure them from the dominion of a sordid avarice." Gallison's assessment of privateers carries extra weight because he was trained in the law by Story, served as a wartime reporter for Story's Circuit decisions, and therefore had first-hand knowledge of Story's regulatory efforts.

The illustrious New York jurist James Kent shared Gallison's view. In his highly acclaimed Commentaries on American Law (1826-1830), Kent noted, in a passage repeatedly quoted on the floor of Congress, that "[p]rivateering, under all the restrictions which have been adopted, is very liable to abuse." Apparently concluding that prize money was not the main motivator of naval cruisers, Kent blasted privateering for having as its object "not fame or chivalric warfare, but plunder and profit." "The discipline of the crews," he added, "is not apt to be of the highest order." Notably, Kent singled out privateering during the Latin American revolutions as especially bad, without mentioning the War of 1812. A similar indictment came from Wheaton, who published his perennially re-issued treatise for the first time in 1836: privateering "has been justly ar-

321. Gallison, supra note 304, at 171, 189.
322. Id. at 193.
324. On Gallison's training under Story, see Channing, supra note 307, at 347. The two volumes of reports of Story's opinions edited by Gallison are 1 Reports of Cases Argued and Determined in the Circuit Court of the United States, for the First Circuit, supra note 255; and 2 Reports of Cases Argued and Determined in the Circuit Court of the United States, for the First Circuit (Boston, Wells & Lilly 1817). In the first volume, Gallison's name appears at the end of the opening "Advertisement," 1 id. at iv, and in the second volume, his name appears on the title page, 2 id. title page. Note that Gallison did not hold the office of reporter from 1812 to 1813, 1 id. at iii (explaining that "[a]ll the cases, which appear in this Volume," that is, cases in the period 1812-13, "were decided before" Gallison "assumed the office of Reporter"), though he did hold the office in 1814 to 1815, 2 id. at viii (explaining that Gallison held the office up to "the period, which closes the present volume," that is, November term 1815).
325. 1 Kent, supra note 146, at 92. Quoted, for example, in Cong. Globe 37th Cong., 3d Sess. 1021 (1863) (statement of Sen. Sumner); id. at 1026 (statement of Sen. Dixon).
326. Id.
327. Id.
328. Id.
raigned as liable to gross abuses.”

The rhetoric of humanitarianism that Adams and Monroe applied to commerce raiding in general, Wheaton used to describe privateering specifically: it was in “glaring contradiction” to “more mitigated modes of warfare” and was “inconsistent with the liberal spirit of the age.”

Aside from the abuses that privateers committed against captives, the practice was also frequently criticized as breeding a class of criminals who had to be re-absorbed into society after hostilities ended. At this time, geographic mobility and urbanization were breaking down the structures of social control in local communities that had characterized the colonial period. Thus, young white men in antebellum America lived under unprecedentedly weak social constraints. Anxiety about the morals of young males was therefore a pressing social issue, especially since the eyes of the world were on the United States to see whether society could remain stable once it became democratic.

Privateers, many feared, were “schools of depravity and licentiousness.” As the people of a little New England town stated in a petition to Congress in 1820: “As in the business of privateering all the odious passions of human nature are licensed—as the youth of our country become associated with desperate and unprincipled men let loose from every moral restraint—what better can reasonably be expected than that many of them will, after the close of the war, follow the trade to which they had been educated?” This concern was not exclusive to provincials. The exact same argument was made by Kent, Gallison, Yale president Theodore D. Woolsey, and the editors of the New York Times.

Although the American public in the wake of the War of 1812 seems to have admired privateers, the conventional wisdom was shifting by mid-century. For many, particularly in polite society, the indictment of commerce raiding as inconsistent with modern humanitarian values applied especially, or even exclusively, to the privatized form of the practice. Queen Victoria herself told her prime minister that “[p]rivateering is a kind of Piracy which disgraces our Civilisation.” The defenders of privateering acknowledged that polite opinion was against them. One Con-
gressman complained of “all this talk about ‘legalized piracy.’”

A veteran U.S. privateer captain wrote a celebratory history of the practice in order to counteract “the odium entertained against privateering by the honest and virtuous part of the world.” When he praised privateersmen’s gallantry and other fine points, a reviewer for the Boston Athenaeum scoffed that the same qualities could sometimes be found in "highwaymen.”

C. The Dilemma of the Declaration of Paris: A Tradeoff Between Humanitarian and Democratic Values

With the legitimacy of privateering thus besieged, events in Europe took a turn that placed the United States in an uncomfortable dilemma. In the Crimean War (1854-1856), Britain and France fought Russia. Traditionally, Britain captured neutral ships and condemned their enemy cargoes but not their neutral cargoes. France let go the neutral ships but, when it captured enemy ships, condemned all their cargo, even if neutral. Now allied for first time in recent memory, the two nations had to choose a uniform policy to coordinate their operations. For several reasons, a neutral-friendly policy seemed the best choice. It would prevent neutral countries from carrying out their threats to violently defend their ships from capture and from aiding Russia. Besides, the capture of neutral vessels on the sea lanes would not be useful to Britain and France against Russia, since their large navies allowed them to blockade Russian ports, so that neutrals would be unable to pick up Russian cargo in the first place. Hence, Britain and France adopted a neutral-friendly policy. They promised, for the duration of the war, not to capture any neutral ship on the sea lanes, even if it carried enemy cargo, and not to condemn neutral cargo found on board a captured enemy ship. This was a major expansion of neutral rights. Yet all neutral rights, however liberal in the abstract, could become precarious in practice when privateers were at sea. The renunciation of privateering, then, would further ingratiate Britain and France to the neutrals. Strategically, it was not a large concession, for privateering was more useful to Russia, which was limited by its small navy to the

337. COGGESHALL, supra note 11, at xliiv. On Coggeshall’s experience as a privateer captain, see GARITEE, supra note 11, at 100.
340. Id. at 167, 171.
341. Id. at 167.
342. Id. at 171-72.
guerre de course. If Britain and France renounced privateering, the neutrals could be expected to close their ports to Russian privateers, as well. Thus, to further ensure neutral goodwill, Britain and France promised not to license privateers for the duration of the war. In the war itself, all these policies succeeded. Russia lost.

At the Paris peace conference in 1856, the neutrals naturally wanted to make the concessions permanent. Britain was willing to give up the right to capture enemy goods on board neutral ships (this right of capture, given Britain's large navy, could be an advantage) in exchange for a permanent ban on privateering (privateering could never be a net advantage to Britain, since its navy oriented it toward the guerre d'escadre, while its large merchant marine was vulnerable to privateers). France, having acquired the world's second-largest navy, was in a position similar to Britain: privateers would be of no use to it against any nation (except Britain). Actuated by this and other factors, and by the desire to win international prestige for a leap forward in humanitarian reform, the French diplomats agreed. The Declaration of Paris made the wartime concessions permanent in any future conflict between the signatories, who, by 1858, included almost all the nations of Europe and Latin America. (The most prominent hold-outs, besides the United States, were Spain, which held out till 1908, and Mexico, till 1909.) It exempted neutral ships from commerce raiding and guaranteed that exemption with a prophylactic rule banning privateering completely.

Would the United States sign the Declaration? On the one hand, the treaty implemented an expansion of neutral rights which the U.S. government had long advocated. On the other, these rights could be purchased only at the price of giving up privateering. Because Britain agreed to expand neutral rights only on condition that privateering be abolished, the two provisions could not be severed. Indeed, the linking of the two provisions was a coup for Britain and constituted a major reason for Britain's accession to the Declaration, since the United States had in 1854 revived its second-best solution to the commerce-raiding problem, i.e., to ban...
the capture of enemy goods on neutral ships, but without abolition of privateering.\textsuperscript{353} With the privateering ban added, the expansion of neutral rights that Americans sought was now tainted by a potential blow to their security.

If the United States renounced privateering, argued Secretary of State William L. Marcy, it would be forced either (1) to relinquish its main war strategy, thus leaving its large merchant marine dangerously vulnerable, or (2) to replace that strategy with one dependent on a large public navy.\textsuperscript{354} The first alternative was obviously unacceptable. But the second seemed just as bad—a view that requires some explanation.

According to the Jeffersonian ideology that dominated U.S. foreign policy for most of the nineteenth century, republican government was precious and fragile, and perhaps nothing was more likely to shatter it than militarism. Frequent wars and the large permanent military forces that they demanded threatened to corrode the republic in several ways: they spawned a quasi-aristocratic officer class dangerously removed from civil society; expanded and strengthened the executive at the expense of the legislature, and the federal government at the expense of the states; and raised the tax burden on virtuous farmers in the heartland while benefiting Eastern elites who financed the war debt and (later in the century) giant industrial firms who sold warships, artillery, and other weapons.\textsuperscript{355} A big standing army was especially dangerous, since it could potentially be used directly against the American populace. Only the militia—a citizen army founded on local organization that emerged from civil society when war began and melted back into it when peace returned—could be trusted to protect the interests of the people and not the government.\textsuperscript{356} Some argued that a big permanent navy was not as dangerous as a standing army, since it could not be used directly against the domestic population.\textsuperscript{357} But this point did nothing to answer the fears about taxes and debt, nor did it fully address concerns about federal and executive aggrandizement.\textsuperscript{358} Moreover, as Jeffersonians well knew, there were several ways in which a navy could be more dangerous to the republic than an army. It was more likely than an army to interact with foreigners at global hot-spots and in-

\begin{footnotes}
\item[353.] Malkin, \textit{supra} note 12, at 20-25, 37-41.
\item[354.] Marcy, \textit{supra} note 316, at 388-89.
\item[355.] \textsc{Walter Russell Mead}, \textsc{Special Providence: American Foreign Policy and How It Changed the World} 182-94 (2002).
\item[357.] Symonds, \textit{supra} note 90, at 18.
\item[358.] \textit{See, e.g., Cong. Globe}, 34th Cong., 1st Sess., Appx., 898-99 (1856) (statement of Rep. Davis) (predicting that a large navy would create a “national debt,” resulting in the “dismemberment of the Republic,” and concentrate too much power in the hands of military officers, the only members of the government wielding “anything like permanent power and authority,” besides judges).
\end{footnotes}
volve the nation in faraway wars.\textsuperscript{359} More broadly, its existence was an invitation for the United States to engage actively in the global imperial rivalries of the European powers—a game that a republic could never truly win, for it would either find itself subjugated, manipulated, or used as a pawn, ruining its chances at self-determination;\textsuperscript{360} or it would “win” by acquiring overseas colonies, in the process becoming an imperial oppressor itself.\textsuperscript{361} (The U.S. government had briefly attempted to build a capital-ship navy starting near the end of the War of 1812, but the project fizzled by the 1820s because the reigning ideology was against it.\textsuperscript{362})

The echo of these fears can be heard in Marcy’s rejection of the Declaration of Paris. He considered “powerful navies,” like “large standing armies,” to be “detrimental to national prosperity and dangerous to civil liberty.” “A large force ever ready to be devoted to the purposes of war,” he explained, “is a temptation to rush into it.” When faced with a conflict, he continued, the American people were “content... to rely, in military operations on land, mainly upon volunteer troops [i.e., the militia], and for the protection of their commerce... upon their mercantile marine,” in the form of privateers.\textsuperscript{363} Accordingly, the United States was no more willing to give up its privateers at sea than its militia on land.\textsuperscript{364} Privateers, insisted one Congressman, made up “the only legitimate marine defense that can to any very considerable extent be recognized by a republican Government.”\textsuperscript{365} He went so far as to label privateers “our marine militia.”\textsuperscript{366}

In truth, therefore, the U.S. government rejected the Declaration because it judged the cost of giving up its “militia mentality” to be greater than the benefit of whatever protection the treaty might provide for neutral rights. Indeed, asserted Marcy, the benefits for neutrals of the abolition of privateering were nearly zero. He conceded, in a dismissive tone, “that annoyances to neutral commerce, and even abuses, have occasionally resulted

\begin{itemize}
  \item \textsuperscript{359} MEAD, supra note 355, at 195-96.
  \item \textsuperscript{360} SYMONDS, supra note 90, at 12-14, 233-35 (describing early-nineteenth-century antinavalists’ fears of entanglement in the rivalries, intrigues, and wars of imperial Europe); GEORGE WASHINGTON, Farewell Address (Sept. 19, 1796), in GEORGE WASHINGTON: WRITINGS 962, 974 (John Rhodehamel ed., 1997) (”Against the insidious wiles of foreign influence, ... the jealousy of a free people ought to be constantly awake; since history and experience prove that foreign influence is one of the most baneful foes of Republican Government.”).
  \item \textsuperscript{361} MEAD, supra note 355, at 193.
  \item \textsuperscript{362} SYMONDS, supra note 90, at 171-237; see also SPROUT & SPROUT, supra note 14, at 141-50 (recounting a cruiser construction program in 1854-58). It should also be noted that Jeffersonian ideology in some of its forms approved the military acquisition of a continental empire, by wars against Latin Americans and Native Americans. MEAD, supra note 355, at 184. But there was much more universal hostility to U.S. expansion that might involve direct action against the European global empires, which is the only type that would require a navy.
  \item \textsuperscript{363} Marcy, supra note 316, at 388.
  \item \textsuperscript{364} Id.; Message of President Pierce to Congress (Dec. 4, 1854), in 1 SAVAGE, supra note 303, at 378, 380.
  \item \textsuperscript{365} CONG. GLOBE 34th Cong., 1st Sess., Appx., 898 (1856) (statement of Rep. Davis).
  \item \textsuperscript{366} Id. at 902 (1856) (statement of Rep. Davis).
\end{itemize}
from the practice of privateering; such was the case formerly, more than in recent times." \footnote{Marcy, supra note 316, at 385.} Further, he derided as a "pretense," "not well sustained by modern experience," the notion that "ships not belonging permanently to a regular navy are more likely to disregard the rights of neutrals than those which do belong to such a navy." To support this point, he noted that naval crews received prize money just like privateers, ignoring the competing structures of accountability imposed on the former. \footnote{Id. at 387.}

Marcy's rosy assessment of privateering raised several questions. If privateers truly were no more dangerous to neutrals than naval ships, why did Britain and France offer to ban privateering as consideration for neutral goodwill? Why did the neutrals accept the deal to ban all privateers from their ports? And why did the neutrals insist at the peace conference on making the ban permanent? Obviously, neutrals believed the regulatory system for privateers, as compared with that of navy ships, failed to protect them. Had Marcy acknowledged this fact even as he clung to privateering so that his country could keep its navy small, he might have looked retrograde. To avoid this, he shifted the debate to a question on which the United States held the moral high ground. \footnote{Stark says that Marcy's argument "took the United States out of the unpleasant position of appearing to obstruct progress, and enabled it, instead of being left an unwilling straggler, to pose as the leader of the van." Stark, supra note 12, at 148. Stark fails to recognize how Marcy's shift in focus allowed him to dodge an explicit discussion of whether privateering was effectively regulated. Indeed, Stark says that the aim of the privateering ban to protect neutrals was "open to the criticism" that it was an argument "from the abuse of a thing against its use, and that what privateering really needed was not abolition, but regulation." Id. Stark ignores the fact that abolition may be appropriate if regulation has consistently failed.} This question was whether to ban commerce raiding altogether. In the 1820s, the United States, as we have seen, made a radical proposal to do so, only to be rebuffed by the Europeans. With the blessing of President Pierce, Marcy now revived that proposal. Rather than admit what he knew to be true, that the ban on privateers was meant to prevent their illegal acts against neutrals, Marcy asserted (falsely) that it was "fair to presume" that "the chief inducement" that led the Europeans to ban privateering was "the strong desire to ameliorate the severe usages of war by exempting private property upon the ocean from hostile seizure." \footnote{Marcy, supra note 316, at 385-86.} If that was the goal, said Marcy, then the United States was happy to oblige. It would join an agreement to ban commerce raiding altogether. \footnote{Id. at 386.} Having imputed America's radical goal to a group of European nations that did not all share it, Marcy then faulted them for choosing means that did not meet the goal. The ban on privateers went "but little way in carrying out that principle." For commerce raiding to be stopped, it was necessary that "private property should not be seized
or molested by national ships of war," either.\textsuperscript{372} The conceit was that the United States was rejecting the Declaration because it did not go far enough in the cause of humanitarianism.

Marcy’s proposal was not solely a rhetorical dodge. It had a chance of being implemented. An absolute ban on commerce raiding had the support of most of the press in continental Europe and half the press in Britain.\textsuperscript{373} Richard Cobden, Britain’s renowned apostle of free trade, proclaimed that “‘the proposal of the American government carries out my wishes completely.’”\textsuperscript{374} Even the British prime minister Lord Palmerston (no pacifist) briefly entertained the idea of supporting the change.\textsuperscript{375} Had it succeeded (which it ultimately did not), the proposal to ban commerce raiding would have been the ultimate coup for the United States, for it would have relieved the Americans of the hard choice between giving up their tradition of a small military and relying on a privatized fighting force maligned for its abuses.

Though Marcy’s argument was not frivolous, it was, as a response to the accusations against privateering, a distracting non sequitur. Marcy focused on the need to exclude nonstate victims from war. He made the fair point that the humanity or inhumanity of a mode of warfare ought to be judged by its effect on victims. Rhetorically, however, his focus on the formally permissible range of victims allowed him to distract attention from the functional question of whether nonstate actors, for reasons of institutional design rather than abstract powers and restrictions, actually committed more abuses. It was a trick long employed by Americans when discussing privateering. “‘What difference to the sufferer is it,’” asked Thomas Jefferson in 1812, “‘that his property is taken by a national or private armed vessel?’”\textsuperscript{376} A few years before the Declaration, James Buchanan, then U.S. ambassador to Britain, had told Marcy there was “no difference ‘in principle or morality’ between the act of a regular naval vessel and that of privateer ‘in robbing a merchant vessel upon the ocean.’”\textsuperscript{377}

If this was true, then the Declaration was simply a pernicious invitation to the United States to give up its private means of commerce raiding while the European naval powers retained their public means of doing the same thing. It was an invitation to unilateral disarmament.\textsuperscript{378} To illustrate this point, U.S. Senator Jacob Collamer played-acted the role of a minister of state from a European naval power, saying, “[A]s to you Americans,
who do not have and cannot have, according to the policy and theory of your Government, very large navies, [maritime] property shall have an immunity as it affects you,” since the Declaration denied the sole means of commerce raiding available to Americans, i.e., privateering. “[B]ut we,” continued Collamer in his European voice, “shall have the whole of it to the benefit of our great navy and our national treasury, and you shall have nothing to do with it.” And if “you presume to pursue” commerce raiding by means different from what is acceptable in Europe, “you shall be branded . . . as standing against the progress of civilization.”

Put this way, the ban on privateering seemed manifestly unfair.

Overall, then, Americans generally refused to give up the republican limits on their public military, which limits created the need for a large privatized auxiliary in wartime. Further, Americans often claimed, like Marcy and Collamer, that a privatized military caused no more unintended harm than a European-style public one. By this reasoning, there was no tradeoff between privatization and humanitarianism. Other Americans, however, did acknowledge a tradeoff, even if they still believed that privatization’s republican benefits offset its humanitarian liabilities. The New Englander and Yale Review, for example, rejected Marcy’s argument that the award of prize money to naval personnel meant that they behaved no differently from privateers: “there are causes which secure the officers and men in the public service from the demoralizing influences which must act on the captains and crews of privateers.”

Further, to say that privateers were “no more apt than a regular navy to disregard neutral rights” was empirically false—a fact of which Marcy was “perfectly aware.” Having rejected almost all of Marcy’s reasoning, the New Englander at last conceded that the Declaration still had to be rejected, for the “main reason” that the “United States cannot consent to maintain a large navy. It is expensive, and ‘a menace to peace among the nations.’”

Likewise, the New York Times candidly admitted that the question of whether to ban privateering presented “the difficulty of reconciling a decent deference to the apparent demands of civilization with a proper regard for our own interests.” The European objection to privateers, as the Times recognized, was that they were “not subject to the same discipline, nor under the same responsibility, nor amenable to the same code of honor, as vessels belonging to the national force.” The Times laughed at the notion of some U.S. officials that privateers were no different from the militia. “The militia,” explained the editors, “is under the orders of a gen-

380. Recent Aspects of International Law, 14 NEW ENGLANDER & YALE REV. 560, 568-69 (1856).
381. Id.
382. Id. at 569.
eral appointed by [the] government; executes operations determined upon by the government, in the way the government directs, and the nation is just as accountable for its acts as if it were the line itself.” What is more, privateering was sure to confuse the participants’ “notions of right and wrong, and stimulate greed and rapacity and gambling. Nothing is more apt to demoralize a whole population than long and successful privateering.” Despite all this, the Times ultimately concluded that “we certainly cannot safely relinquish” privateering without “substituting a large navy,” which the Times apparently did not think was going to happen in the foreseeable future. The implication of the arguments in the New Englander and the Times was that a regulated military force that struck only its intended targets in the intended way was the luxury of a strong state dedicated to militarism—something incompatible with American democracy. Still, the Times held out hope that the United States might, in a future war, “do something to make our privateers in reality the militia of the seas,”383 i.e., to absorb the nation’s civilian maritime capital and labor temporarily into the military while keeping them under firm direction.

V. COMBAT FOR PROFIT IN THE CIVIL WAR

A. The Union Blockade and the Emergent Perversity of Naval Prize Money

As we have seen, the United States traditionally thought of itself as a relatively weak naval power and relied on the guerre de course. Its navy consisted of a small group of cruisers to be supplemented by privateers in wartime. But in 1861, the U.S. government confronted, in the Confederacy, a naval opponent even weaker than itself, one whose ports were vulnerable to blockade—a golden opportunity for the Union, since the South had little domestic industry and had to export cotton and import munitions to keep fighting. 384

Yet the small cruiser force that constituted the U.S. Navy in 1861 was not big enough to blockade the Confederacy’s 3,000-mile coastline. To solve this problem, the Union massively expanded its publicly owned force. It built approximately two-hundred vessels and purchased another five-hundred preexisting ones from the private sector, also renting a few at a daily rate. 385 The program was made possible by the Union’s expansion of government finance, through small war bonds and new forms of taxa-

384. SPROUT & SPROUT, supra note 14, at 150-55.
385. ALBION & POPE, supra note 11, at 149 (hiring); DAVIS, supra note 14, at 11 n.* (purchase and construction).
tion, to a scale unprecedented in the nation’s history. Its success—historians believe the blockade was important to the Union victory—belied the notion that a large public navy was somehow inherently incompatible with U.S. institutions or political culture. Still, the political will for such a radical departure arose solely from the need to save the country from dismemberment. At the end of the war, the United States returned as quickly as possible to its usual peacetime arrangement, selling or scrapping more than two-thirds of the Navy, reverting to the guerre de course.

Why did the Union conduct the blockade using a big (albeit short-lived) publicly owned force, rather than rely on privateers? It was not for lack of prizes. On the contrary, there were prizes aplenty, in the form of merchantmen caught attempting to run the blockade. Other factors, however, rendered privateering incompatible with blockade duty, both in maritime war generally and the Civil War in particular. For one thing, the ships conducting a blockade were charged with collectively minimizing the commerce going in and out of the port. In contrast to solo commerce-raiding missions, this demanded tight coordination and a division of labor. At Wilmington, North Carolina, the most important Confederate port, the blockade reached its highest level of sophistication:

[The blockade] comprised four seaward lines of cruisers. Just off the bars and as close to shore as possible lay the first line, called the bar tenders. These vessels watched the bar and gave a signal if a blockade runner attempted to escape. The bar tenders did not chase. Chasing was the function of a second line of vessels, which supported the bar tenders and moved back and forth like sentries. The divisional officers, in fast gunboats, supported this second line. Beyond these three lines lay the outside blockaders, usually the fastest in the squadron, who cruised on the outside tracks of the blockade runners.

These elaborate arrangements were determined and constantly adjusted in light of changes in weather and visibility, fluctuations in the strength of the blockading fleet, the capabilities of shore artillery, and visits from enemy warships. It was impossible to achieve the necessary coordination unless all the ships followed orders, even when they were assigned to positions that resulted in fewer captures. Hence it was best to take all of

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387. ALBION & POPE, supra note 11, at 149, 155; SPROUT & SPROUT, supra note 14, at 164.
388. SPROUT & SPROUT, supra note 14, at 165-66.
389. BROWNING, supra note 13, at 220.
390. Id. at 242; on the relative level of sophistication see id. at 229-30.
391. See generally id. at 222-48. For further examples of coordination among blockading ships, see ROBERT M. BROWNING, JR., SUCCESS IS ALL THAT WAS EXPECTED: THE SOUTH ATLANTIC BLOCKADING SQUADRON DURING THE CIVIL WAR 76, 108-09, 288-90, 317-21 (2002).
them into the direct employment of the military, with its thick web of accountability mechanisms, including promotion, honor, and effective courts-martial.

Another reason that privateers did not perform blockade duty was simple danger. If a privateer encountered an enemy warship during a commerce-raiding mission, it could run away in search of easier prey, but if enemy warships suddenly arrived at a port to break a blockade, the squadron had to stand and fight. Blockade duty became increasingly dangerous during the Civil War as the Confederacy gradually acquired a small navy. When an apparent blockade runner came to the port, Union blockaders did not know at first whether it might in fact be a warship.

While privateers played no role in the Union blockade, prize money did: the officers and crew of a naval ship were entitled to the value of captured blockade runners under the same statutory scheme that had granted them rights to their raiding victims in the War of 1812. Yet while the incentive structure of prize money was fairly compatible with the Navy’s mission in 1812 to raid commerce, it was far less compatible with its mission in 1861 to blockade the South.

To be sure, prize money gave naval ships an incentive to chase down blockade runners. But as noted above, a blockade was supposed to be a centrally controlled operation involving numerous ships, each doing its assigned part. Aware of this, the British courts in the early nineteenth century had at times recognized all ships in a blockading force as collectively responsible for a capture and therefore deserving to share in the proceeds, as in The Guilliaume Tell (1808), where the “whole fleet were acting with one common consent, upon a preconcerted plan, for the capture of this [particular] prize.” However, the British courts were never entirely comfortable with this doctrine, and it never became firmly established. For its part, the U.S. Congress in 1800 had adopted a narrow rule, dividing the prize among the vessels “in sight” of the capture, later modified in 1862 to those “within signal distance,” and in 1864 to those “within signal distance” and “able to render effective aid” to the capture itself at the time it occurred. All of these formulations had the effect of excluding many
of the ships blockading the port, even though it was the positioning and action of all the ships that really determined the blockade runner’s actions and its chances of capture. In several cases, men on ships that took part in a blockade but happened not to fall within the statute’s literal terms argued that they still deserved shares, drawing in part on cases like The Guillaume Tell. But federal judges in New York and Boston, while acknowledging that blockade was the “closest association known to the English [prize] law” on which U.S. law was based, refused to ignore the plain text of the federal statutes. However, the Boston judge did acknowledge that his counterpart in Louisiana had, in an unreported decision, distributed the prize to the “whole fleet,” by reason of—as the Boston judge phrased it—the “apparent and attractive equity” of a more inclusive rule.

Contemporaries’ frustration at the narrowness of prize eligibility was understandable. A U.S. sailor’s chance at prize money depended enormously on whether he happened to be assigned to one of the faster or slower ships in the squadron, and presumably on the tasks that ship was ordered to undertake within the blockade framework. Of course, similar inequities existed in commerce raiding: cruisers varied in speed, and the broad geographic areas to which they might be assigned varied in the availability of potential victims. Yet the distribution of chances was especially arbitrary in the case of blockade, where the ships had so little autonomy. Further, blockade rendered the inequity more salient, since men who enjoyed few opportunities cooperated day-to-day, for years on end, with those who enjoyed many. Thus, in 1882, Navy Secretary William H. Hunt forwarded to Congress an unsigned memorandum written by an “eminent and experienced officer” urging that prize money be abolished, or at least distributed among the entire squadron (much as the Civil War litigants argued), since “the operation of prize-laws is very unequal, and is in no wise dependent upon the skill and energy of the officers and men concerned, but rather upon the speed and other qualities of the vessel to which they may happen to be attached, and upon the character of the service to which she may be deemed best adapted.” The memo urged the abolition or

other Purposes, ch. 174, § 10, 13 Stat. 306, 309 (1864). The 1800 statute said the eligible vessels’ respective shares were to be determined “according to the number of men and guns on board each ship.” 2 Stat. at 53; see also The Despatch, 7 F. Cas. 536 (C.C.D. Mass. 1813) (No. 3823) (Story, J.). The 1862 and 1864 statutes (apart from certain fixed percentages to top officers) distributed the proceeds among all the men of all the eligible vessels in proportion to their ordinary rates of pay. § 3, 12 Stat. at 606 (1862); § 10, 13 Stat. at 309-10 (1864); see also Langley, supra note 18, at 27.

398. The Selma, 21 F. Cas. 1045, 1046 (D. Mass. 1865) (No. 12,647); see also The Anglia, 1 F. Cas. 916, 918 (S.D.N.Y. 1863) (No. 391); The Cherokee, 5 F. Cas. at 556-57;

399. The Selma, 21 F. Cas. at 1047.

400. BROWNING, supra note 13, at 263.

reform of prize money for all naval duties, even commerce raiding, but the author's examples were drawn entirely from the Civil War, and his complaints seem deeply informed by the distinct frustrations of blockade duty.

Even worse, prize money positively disrupted the coordination necessary to blockade. When multiple cruisers were chasing a blockade runner but only one was fast enough to make the actual capture, the fast vessel would sometimes deliberately delay taking the prize just long enough for its fellows to be no longer nearby enough to meet the statutory standard—a ploy that risked losing the prize altogether. Also, when a cruiser spotted a blockade runner, it was normally under orders immediately to signal its nearby fellows to enlist their help, but would often disobey this order and chase the prize by itself, hoping to get the entire reward. At least one Admiral threatened to court-martial his subordinates to "cure" them of this tendency. This raises an interesting point: the commander of the blockading squadron possessed various carrots and sticks (such as courts-martial) by which to counterbalance the effects of prize money on his subordinates, and Congress incentivized the commander to exercise these powers so as to maximize the total take for the entire port by granting him five percent of every prize taken by vessels under his command, regardless of whether his own vessel was nearby enough to meet the ordinary statutory standard. Indeed, the Admiral who directed the blockade of Wilmington both devised the most advanced blockade techniques of the entire war and pocketed the largest sum of prize money of any officer in the U.S. Navy: in two years, he received twenty-five times his annual salary. Still, this left unaddressed the perverse possibility that a blockade might deter merchantmen so effectively as to reduce the squadron commander's earnings. Relatedly, it was rumored that a squadron capable of taking

402. Id. McKee, in his exhaustive study of the officer corps up to 1815, when individualized cruising was the unbroken tradition, never mentions these types of complaints about prize money. McKee, supra note 10.
403. BENNETT, supra note 394, at 63.
404. Id.; BROWNING, supra note 13, at 259.
405. BROWNING, supra note 13, at 259 (citation omitted).
406. See the statutory sections cited supra note 397; see also Theodore Ayrault Dodge, Book Review, 4 AM. HISTORICAL REV. 750, 756 (1899) (noting that the fleet commander must be granted a big share if the fleet is to be a "homogenous" unit).
407. For the period of the admiral's command, see BROWNING, supra note 13, at 229, 246. For his advanced techniques, see id. at 229-30. For his total prize money, see id. at 263. For his salary, see CHISHOLM, supra note 10, at 292.
408. Of course, increased probability of capture could also increase prices in the blockaded port, which in turn could motivate blockade runners to invest in more sophisticated techniques. BROWNING, supra note 13, at 250-51, 268. This helps explain why the number of captures at Wilmington remained constant even as the blockade became stronger. Id. at 247. Presumably the effectiveness of the blockading ships and the sophistication of the blockade runners might ultimately reach some kind of equilibrium that was profit-maximizing for the squadron commander. The problem was that this equilibrium likely would not have matched the outcome desired by the Union government, whose goal was to balance the minimization of commerce to and from the blockaded port with the
an entire port would often delay doing so, since those in charge "did not care to kill the goose that laid their golden eggs." 410

Another factor that de-legitimated prize money during the Civil War was that the U.S. Army occupied a huge amount of enemy territory and captured a huge amount of enemy property. 411 There was no reason to think these captures contributed less to the war effort than did captures at sea, yet U.S. law granted soldiers no personal claim to them. And whereas the U.S. Navy in 1812 had fought much of the war on the high seas, during the Civil War it operated almost entirely near land and frequently cooperated with the Army. 412 Plus, the Army itself sometimes captured ships. 413 The two services’ proximity, both in physical space and in the nature of their missions, highlighted the disparity in their rights and bred jealousy in the Army. 414 Significantly, this was an era when soldiers (and later Army veterans) were becoming an enormously powerful national political constituency. 415

So it is not surprising that, at the close of the Civil War, there was a wholesale “attack” on naval prize money, as the Army and Navy Register recalled years later. 416 In 1876, a bill to abolish naval prize money was introduced in Congress, 417 but nothing came of it. Another was introduced in 1882, 418 on which the House Naval Affairs Committee reported favorably, citing the memo forwarded by Secretary Hunt on the inequity of the system (discussed above). 419 But the bill died in the Senate. The reason for its demise is unclear. Significantly, the Chicago Tribune had noted a few years earlier that any attempt to abolish prize money would “excite much opposition in naval circles,” suggesting that many naval officers preferred to retain the system. 420 If so, their preference may be explained by the Navy’s postwar reversion to commerce raiding, a strategic

military expenditure of maintaining the blockade.

409. Argument for the Abolition of Prize-Money, supra note 401, at 2; see also Proposed Abolition of the Prize Money System, CHI. DAILY TRIB., Feb. 1, 1876, at 5.


413. Prize-Money and Bribery, supra note 410; see also Captures and Prize Money, 3 UNITED STATES SERVICE MAGAZINE 260 (1865) (advocating prize money for the army).


416. 4 CONG. REC. 770 (1876).

417. 13 CONG. REC. 1825 (1882).


framework in which prize money remained fairly rational, not to mention potentially lucrative.

B. Public and Private Commerce Raiding as Civil War Strategies

Early in the war, the Confederacy, as the weaker naval power, naturally commissioned privateers to attack Northern commerce. The British and French governments, hoping to protect their own shipping but apparently finding it understandable that the Confederacy needed privateers, extracted from the Confederacy a promise in 1861 to abide by all the provisions of the Declaration of Paris (particularly the one immunizing neutral ships and whatever goods they carried) except the abolition of privateering.

Meanwhile, U.S. Secretary of State William H. Seward told the Europeans that his government was now willing to sign the Declaration of Paris, including the ban on privateers. He hoped that U.S. accession would make the Europeans more friendly to the Union side and that it would sweep the Confederate privateers into the legal category of pirates, thereby forcing Britain and France—whose navies generally policed the seas against piracy—to attack those vessels. However, Britain and France saw this ploy for what it was: wishing to keep their navies out of the conflict, they offered to let the Union sign the Declaration but only on the condition that it not obligate them to police Confederate ships. Seward refused. It is intriguing that Seward considered British and French maritime aid to be so valuable that he was willing to purchase it at the cost of surrendering a weapon that Marcy in 1856 had defined as essential to U.S. security. One historian thinks Seward believed the big Union Navy would be permanent; and it is interesting to speculate whether, if the United States had signed the Declaration in 1861, the nation would have held onto its big new navy after the Civil War rather than sell it off, as it did. Or perhaps Seward cynically believed that he was surrendering nothing at all, sharing the view of the British foreign minister that the Declaration’s privateering ban, because it did not define “privateering,” could be circumvented quite easily by re-labeling privateers as “volunteers of the navy”—a ruse that Prussia in fact contemplated (and Britain approved) in its war against France in 1870.

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420. CASE & SPENCER, supra note 13, at 52.
421. Id. at 109-10, 115-16; JONES, supra note 13, at 66.
422. CASE & SPENCER, supra note 13, at 78-80, 90, 121-22; JONES, supra note 13, at 40-41. But see NORMAN B. FERRIS, DESPERATE DIPLOMACY: WILLIAM H. SEWARD’S FOREIGN POLICY, 1861, at 81-85 (1976) (arguing that Seward was not motivated by the piracy issue).
423. CASE & SPENCER, supra note 13, at 102-09.
424. FERRIS, supra note 422, at 75-76.
425. On the foreign minister’s view, see CASE & SPENCER, supra note 13, at 105-06.
426. See infra note 496.
Even though Britain and France refused Seward’s offer, they did undermine Confederate privateering by officially prohibiting in their ports (and those of their colonies) the sale of all Civil War prizes, whether captured by naval cruisers or privateers.\(^{427}\) This limited the Confederate privateers’ options for places to sell their captures. They took about forty prizes, sailing many of them into Southern ports for condemnation, but as the blockade of these ports tightened, they gave up altogether by 1863.\(^{428}\)

Unable to privateer effectively and possessing little shipbuilding capacity, the Confederacy sent clandestine agents to Britain to contract for the construction of naval cruisers in that country. In early 1862, Union diplomats got wind of this activity and pleaded with the British government to put a stop to it.\(^{429}\) Unfortunately for the Union, both international law and British domestic law were unclear as to whether the contractors’ aid to the Confederacy violated Britain’s neutral obligations.\(^{430}\) Further, at least one British official acted with egregious negligence in responding to the pleas of Union diplomats.\(^{431}\) Ultimately, a handful of steam-driven naval cruisers escaped from British shipyards into Confederate hands, whereupon they began terrorizing Northern merchantmen.\(^{432}\) Barred from selling their captures in British and French ports (by law) and in Southern ones (by blockade), the Confederate raiders resorted to simply destroying the merchant vessels they encountered (rescuing the crews, of course).\(^{433}\) The Union, preoccupied with maintaining the blockade, could spare few ships to police the raiders.\(^{434}\) These factors, combined with the raiders’ use of steam propulsion at a time when most merchant vessels relied on sail,\(^{435}\) enabled each raider to destroy a remarkable number of merchantmen. Though only about four raiders were at sea at any given time,\(^{436}\) they took nearly three hundred Northern vessels.\(^{437}\) The raiding placed U.S. shipping firms at a competitive disadvantage vis-à-vis neutral ones, prompting the former to sell large numbers of their ships to the latter at distress prices, plunging the U.S. shipping industry into a depression from which it did not recover for fifty years.\(^{438}\) (Although later historians have argued that Confederate raiding was strategically ineffective because the North could still engage in commerce via neutral vessels and was self-

\(^{427}\) Case & Spencer, supra note 13, at 59-60, 71-72.
\(^{428}\) Albion & Pope, supra note 11, at 151-52.
\(^{429}\) 2 Jenkins, supra note 13, at 120-24.
\(^{430}\) 2 Adams, supra note 13, at 116-17; 2 Jenkins, supra note 13, at 123, 243-44.
\(^{431}\) 2 Jenkins, supra note 13, at 122-26.
\(^{432}\) Albion & Pope, supra note 11, at 152-53; 2 Jenkins, supra note 13, at 120-24.
\(^{433}\) Albion & Pope, supra note 11, at 151-53.
\(^{434}\) Sprout & Sprout, supra note 14, at 163.
\(^{435}\) Albion & Pope, supra note 11, at 156.
\(^{436}\) Id. at 153.
\(^{437}\) Sprout & Sprout, supra note 14, at 162.
\(^{438}\) Albion & Pope, supra note 11, at 150; 169-72.
sufficient anyway, the fact that such a tiny number of Confederate ships wreaked such havoc made a deep impression on contemporary observers and was taken, despite the Union victory, to confirm the effectiveness of the guerre de course.

The inception of the British-built raiders' reign of terror in 1862 and the huge role of British merchant ships in blockade-running made the Northern public and at times the Union leadership deeply suspicious and resentful of Britain. Meanwhile, British firms continued to build Confederate warships, not the least of which were rams designed to break the blockade. Seward had to persuade the British government to halt the construction of those ships. Yet an "immediate downright threat of war would have been impolitic and would have stirred British pride to the point of resentment," raising too great a risk of an actual war between Britain and the Union. Seward sought a more incremental and less transparent way to pressure Britain. As E.D. Adams argues in his classic study of Civil War diplomacy, the U.S. government believed that privateering could serve this purpose. In mid-1862 Seward had an ally in the Senate introduce a bill authorizing the President to license privateers in war. The Senate allowed the matter to lapse but, when tensions with Britain heated up again early in the following year, both houses passed the bill (with a three-year sunset clause), and Lincoln signed it on March 3, 1863. Seward and his allies offered various official explanations for why the Union might need privateers, such as chasing the Confederate raiders or aiding the blockade. But as we have seen, privateering was not suited to such missions. According to both Adams and the more recent authoritative study by historian Brian Jenkins, the Union privateers' actual but unspoken purpose, which most Senators recognized, was to prey on Confederate commerce via the capture of the British merchant vessels that carried it, with the expectation that these privateers would "commit all sorts of indignities and interferences with British merchant ships whether on a blockade-running trip [to the South] or engaged in or-

439. Id. at 155; SPROUT & SPROUT, supra note 14, at 164.
441. On blockade-running, see 2 JENKINS, supra note 13, at 118; on Union attitudes, see id. at 122, 142-43, 184-87, 242.
442. 2 ADAMS, supra note 13, at 121-22.
443. Id. at 121.
444. Id. at 116-51.
446. 2 ADAMS, supra note 13, at 123-24.
447. 2 JENKINS, supra note 13, at 127.
dinary trade between non-belligerent ports." In other words, the Union understood that privateers would harm British commerce not only through ordinary legal means (such as capturing blockade runners and generally searching British merchantmen for Confederate cargo and hauling them into port when such cargo was found) but also illegal means (such as capturing or otherwise harassing British merchantmen without probable cause to believe they were engaged in Confederate commerce). The Union knew of the tendency of privateers to engage in harassment without official authorization, and it deliberately exploited that tendency to add unofficial force to its threat against Britain. In an assurance that was less comforting than menacing, Seward promised the British ambassador that the Union would warn Britain before it licensed any privateers whose activities might ""incidentally or indirectly affect[ ]"" British shipping. Seward was prepared to carry out the threat: he submitted proposed regulations to the Cabinet, investigated the willingness of New York merchants to fit out privateers, and received some applications for licenses.

On April 5, 1863, the British government seized one of the Confederate warships under construction, sending a positive signal to the Union; thus, the Union never had to carry out its threat to commission privateers. Historians differ on whether the British seizure constituted a sharp reversal of policy in response to the privateering threat or was instead part of a gradual shift that was occurring for other reasons. In any case, these events confirm that in 1863 the U.S. government continued to view privateering as an important military option.

During deliberations over the privateering statute and its implementation, U.S. officials aired their views about the regulation of privateers. Although Navy Secretary Gideon Welles supported the privateer legislation

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448. 2 ADAMS, supra note 13, at 136-38 (quote at 138); 2 JENKINS, supra note 13, at 127, 196-98.
449. This point is recognized by O'Malley, supra note 12, at 263; he gleans it from a single primary source, without engaging the secondary literature on the Civil War.
450. 2 ADAMS, supra note 13, at 125 (quoting Seward's summary of what he told the British ambassador).
451. 2 JENKINS, supra note 13, at 197.
452. 2 ADAMS, supra note 13, at 136; 2 JENKINS, supra note 13, at 199.
453. The former interpretation appears in 2 ADAMS, supra note 13, at 136-41; for alternatives, see 2 JENKINS, supra note 13, at 254-57; WILBUR DEVEREUX JONES, THE CONFEDERATE RAMS AT BIRKENHEAD: A CHAPTER IN ANGLO-AMERICAN RELATIONS 52-58 (1961); FRANK J. MERLI, THE ALABAMA, BRITISH NEUTRALITY, AND THE AMERICAN CIVIL WAR 179 (David M. Fahey ed., 2004) [hereinafter MERLI, ALABAMA]; FRANK J. MERLI, GREAT BRITAIN AND THE CONFEDERATE NAVY, 1861-1865 at 160-77, esp. 163 (1970); David F. Krein, Russell's Decision to Detain the Laird Rams, 22 CIVIL WAR HIST. 158 (1976). One study, MERLI, ALABAMA, supra, attacks E.D. Adams' interpretation as being premised on a factual error, namely, that E.D. Adams purportedly says that a memo from U.S. minister Charles Francis Adams containing the words "this is war" was dated April 5, 1863, when in fact it was dated September 5, 1863, id. at 23; see also id. at 194 n.9. In fact, E.D. Adams makes no such error. He says the memo was dated September 5, 1863, see 2 ADAMS, supra note 13, at 144, 145 n.2, 147 n.1, which is the same date that Merli gives to it. It should be noted that Merli's book was compiled posthumously from unpublished writings in his possession at the time of his sudden death. MERLI, ALABAMA, supra, at x-xviii.
"as a menace and admonition to England,"454 he acknowledged that privateers' "tendency must unavoidably be to abuse," that "reckless men will be likely to involve the Government in difficulty," and that privateers were "to some extent . . . likely to be officered and manned by persons of rude notions and free habits."455 Massachusetts Senator Charles Sumner, a leading humanitarian reformer, sharing these same fears and doubtless inspired by the expansion of the Union Navy, made a proposal that echoed the reaction of the New York Times to the Declaration of Paris. The apparent purpose of privateering, said Sumner, was "to enlist the private marine of the country in the public service" and "to contribute . . . to the national force." Those purposes could be accomplished by authorizing the Navy to "hire private ships wherever [it] can find them, and put them in commission as national ships, with the rations, pay, officers, and character of national ships." Such an arrangement would "avoid those embarrassments and difficulties necessarily incident to the system of privateering" and would "be in harmony with the civilization of our age."456 It would fit the proper definition of a "militia of the sea."457 The Senate defeated Sumner's proposal 28-8.458 The vote was largely symbolic, since the Navy probably already possessed the power to do everything Sumner proposed.459 Had it passed, however, it might have helped create stable arrangements for a wartime military service not permanently identified with the state and yet accountable to it when engaged in combat.

VI. THE ABANDONMENT OF PRIVATEERING

Privateering remained a legal option for the U.S. government throughout the nineteenth century and into the twentieth.460 But for how long did policymakers view it as a practical option? The Union threat against Britain in 1863 shows that privateering was still a serious possibility at that time. Further, if the Union actually had gone to war with Britain during the Civil War, there is no question that the Lincoln administration would have licensed privateers, since Britain had a superior navy and a large

454. 1 GIDEON WELLES, DIARY OF GIDEON WELLES, SECRETARY OF THE NAVY UNDER LINCOLN AND JOHNSON 258 (1911).
455. Id. at 253-54.
457. Id. at 961 (statement of Sen. Sumner).
458. Id. at 1028.
459. Id. at 1028 (statements of Sens. Sumner and Grimes).
460. Supra text at note 8. When war broke out between the United States and Spain (both non-signatories to the Declaration of Paris) in 1898, the British crown law officers—whose country had the world's largest merchant marine and therefore the most to lose from privateering—nevertheless concluded that neither belligerent was bound by the Declaration "directly or indirectly." Letter from Crown Law Officers to Foreign Minister (Apr. 20, 1898), in 3 INTERNATIONAL LAW OPINIONS 97, 97 (Lord McNair ed., 1956); see also WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 526 (J.B. Atlay ed., 5th ed. 1904) (stating that non-signatories can use privateers).
merchant marine. In the event of such a war, declared Welles in 1863, "We could, with our public and private armed ships, interrupt and destroy [Britain's] communication [i.e., trade] with . . . her colonies, on which she is as dependent for prosperity as they on her." 461 After the Civil War, as noted above, the Union quickly sold off more than two-thirds of its naval ships. Through the early 1880s, the U.S. Navy neglected its remaining vessels, ignored new technology, and fell behind the European powers and some of the Latin American republics. 462 It reverted to its ancestral devotion to the guerre de course. 463 Had the United States gone to war with a maritime power under these conditions, it surely would have needed all the help it could get to prosecute the guerre de course, suggesting that the nation would have commissioned privateers. Contemporary observers confirmed this. In 1874, the New York Times, even while it criticized privateering, admitted that the United States might have to employ it in the "last extremity." 464 In 1879, Theodore S. Woolsey, a professor of international law at Yale, urged his government to accept the Declaration of Paris but "frankly admit[ted]" that privateering was of "some, perhaps of considerable, value" against a superior naval power. 465 The memo on prize money which the Navy Secretary forwarded to Congress in 1882 stated that the "only real objection to the abolition of prize-money" was that it might render the Navy less competitive in the labor market if the nation "should find it expedient in some future foreign war to resort to privateering"; rather than dismiss the possibility of privateering, the memo argued that the Navy could compete with privateers by offering signing bonuses to sailors. 466 That same year, United Service, a magazine for the U.S. Army and Navy, printed a piece on international law that walked through scenarios for future wars, predicting that "if the United States were to take up arms [against Britain], their privateers would in all probability sweep the English merchant navy from the seas." 467

Thus, in the early 1880s, privateering remained a practical U.S. option, but sometime thereafter it ceased to be. Just when and why did that oc-

461. 1 Welles, supra note 454, at 258 (emphasis added).
462. Davis, supra note 14, at 32; Herrick, supra note 14, at 18-20; Sprout & Sprout, supra note 14, at 165-82.
463. Sprout & Sprout, supra note 14, at 168.
465. Theodore S. Woolsey, The United States and the Declaration of Paris, Journal of Social Science, Containing the Transactions of the American Association, Issue Number X, Dec. 1879, at 124, 129. On at least some copies, this issue was misnumbered "IX." This periodical was sometimes published under an alternative subtitle: "CONTAINING THE PROCEEDINGS OF THE AMERICAN ASSOCIATION." Also, note that the copy of this issue contained in the American Periodicals Series Online, 1740-1900 (Ann Arbor, ProQuest Information and Learning Co.), is misdated "Oct. 1, 1879."
466. Argument for the Abolition of Prize-Money, supra note 401, at 3.
cur? The question has no exact answer, since the government's willingness to use privateers could truly be tested only in a war against a superior naval power with a vulnerable merchant marine—something that never again happened. Still, by tracing the evolution of technology, strategy, and politics, we can make a reasonable guess.

The key point is that the U.S. government remained firmly committed to the guerre de course up to about 1890. Although a new wave of naval ship construction began in the early 1880s, its purpose was merely to acquire a state-of-the-art version of the same small force of cruisers that the nation traditionally employed. No capital ships were built. No fleet coordination was contemplated.468 Only sixteen new cruisers were authorized prior to 1890, several of which turned out to be poorly built and unable to raid effectively.469 The experts who initially advocated the build-up in the early 1880s understood that the Navy would somehow need to be expanded rapidly in the event of a major war.470 So long as this small-navy guerre de course strategy remained in place, it is hard to say that privateering was foreclosed. To be sure, as Section A explains below, the privatized version of the guerre de course during the late nineteenth century faced new and increasingly severe technological, diplomatic, and economic obstacles. But even so, there is some probability that the United States could have continued to rely on privateers if it were willing to accept the status of a second- or third-rate naval power, excluding itself from global imperial competition.

What decisively banished privateering from the realm of possibility, as argued below in Section B, was the nation's political choice around 1890 to enter the arena of global imperial competition and consequently to embrace the guerre d'escadre. A tremendously expensive program to build capital ships, which had no peacetime commercial use, began in 1890 and accelerated around the turn of the century. Fleet action, suited to centralized public provision, became the war plan.

A. The Feasibility of Private Commerce Raiding in the Late Nineteenth Century

How feasible was privateering in the time period circa 1880 to 1900? At the most practical level, how feasible was it to convert a fast private merchant vessel into a commerce raider in light of the major technological changes of the era? Let us begin by reviewing the technological develop-

468. On the construction program of the 1880s and its limits, see DAVIS, supra note 14, at 37-55; and SPROUT & SPROUT, supra note 14, at 183-201. On fleet action in particular, see DAVIS, supra note 14, at 55.

469. DAVIS, supra note 14, at 40-47.

Steam replaced sail in half the merchant tonnage of Britain by 1883, half that of the United States by 1892, and all of British merchant tonnage by 1913. During the transition period, with steam technology developing gradually, it was common for a merchant ship to carry both engines and sails, in part because wind allowed a vessel to conserve coal. Similarly, naval officers through the early 1890s generally agreed that a cruiser should have some combination of steam and sail, though they differed on the exact balance. At the very least, however, a commerce raider required a relatively high speed under steam, so it could escape the steam-powered naval cruisers patrolling the sea lanes. As for guns, those on naval warships were increasing exponentially in size, such that vessels needed to be specially designed to carry them, and in response armor was growing more common and becoming stronger; but we must remember that a pure commerce raider needed only enough artillery to overwhelm unarmed or lightly armed merchantmen, so long as it was fast enough to run away from naval cruisers.

The feasibility of converting merchant vessels to commerce raiders was always a question of degree. The more one narrowed the range of eligible vessels, whether by speed or some other quality suiting them to the task, and the more one was willing to spend on conversion, the more effective the selected vessels would be in making captures. This complexity helps explain the wide differences of opinion, even among the best-informed people, regarding the conversion of merchant ships to cruisers during this period.

Some observers were quite sanguine (or, if predicting the actions of their foes, apprehensive) about the possibility. A board of U.S. Navy policy experts in 1881 explained that its proposed construction program need not be terribly large, given "the availability of our commercial steamers for conversion into fast commerce-destroying vessels." Although some analysts thought commerce raiders should be modeled on the new super-fast mail steamers, another board of U.S. Navy experts rejected this notion in 1883, arguing that the proper targets for commerce raiders were "the great bulk of the slow or moderate speed steamers" and that raiders need only be able to catch these slower vessels. One theorist argued in the U.S. Naval Institute Proceedings in 1886 that the U.S. Navy should not

471. ALBION & POPE, supra note 11, at 178, 184.
473. HAGAN, supra note 14, at 6, 19-20, 34, 44.
474. Albion and Pope note that the new steam-powered patrolling cruisers had “good speed.” ALBION & POPE, supra note 11, at 186.
478. 1 NAVY REPORT (1883), supra note 470, at 88.
concentrate on building raiders, in part because their strategic value was generally low, and in part because "the very best . . . commerce destroyer is a first-class merchant steamer bought out of hand, filled with Hotchkiss rapid-firing guns, and sent to sea full of coal." 479 From 1887 until at least 1900, the British Admiralty tailored its plans to the assumption that "France and Russia would fit out their faster merchant ships with guns, and use them, like the privateers of old, to harass British merchant ships." 480 The President of the U.S. Naval War College wrote in 1899 that, "with little or no material change," a merchant steamer, whether designed for passengers or cargo, "may become a cruiser." 481

Other observers had less faith in convertibility. The British Admiralty in 1887 entered subsidy agreements with private firms to build extremely fast merchant steamers that were convertible to cruisers. It found it necessary to make specifications about the bulkheads, gun mountings, and the location of the steering mechanism and engines. In light of advancing technology, the Admiralty concluded in 1905 that no merchant steamers, except for two highly specialized mail ships, were fast enough to escape opposing cruisers. 482 Earlier, in 1889, the U.S. Navy Secretary declared that any watertight "vessel with a good coal capacity and the highest rate of speed, armed with a few rapid-firing guns, though built and used principally for commercial purposes, may by certain adaptations in her construction be made readily available" for "the attack and defense of commerce." However, he believed that the "adaptation" of such vessels to the government's needs was costly enough that investors would not finance them without a subsidy. 483 It should be emphasized that he was contemplating the use of these vessels not only to raid commerce but also for its "defense," that is, to patrol the sea lanes and fight enemy warships. If a pure commerce raider were fast enough to outrun such warships, it would presumably need little adaptation. Under the Ocean Mail Act of 1891 (and possibly additional legislation) the U.S. government in the 1890s did subsidize several merchant vessels which, in exchange, made themselves available for naval wartime service, though it seems they all had to meet

480. MARDER, supra note 36, at 102.
481. Charles H. Stockton, The Capture of Enemy Merchant Vessels at Sea, 168 N. AM. REV. 206, 209 (1899). The author added that it could also serve as a scout, a collier, and in other roles. Id. He stated that some merchant vessels were constructed with government supervision and subsidies, though he did not use this fact to qualify the statement quoted in the text. Id. at 211.
482. MARDER, supra note 36, at 103; see also HAGAN, supra note 14, at 8 (recounting U.S. Navy officers' fear in 1880s that fast cruisers of the most advanced navies might prevent raiders in general from doing their work).
483. 1 REPORT OF THE SECRETARY OF THE NAVY 12 (1889) [hereinafter NAVY REPORT (1889)]. The U.S. Navy had been pushing such subsidies for several years. HAGAN, supra note 14, at 26-27, 51.
naval specifications and were intended to fight vessels stronger than merchantmen. 484

Apart from these technological complications, foreign pressure may have reduced the feasibility of U.S. privateering in this period. 485 Under the law of nations, a captor could litigate a prize case in the court of its home country (or of an ally) while storing the prize itself in the port of a neutral country, and it could eventually sell the prize in the neutral port if the case ended in condemnation; but the neutral government had the option to restrict such practices. 486 Also, a neutral government had the option to restrict purchases of supplies by belligerent ships in its ports, including purchases of coal, 487 which was becoming crucial with the rise of steam propulsion. From the time of the Civil War through the early twentieth century, neutral countries imposed such restrictions (if any) by way of policies issued ad hoc for each war. 488 Presumably, each neutral’s regulations for a given conflict resulted from some combination of precedent, norms, calculation, and negotiation. Within this framework, regulations in this period were becoming stricter. 489 Neutrals commonly banned the sale of prizes in their ports, 490 as well as the storage of prizes, 491

484. An Act to provide for ocean mail service between the United States and foreign ports, and to promote commerce, ch. 519, 26 Stat. 830 (1891) (offering subsidies to ships meeting the U.S. Navy’s specifications, including gun-carrying capacity); HERRICK, supra note 14, at 133-34, 179-80 (citing REPORT OF THE SECRETARY OF THE NAVY 18 (1896), which refers to conversion of subsidized merchant steamers into “men of war”); see also HAGAN, supra note 14, at 42 (stating that in 1880s value of merchant fleet as reserve force became “increasingly dubious” since Congress failed to grant subsidies needed for expansion), 52-53.

485. I am grateful to Jan Lemnitzer for pointing out to me the general problem discussed in this paragraph.

486. Supra text accompanying note 178.

487. EDWARD S. CREASY, FIRST PLATFORM OF INTERNATIONAL LAW 585 (London: J. Van Voorst, 1876).

488. I conducted a survey, covering the period from the outbreak of the Civil War (1861) to the Second Hague Conference (1907), of all maritime neutrality policy statements collected in the most comprehensive English-language source on the subject, A COLLECTION OF NEUTRALITY LAWS, REGULATIONS AND TREATIES OF VARIOUS COUNTRIES (Francis DEAK & Philip C. JESSUP eds., 1939) [hereinafter DEAK & JESSUP], for a sample of fifteen states: Argentina, Brazil, Britain, Chile, China, Colombia, France, Germany (subsequent to its unification in 1871), Japan, Mexico, the Netherlands, Peru, Russia (listed under Union of Soviet Socialist Republics), Spain, and Venezuela. Within my survey, the policies in force during this period on the specific issues discussed in this paragraph were invariably ad hoc, except in one instance, id. at 352-53 (Chilean decree of 1864 permanently prohibiting supply of coal to belligerents). Note that in several cases a policy incorporates earlier policies by reference.

489. On the general trends, see CREASY, supra note 487, at 585-86 (on coal); and HALL, supra note 178, at 75 & n.2 (on storage and sale).

490. Within my survey, described supra note 488, maritime neutrality policies banning sale were adopted by Brazil in five wars (DEAK & JESSUP, supra note 488, at 101, 106, 107-08, 110, 111); by Britain in nine wars (id. at 191, 203, 206 & n.); by Chile in one war (id. at 365); by China in two wars (id. at 384, 389-90); by Colombia in two wars (id. at 410, 430); by France in four wars (id. at 590, 592, 593, 617-18 & n.); by Japan in one war (id. at 740); by the Netherlands in four wars (id. at 795, 796 n., 798, 816); by Peru in one war (id. at 873); by Russia in one war (id. at 1073); by Spain in two wars (id. at 934, 935); and by Venezuela in one war (id. at 1296). Maritime neutrality policies setting forth no specific rule on this point were adopted by Argentina in three wars (id. at 6-7, 25-26); by Britain in one war (id. at 204-05); by Mexico in two wars (id. at 770, 771 n., 777); by the Netherlands in four
though some major powers at times allowed storage, or guarded their option to do so.\textsuperscript{492} When in place, bans on sale and storage reduced the locations in which a commerce raider could convert its captures into money; this tended to discourage privateers and to confer an advantage on public raiders (like those of the Confederacy) who simply destroyed merchant vessels rather than capture them. As for coal, several countries began strictly limiting what warships could buy, though many others did not.\textsuperscript{493}


491. Within my survey, described \textit{supra} note 488, maritime neutrality policies banning storage were adopted by Brazil in five wars (\textit{DEAK & JESSUP, supra} note 488, at 101, 106, 107-08, 110, 111); by Britain in nine wars (id. at 191, 203, 206 & n.); by Chile in one war (id. at 365); by China in two wars (id. at 384, 389-90); by Colombia in two wars (id. at 410, 430); by France in four wars (id. at 590, 592, 593, 617-18 & n.); by Japan in one war (id. at 740); by the Netherlands in three wars (id. at 795, 796 n., 816); by Peru in one war (id. at 873); by Spain in two wars (id. at 934, 935); and by Venezuela in one war (id. at 1296). Maritime neutrality policies setting forth no specific rule on this point were adopted by Argentina in three wars (id. at 6-7, 25-26); by Britain in one war (id. at 204-05); by Mexico in two wars (id. at 770, 771 n., 777); by the Netherlands in five wars (id. at 796-97, 797 n., 798-99, 814-15); by Peru in two wars (id. at 874 n.); by Russia in one war (id. at 1072-73); and by Spain in four wars (id. at 936 & n.). As noted \textit{supra} note 490, Germany generally refrained from publishing its policies in this period. No policy expressly permitted storage, though Japan's policy in the Franco-Prussian war, \textit{id. at 737}, may have done so by implication.

492. At the Second Hague Conference in 1907, there "was vigorous debate over whether to permit neutral states to allow, as an exceptional matter, the sequestration of prizes in their territories pending adjudication by a prize court. Britain, predictably, opposed the idea. With its far-flung colonial possessions, it had no need to rely on neutral ports for storing prizes." \textit{STEPHEN C. NEFF, THE RIGHTS AND DUTIES OF NEUTRALS: A GENERAL HISTORY 131-32} (2000). Britain's stance was de-fined by a margin of 29-7; the majority included France, Germany, and Russia. 3 \textit{THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: TRANSLATION OF THE OFFICIAL TEXTS: THE CONFERENCE OF 1907, at 486 (James Brown Scott ed., 1921). Russia expressly permitted prize storage during a 1911 war, \textit{DEAK & JESSUP, supra} note 488, at 1073. Germany expressly permitted it by permanent legislation in 1913. \textit{id. at 661.}

493. Because Britain possessed more coaling stations than any of its rivals, it wanted neutrals to be stingy with their coal. Accordingly, it championed a strict rule by which a belligerent ship could (1) purchase only enough coal in a neutral port to reach its nearest home port and (2) not purchase coal again at that neutral port, nor any other of the same country, for three months. France, with fewer coaling stations than Britain, led the opposition, insisting that a neutral could let belligerents purchase as much coal as they wished; its only obligation was to refrain from discriminating among belligerents. \textit{NEFF, supra} note 492, at 106-07; see also \textit{id. at 132-33}. Russia and Germany, in the same fix as France, agreed. \textit{DAVIS, supra} note 8, at 248. Within my survey, described \textit{supra} note 488, maritime neutrality policies imposing the British rule, a similar one, or a stricter one, were adopted by Brazil in five wars (\textit{DEAK & JESSUP, supra} note 488, at 102, 106, 108, 110, 112); by Britain in nine wars (id. at 196, 205, 206 n., 209-10); by Chile in a permanent decree of 1864 (id. at 352-53); by China in two wars (id. at 384, 389); by Colombia in two wars (id. at 410, 430); by Japan in one war (id. at 741); by the Netherlands in four wars (id. at 795, 796 n., 798, 816); by Peru in one war (id. at 876-77); and by Spain in two wars (id. at 934, 935). Maritime neutrality policies setting forth no limits on coal purchases were adopted by Argentina in three wars (id. at 6-7, 25-26); by France in four wars (id. at 590-91, 592, 593, 615, 617-18); by Japan in one war (id. at 736); by Mexico in two wars (id. at 770, 771 n., 777); by the Netherlands in four wars (id. at 796-97, 797 n., 814-15); by Peru in two wars (id. at 874 n.); by Russia in one war (id. at 1072-73); by Spain in four wars (id. at 936 & n.); and by Venezuela in one war (id. at 1295-96). Note that Mexico permitted coaling of a U.S. warship during the Spanish-American War. N. Ray Gilmore, \textit{Mexico and the Spanish-American War}, \textit{43 HISP. AM. Hist. Rev. 511, 514} (1963). As noted \textit{supra} note 490, Germany generally refrained from publishing its policies
A few imposed tighter coal restrictions on privateers than on public warships. The paucity of such discriminatory policies may be due to the rarity of actual privateering in this era; such policies might have become more common had a major power—like the United States—commissioned privateers. Overall, then, the efficacy of U.S. privateering in any given war would depend in part on the degree to which maritime nations were allied with, or friendly and permissive toward, the United States. Nota-
bly Woolsey, an expert on international law who must have been aware of these potential obstacles, did not consider them important enough to include in his arguments for giving up privateering in 1879 and 1894.497

Lastly, we must consider the business resources available for privateering in this period. Had the United States fought a superior naval power after 1865 and licensed privateers, the shipping industry would not have been as powerful a source of investment as it was in 1812. Between 1861 and 1914, U.S. tonnage registered for foreign trade shrank by more than half.498 This was due in part to secular changes in technology. The replacement of sails by steam and of wood by steel took away competitive advantages of U.S. shipbuilding. While the United States had plentiful timber, Britain had the world’s leading steel industry and plentiful coal.499 Yet the decline also resulted from more contingent factors. As we have seen, a handful of Confederate commerce raiders caused a fire sale of U.S. merchant ships to foreign owners.500 The disaster was prolonged by Congress, which—in a policy to help shipbuilders rather than shipowners—forbade the transfer of foreign-owned vessels to U.S. registry.501 Overall, the decline of the industry reduced the potential number of private raiders. It also weakened a potential source of lobbying to preserve privateering. Still, we must keep the industry’s decline in perspective. As of the early twentieth century, the nation was fourth in the world in ocean-going merchant tonnage, nearly equal to France, though far behind Britain and Germany.502

In light of all this, it seems that reliance on private converted merchantmen might well be acceptable to a nation willing to remain a second or third-rate maritime power. On the one hand, the invincible Royal Navy found merchantmen inadequate to be cruisers by 1905.503 In France, by

already been (nominally) placed under the Articles of War in the early nineteenth century. Supra text accompanying note 159. As for the other differences between the Prussian plan and privateering, by far the greatest was that the volunteer ships were to attack warships in exchange for state-paid bounties, as opposed to raiding commerce. But the British government did not cite this distinction in the letters from its Foreign Minister and Law Officers approving the plan, described above. Further, Prussia very likely would have authorized the volunteers to raid commerce if the war (which turned out to be short) had lasted longer and if the volunteer force had actually been formed, which it never was. Hall, supra, at 622-23.

497. Woolsey in 1879 said that privateers were of “some, perhaps of considerable, value” against a superior naval power, and he did not bring up the issue of foreign neutrality policies. Woolsey, supra note 465, at 129. In 1894, he omitted to state that privateers were valuable, arguing instead that public cruisers could raid commerce more efficiently than privateers, but he did not include foreign neutrality policies among the reasons for this. Theodore S. Woolsey, The United States and the Declaration of Paris, 3 Yale L.J. 77, 80-81 (1894).

498. Albion & Pope, supra note 11, at 185.
499. Id. at 178.
500. See supra text at note 438.
503. Supra text at note 482. In World War I, even Britain found converted merchantmen ade-
contrast, a minority faction within the naval ministry argued that the na-
tion lacked the financial strength to match the Royal Navy, meaning that it
should quit trying to copy Britain and instead go with its comparative ad-

tantage of raiding commerce. 504 Georges Clemenceau, France’s future
wartime prime minister and a devotee of this school, wrote in a major U.S.
magazine in 1897 that “the fear of a contest with privateers” could intimi-
date the British leviathan. Accordingly, he urged France’s renunciation of
the Declaration of Paris. 505 Whether a nation found private commerce
raiders to be up to its standards depended on what those standards were,
which was a political choice about what place to occupy in the interna-
tional balance of power. Speaking against an increase in naval appropri-
tions in 1883, Representative William Steele Holman, an Indiana Demo-

crat, proclaimed:

What is the object of those European navies? To meet those exigen-
cies which arise by reason of the petty ambition of crowned heads,
and more than that, to overawe their people by a display of physical
power.

England keeps a strong army and navy . . . to watch her colonies, sub-
ject empires which belt the globe, and awe them into submissive
peace. Are we to imitate such a policy?

. . . .

[W]henever during the century of our national experience we have
found . . . war the only alternative, although we and our fathers have
never felt it necessary to maintain a navy of any considerable magni-
tude[,] our people have always been found amply prepared for the
emergency, and navies have sprung up as if by the power of en-
chantment sufficient to meet the leading naval power of the globe. 506

Holman thus expressed the populist Jeffersonian beliefs that had long
maintained the tradition of privateering, despite all its dangers and weak-

nesses. On this point, it should be noted that the U.S. shipping industry in
the late 1800s generally remained a domain of small firms; not until the
twentieth century would it exhibit the tendency toward monopoly that was
then overtaking many other American industries, 507 including steel, on
which the government would have to rely if it wanted big modern war-

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504. S EMMEL, supra note 12, at 89-92; see also ROLF HOBSON, IMPERIALISM AT SEA: NAVAL
STRATEGIC THOUGHT, THE IDEOLOGY OF SEA POWER AND THE TIRPITZ PLAN, 1875-1914, at 96-109
(2002).


ships. Thus the shipping industry retained the decentralized character that for so long had made it an attractive military source in the eyes of civic republicans.

B. The Embrace of an Imperial Strategy and the Public Monopolization of Combat

As of the late 1880s, proposals that the United States adopt the *guerre d'escadre* were scattered and attracted little attention. The person most responsible for changing this was Alfred Thayer Mahan, a professor at the Naval War College. He published, in 1890-92, two books that traced the rise of the British Empire from the mid-1600s to when it became the world's richest and most powerful state in the early 1800s. According to Mahan, Britain triumphed because it possessed command of the sea—that is, a fleet of capital ships more powerful than any other, capable of destroying any enemy fleet (or preventing it from massing) and keeping the sea lanes open to British commerce. Simple commerce raiding, argued Mahan, was simply ineffectual. It had not won the War of 1812 for the United States, when Britain had successfully blockaded the American coast, nor the Civil War for the Confederacy, when the North had successfully blockaded the South. "It is not the taking of individual ships or convoys... which strikes down the money power of a nation," he contended, but rather "the possession of that overbearing power on the sea which drives the enemy's flag from it, or allows it to appear only as a fugitive; and which, by controlling the great common, closes the highways by which commerce moves to and from the enemy's shores."

Mahan's books were not only works of strategy, but also political economy. He argued that Britain became rich because its command of the sea forced open overseas markets and ensured passage thereto for British commerce. In Mahan's Darwinian universe, a nation that did not actively strive for power and wealth found itself overtaken and in decline. This thesis struck at the foundation of the traditional American attitude of isolation and defense. To Mahan, "defense" in a pure sense did not exist.


509. SPROUT & SPROUT, supra note 14, at 200.


511. MAHAN, INFLUENCE OF SEA POWER UPON HISTORY, supra note 510, at 138; see also id. at 87, 136-38, 328-29, 533-40; DAVIS, supra note 14, at 92; SPROUT & SPROUT, supra note 14, at 204-05.

512. E.g., MAHAN, INFLUENCE OF SEA POWER UPON HISTORY, supra note 510, at 228-30, 328-29.

513. HOBSON, supra note 504, at 163-64.
A nation that adopted such an attitude would eventually find its markets swallowed, and its coasts menaced, by rivals. The best—the only—defense was a good offense.\textsuperscript{514}

Crucially, in 1889 Mahan served as a consultant to the newly appointed Navy Secretary Benjamin F. Tracy, then a complete novice in naval affairs, and helped convince Tracy to write the pathmarking report of that year which first asked Congress to undertake the huge expense of building capital ships.\textsuperscript{515} During his tenure (1889-1893), Tracy received appropriations for four such ships.\textsuperscript{516} During the subsequent administration of Grover Cleveland (1893-1897), despite the Democrats' traditional aversion to naval expansion,\textsuperscript{517} Navy Secretary Hilary A. Herbert read Mahan's work shortly after his appointment and was likewise converted, asking Congress for yet more capital ships.\textsuperscript{518} Five were authorized on his watch.\textsuperscript{519} The leading pro-Navy Senators relied on Mahan's ideas in every appropriations debate of the 1890s and frequently quoted his works at length.\textsuperscript{520} By the mid-1890s, the Navy was seriously practicing fleet coordination for the first time.\textsuperscript{521} Also, starting in 1890, states began organizing "naval militias," which Congress began sponsoring in 1891; the ships of these auxiliary forces, unlike the privateers, were taken under direct navy command in wartime and took part in fleet action.\textsuperscript{522}

Technological issues played a role in the debate over transforming the Navy, but the transformation was far from an automatic response to technological change. Taking one key example, proponents of the \textit{guerre d'escadre} noted that the reliance of steam-powered commerce raiders on coaling stations reduced their cruising radius from what it had been in the age of sail.\textsuperscript{523} But surely this was known in 1883, and it did not stop the government from spending six years building steam cruisers expressly to raid commerce. And while Mahan agreed that steam constricted the range of a commerce raider,\textsuperscript{524} his argument was not that the practice had be-

\textsuperscript{514} For a recent critical evaluation of Mahan's thought, see id. at 154-77.
\textsuperscript{515} HERRICK, supra note 14, at 43; SPROUT & SPROUT, supra note 14, at 207.
\textsuperscript{516} DAVIS, supra note 14, at 87-88.
\textsuperscript{517} Id. at 99.
\textsuperscript{518} Id. at 157-60; Symcox, supra note 14, at 691; see also ANNUAL REPORT OF THE SECRETARY OF THE NAVY FOR THE YEAR 1893, at 37-38 [hereinafter NAVY REPORT (1893)].
\textsuperscript{519} DAVIS, supra note 14, at 89.
\textsuperscript{520} Id. at 75-76.
\textsuperscript{521} SPROUT & SPROUT, supra note 14, at 217. On the absence of fleet action in the early and mid-nineteenth century, see VALLE, supra note 10, at 12.
\textsuperscript{522} HAGAN, supra note 14, at 53. On the auxiliary forces' tight integration into the U.S. Navy during the Spanish-American War, see BENTON, supra note 496, at 136-37.
\textsuperscript{523} DAVIS, supra note 14, at 91-92; SPROUT & SPROUT, supra note 14, at 204. For a broader discussion of the problem of cruising radius, especially with respect to fleet actions, see REPORT OF [NAVAL] POLICY BOARD, S. EXEC. DOC. NO. 51-43, at 7-11 (1890) [hereinafter POLICY BOARD REPORT].
\textsuperscript{524} KARSTEN, supra note 10, at 338.
come obsolete, but that it had never been useful in the first place. Indeed, Mahan generally eschewed arguments from the imperatives of technological change, warning against "too exclusive attention to mechanical advance." 525 When Herbert made a historical argument for the guerre d'escadre in his 1893 report, half of it was drawn from the age of sail. 526 Besides, arguments resting on technology could go against the guerre d'escadre, as well. At least into the early 1890s, experts were divided on whether the modern steel battleship—which remained relatively untested in battle—could survive torpedoes and improved artillery. 527 Indeed, Germany during the 1880s slowed its construction of capital ships in part because of this uncertainty. 528

Ultimately, the strategic revolution can be explained only by a political choice to replace one set of national priorities with another. In this period, U.S. manufacturing was expanding to the point where it could be helped by more access to overseas markets. 529 At the same time, the European powers were increasingly engaged in overseas expansion. 530 As they had partitioned Africa, thought some, so they might someday partition the Americas. 531 The possibility of a canal through the Central American isthmus and the inevitable struggle to control it were of particular concern. 532 The guerre de course could not ensure a sphere of dominance for U.S. commerce in a world of increasingly competitive empires. These issues helped legitimate a new mentality in which the United States, in a forward strategy to stop encroachment by other global empires, would itself become a global empire. In a report that converged closely with Mahan’s thinking, a board of naval experts in 1890 prophesied that, while the United States was currently “self-contained to a greater degree than any other important nation,” its “comparative isolation” would soon “cease to exist,” shattered by rising overseas commerce and the construction of a canal through the isthmus. 533 The nation should anticipate this transition with massive offensive armaments. Skeptics responded that the threat was too speculative and present relations with all the world powers too benign to justify such a radical change. 534 Indeed, the most recent historian of the U.S. naval transformation concludes that no specific external strategic threat was sufficient to explain it. 535 It was a choice to take the

525. Id. at 343.
526. NAVY REPORT (1893), supra note 518, at 37-38.
527. DAVIS, supra note 14, at 50, 99; HOBSON, supra note 504, at 100-02.
528. HOBSON, supra note 504, at 116.
529. DAVIS, supra note 14, at 35. HERRICK, supra note 14, at 4-5, 23, 193.
530. DAVIS, supra note 14, at 72.
531. Id. at 85; HAGAN, supra note 14, at 7.
532. DAVIS, supra note 14, at 24-25, 28, 74-76.
533. POLICY BOARD REPORT, supra note 523, at 4.
534. DAVIS, supra note 14, at 54-55.
535. SHULMAN, supra note 14, at 6-7; see also id. at 46-57, 139-50 (analyzing how the "democ-
offensive in anticipation. The Mahanian vision, concludes the European naval historian Rolf Hobson, “depended on arguments based on ‘myths of empire’—claims about the future direction of international affairs drawn from the racist, social Darwinist, and mercantilist currents of thought” prevailing at the time, which “made territorial and naval expansion seem like necessary measures of national defense because the state could only grow or decline.”

The Mahanian fleet, centered on capital ships, cost far more than had the prior program of updating the old commerce-raiding navy: real average annual naval appropriations rose sixty-two percent between the period from 1883 to 1889 (1883 marking the first major refurbishment appropriation) and the period from 1890 to 1897 (1890 marking the first appropriation for battleships). By 1898, when the United States declared war on Spain, it was prepared to prosecute the guerre d’escadre. Privateers were strategically out of the question. The government explicitly renounced their use for the duration of the war. Instead, while the Spanish fleet sailed westward across the Atlantic, the U.S. Navy used its fleet to blockade Havana, thereby disrupting supplies to Spanish troops in Cuba and preventing the oncoming Spanish ships from entering the harbor of the city, which was the best-defended on the island. When the Spanish fleet reached Cuba, it found Havana closed and therefore sailed into Santiago, a port on the opposite side of the island. The United States reacted by concentrating its naval forces at Santiago and trapping the Spanish ships there, which allowed transports carrying the U.S. Army to sail safely from Florida to Cuba. U.S. troops landed near Santiago, captured key positions, and forced the Spanish ships out of the harbor, at which point the U.S. fleet (centered on capital ships) destroyed them, leaving Cuba defenseless. The war at once vindicated the guerre d’escadre and, in a kind of self-fulfilling prophecy, gave the United States overseas colonies that required more battleships for their defense. When President McKinley was assassinated in 1901, leaving the White House to the ardent navalist Theodore Roosevelt, the national course was set. In 1901-09, real average annual naval appropriations were 255% higher than during the period 1890-

ratic tradition of antimilitarism” was gradually undermined in the arena of public opinion); HERRICK, supra note 14, at 84-85 (citing change in public opinion about imperialism).

536. HOBSON, supra note 504, at 164.


538. Malkin, supra note 12, at 43.

539. SPROUT & SPROUT, supra note 14, at 236-38; WARREN ZIMMERMANN, FIRST GREAT TRIUMPH: HOW FIVE AMERICANS MADE THEIR COUNTRY A WORLD POWER 277-83 (2002).

540. DAVIS, supra note 14, at 103, 107; SPROUT & SPROUT, supra note 14, at 241-45.
By this time, commerce raiding had disappeared from U.S. war plans: the cruisers' exclusive purpose was to take part in the fleet.\footnote{541} The new configuration of naval warfare was seized upon by humanitarians in an interesting way. Whereas the archetype of maritime warfare in the eighteenth century had been a private raider capturing a private merchantman, the archetype at the start of the twentieth century was a pair of fleets, each financed and controlled by its respective state, meeting one another in a decisive battle. To humanitarian eyes, the confinement of maritime warfare to battles between naval fleets distilled international conflict to a highly civilized and even chivalric duel between persons fully qualified to do battle, in contrast to the sub-professional combatants and civilian victims who populated the theater of operations in the previous, more barbarous, age. In keeping with this reasoning, Congress in 1904 unanimously endorsed the immunity of property from capture at sea, just as Monroe had done in the 1820s and Marcy in the 1850s. Advocating this position at an international peace conference in 1907, U.S. Ambassador Joseph H. Choate said:

[B]ecause the great Powers are to-day concentrating their fleets for purely military operations looking to the control of the sea, and are only building vessels which are useful for combat, we think the time has come to appeal to the maritime nations of the world... to agree to desist from this antiquated and mischievous resort to the capture of enemy's [merchant] ships, and to leave the high seas free for the prosecution of innocent and unoffending commerce...\footnote{543}

Mahan had been a major force behind the transformation of naval warfare on which Choate’s thinking was premised. Yet, as the historian Bernard Semmel has shown,\footnote{544} Mahan considered such thinking to be an absurd misinterpretation of why maritime warfare had been so reformed. “For what purposes, primarily, do navies exist?” Mahan asked. “Surely not merely to fight one another... If navies, as all agree, exist for the protection of commerce, it inevitably follows that in war they must aim at depriving their enemy of that great resource...” The reason to build a fleet of capital ships was to support a blockade of enemy ports and break a blockade of one’s own. Blockade aimed at the exact same goal as commerce raiding: “the stoppage of transportation, as a means of destroying...\footnote{545}

\footnotetext{541}{Calculations are based on the total nominal annual naval appropriations given in \textsc{Davis, supra} note 14, at 473, converted to 1860 dollars, using the index in \textsc{Historical Statistics of the United States: Millennial Edition Online, supra} note 537, Table Cc 1-2.}
\footnotetext{542}{\textsc{Davis, supra} note 14, at 191.}
\footnotetext{543}{\textsc{3 Proceedings of the Hague Peace Conferences, supra} note 492, at 753-54.}
\footnotetext{544}{This paragraph draws on \textsc{Semmel, supra} note 12, at 92-95, 154-58. Semmel does not specifically relate his analysis to the de-privatization of combat.}
\footnotetext{545}{\textsc{A.T. Mahan, Possibilities of an Anglo-American Reunion} (1894), in \textsc{The Interest of America in Sea Power, Present and Future} 107, 128 (photo. reprint 1970) (1897).}
the resources of the enemy.” The sole difference between the two, Mahan believed, was that blockade was far more effective in achieving the common end.\footnote{546. MAHAN, supra note 320, at 173-74.} As for the sacredness of private property, said Mahan, “the financial dependence of a state upon the commerce maintained by its citizens” meant there was “practically no such thing as private—individual—losses distinguished from the loss of the community to which the individual belongs.”\footnote{547. Id. at 162.} Thus, in war, the public/private distinction had little meaning for Mahan as a moral construct.\footnote{548. Mahan did think that personal property should be exempt from seizure, since it was not part of commerce and did not contribute to the state’s economic well-being. Id. at 166.} Indeed, Mahan urged his government to cease pressing the traditional American position in favor of immunity for private property on the high seas, for if immunity’s underlying principle—protection of private property—were taken to its logical conclusion, it would undermine the legality of blockade.\footnote{549. The relevant discussion is SEMMEL, supra note 12, at 92-94, 96-97, 154-58. Semmel says that Mahan, in his formulation of naval strategy, considered “commerce-destroying” to be an important “secondary” operation, id. at 92, 155. In Semmel’s reading of Mahan, as I understand it, the “primary” operation would be fleet battle, and “commerce-destroying” (in this context) means blockade, not old-fashioned solo commerce raiding, which Mahan thought should be abandoned completely. In his discussions of the issue, id. at 92-94, 96-97, 154-57, Semmel cites both published and unpublished writings by Mahan. Though I have not checked the unpublished writings, the published ones generally support my interpretation. Several of them reiterate Mahan’s belief in the superior efficacy of blockade and make clear that the danger of high-seas immunity is that its underlying principle—the protection of property—may undermine the legality of blockade. MAHAN, supra note 320, at 173-75; 1 MAHAN, supra note 7, at 283-89, esp. 287; MAHAN, supra note 545, at 128-34. Admittedly, Mahan’s early historical works arguably suggest the utility of old-fashioned solo commerce-raiding as a kind of adjunct to fleet superiority. See MAHAN, INFLUENCE OF SEA POWER UPON HISTORY, supra note 510, at 31, 132, 137, 539-40; 1 MAHAN, INFLUENCE OF SEA POWER UPON THE FRENCH REVOLUTION AND EMPIRE, supra note 510, at 179-80, 337. But these passages probably tell us little about Mahan’s strategic beliefs regarding his own time and the future, since they cover the period before Britain perfected the modern blockade in 1803-15. On the advent of modern blockade, see ALBION & POPE, supra note 11, at 85-86. (The other published Mahan piece cited by Semmel on this issue, Letter from Mahan to Leopold J. Maxse (July 30, 1907), in 3 LETTERS AND PAPERS OF ALFRED THAYER MAHAN 220 (Robert Seager II & Doris D. Maguire eds., 1975), cited in SEMMEL, supra note 12, at 157 n.24, is not relevant for our purposes.) For more on this point, see infra note 550.} Further, it seems Mahan thought it might be necessary in the future to conduct blockades that were more elaborate and geographically spread-out (though still tightly coordinated), which might run afoul of restrictions on high-seas capture.\footnote{550. Charles H. Stockton, the president of Naval War College and an ally of Mahan, wrote an anti-immunity article at Mahan’s behest, see Stockton, supra note 481, at 206 (stating that he wrote the article “at the suggestion of Captain Mahan”), in which he noted that high-seas captures might be necessary since “a forced cessation of [the enemy’s] external trade becomes most difficult, if not impossible, by blockade,” if “the enemy is continental in his geographical position, and connected by railways with continental systems of other countries.” Id. at 210. Considering that Mahan was keen on an Anglo-American naval alliance, SEMMEL, supra note 12, at 154-56, Stockton’s thinking clearly anticipates the British strategy at the start of World War I, in which the Royal Navy used its capital ships to confine all German warships and merchantmen to port and then sent cruisers to conduct a “distant blockade,” i.e., to patrol the high-seas bottlenecks of the North Sea and North Atlantic and search neutral merchantmen bound for neutral continental ports whose cargo might find its way by railroad to Germany. On Britain’s strategy, see ERIC W. OSBORNE, BRITAIN’S ECONOMIC BLOCKADE OF
on neutral ships to which the Europeans had agreed in 1856. President Roosevelt and the naval leadership were sympathetic to Mahan’s view that the imperatives of economic warfare trumped respect for property rights.

Thus, the leading naval imperialists, who were most responsible for the strategic revolution that decisively ended the possibility of privateering, were motivated by the desire to elevate the United States to the status of a global power, and not by the humanitarian wish to protect private rights that actuated the original American critics of privateering, such as Gallison and Kent. To be sure, Mahan said that “privateering inherently and historically had a tendency towards piracy,” and his ally, Naval War College President Charles H. Stockton, said that, “without close governmental supervision,” it “degenerate[d] into illegitimate and often plundering operations of an indiscriminate nature.” They had the luxury of criticizing as inhumane a practice that they considered strategically useless, even as they fought against the rights of property and neutrality whose violation had provided much of the basis for Gallison and Kent’s earlier humanitarian pleas.

VII. BANISHING THE PROFIT MOTIVE FROM THE PUBLIC NAVY: THE ABOLITION OF NAVAL PRIZE MONEY

Early in 1898, the Navy Department submitted to Congress a bill to reform naval personnel policies, increasing salaries, accelerating promotion, and making other improvements. The bill originally said nothing about prize money. It was still under consideration when the Spanish-American War began and concluded in mid-1898. Then, in its first post-war session, Congress amended the bill to abolish prize and bounty money in future wars, and it became law in 1899. Why did Congress abo-

551. SEMMEL, supra note 12, at 93-94, 155.
552. See id. at 156.
553. MAHAN, supra note 320, at 160.
554. Charles H. Stockton, Mitigation of the Evils of War, 51 THE INDEPENDENT 1818, 1819 (1899).
555. CHISHOLM, supra note 10, at 447-55.
557. 32 CONG. REC. 718 (House), 1973 (Senate) (1899).
558. Naval Personnel Act, ch. 413, § 13, 30 Stat. 1004, 1007 (1899); see also CHISHOLM, supra
ish the old system? Unfortunately, Congressmen themselves said precious little on the matter. But other sources suggest answers.

At the outbreak of war, with the Spanish fleet still faraway and the public hungry for war news, U.S. Navy ships sailing toward and blockading Cuba captured a few Spanish merchantmen.\(^559\) The press publicized these captures and linked them with greed for prize money.\(^560\) The New York Times reported that the McKinley Administration—which was officially justifying the war as a humanitarian mission to rescue Cubans from Spanish oppression—worried that the captures might put the United States “in a bad light before the world.”\(^561\) Shortly after the war, the Washington Post led some of its fellow newspapers in calling for the abolition of prize money. Apart from spouting vague platitudes about barbarism and civilization, the papers charged that the system tarnished the war’s much-touted humanitarian rationale.\(^562\) Further, they noted that the naval victory in Cuba (which would yield at least some bounty money) occurred in part because the U.S. Army had forced the Spanish navy out of Santiago Bay into the jaws of the U.S. fleet.\(^563\) This revived the old Civil War resentments about joint Army-Navy operations.\(^564\)

If the press was turning against the old system, what did naval officers—the parties most directly affected—think? The conventional wisdom was that they generally supported abolition: so said Representative George Foss, naval expert and soon-to-be longtime chairman of the House Naval Affairs Committee;\(^565\) the leading navalist Theodore Roosevelt;\(^566\) and the Army and Navy Register, a popular service newspaper.\(^567\) Why would naval officers hold this view? There were three ways to win prize and/or bounty money: commerce raiding, blockade, and fleet battles. There is reason to think that, by 1898, the prospect of profit from each of these three sources had lost its attraction.

As for commerce raiding, incentive awards for individual ships cruising independently arguably made sense and distributed money in accord with

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note 10, at 455-66.

\(^{559}\) *The Capture of the Pedro*, N.Y. TIMES, Apr. 24, 1898, at 2; *Prizes Taken Off Havana*, N.Y. TIMES, Apr. 26, 1898, at 1; *Two Prizes at Key West*, N.Y. TIMES, Apr. 25, 1898, at 1.

\(^{560}\) *The Captured Merchantmen*, HARTFORD COURANT, Apr. 29, 1898, at 8; *An Inglorious Occupation*, N.Y. TIMES, Apr. 26, 1898, at 6.

\(^{561}\) *President and the Prizes*, N.Y. TIMES, Apr. 27, 1898, at 1.

\(^{562}\) *Amend the Blockade*, WASH. POST, Aug. 13, 1898, at 6; *Prize Money*, WASH. POST, July 26, 1898, at 6; *The Prize Money System*, DETROIT FREE PRESS, excerpted in WASH. POST, Aug. 9, 1898, at 6; *Reform It Altogether*, WASH. POST, Aug. 2, 1898, at 6; *A Victorious Crusade*, WASH. POST, Jan. 23, 1899 at 6 (quoting the Philadelphia Press).

\(^{563}\) *The Prize Money System*, supra note 562, at 6; *Reform It Altogether*, supra note 562, at 6.

\(^{564}\) *Prize Money*, supra note 562, at 6; *The Prize Money System*, supra note 562, at 6; *The Prize Money System*, SYRACUSE POST, excerpted in WASH. POST, Aug. 21, 1898 at 6; *Why Prize Money?*, ATLANTA JOURNAL, excerpted in WASH. POST, Aug. 1, 1898, at 6.


\(^{567}\) *The Prize System*, supra note 415, at 184.
merit. But that mattered little, since, as we have seen, commerce raiding itself was vanishing from U.S. strategy by 1898. And even if raiding were still to play a marginal role, awarding prize money to the handful of officers assigned to carry it out in some future war would now be an anomaly within a navy where most officers experienced combat in the form of fleet actions. As Stockton argued in 1899, success in commerce raiding “should be rewarded only in the same way as other military measures are rewarded that are incidental to a maritime war. It certainly should have no greater reward, in a material sense, than that given to phases of naval warfare in which life, limb, and reputation are jeopardized.”

As for blockade, the Civil War had shown that rewards might be significant but that their distribution was likely to be arbitrary. The Army and Navy Register may have had this in mind when, shortly after the Spanish-American War, it editorialized that the “attack upon the Navy prize and bounty system made at the close of the [Civil War] will be renewed with vigor during the next session of Congress,” and added, “We believe Naval officers will favor the proposition to abolish this method of reward which is unfair in its usual results.” Knowing that future rewards from a blockade were likely to be random, naval officers might well have given up their chance at such jackpots in exchange for a more modest but more certain salary increase, which the 1899 personnel bill in fact gave them. Moreover, the effectiveness of a blockade—which during the Civil War had been disrupted by prize money’s incentive structure—was crucial to the guerre d’escadre, which was, in turn, the reason for the U.S. Navy’s meteoric rise in appropriations, importance, and prestige. By giving up prize money, the Navy could perfect the incentive structure behind the strategic weapon that legitimated its heightened institutional status.

As for fleet battles, officers and seamen could potentially earn prize money by capturing enemy warships that were then taken into the U.S. Navy, or they could earn bounty money by destroying such warships. (The bounty rate in 1898 for sinking a ship was $100 per enemy sailor on board at the start of battle, double if the enemy fleet was of superior force.) However, the winnings that top officers reaped from the two fleet battles of the Spanish-American War (the amounts of which were not finally adjudicated until after Congress prospectively abolished prize money) were not nearly as spectacular as those of the cruiser commanders of the War of 1812. Assuming that officers during the years 1898 to

568. Stockton, supra note 481, at 211.
569. The Prize System, supra note 415, at 184.
571. As of 1898, salaries for sea duty stood at $6000 for a rear admiral; $5000 for a commodore; $4500 for a captain; $3500 for a commander; $2800 to $3000 for a lieutenant commander; and $2400
1899 roughly anticipated these outcomes, and considering that the new conventional wisdom predicted that wars would be decided quickly in relatively few decisive engagements, fleet battle would not have seemed an especially great source of profit. Consistent with this, Foss, when introducing the abolition amendment, stated, "I may say for the naval officers that they consider prize money a mere bagatelle. It amounts to but little." What is more, a fleet battle—like a blockade—was a collective endeavor demanding close coordination. It was hard to assign credit to this or that ship when victory required each to perform its assigned duty. To be sure, prize and bounty might be disbursed uniformly by rank to all the officers and seamen in a victorious fleet, but such men already had

to $2600 for a lieutenant. An Act making Appropriations for the naval Service for the Year ending June thirtieth, eighteen hundred and seventy-one, and for other Purposes, ch. 295, § 3, 16 Stat. 321, 330 (1870) (codified in Revised Statutes of the United States § 1556 (2d ed. 1878)); see also Index Analysis of the Federal Statutes 123, 228, 248, 645, 647, 653-54, 991 (George Winfield Scott & Middleton G. Beaman eds., 1908) (listing no changes for any of these ranks prior to 1899). As for prizes and bounties, the two fleet battles of the war were Manila Bay and Santiago. At Manila Bay, the commodore received $18,516. The captains of the fleet's seven ships respectively received $9413, $8011, $5854, $5317, $3834, $2849, and $1754. A special officer known as the "fleet captain" got $5050. Other officers and seamen generally received about the equivalent of three months' pay, though one report gave somewhat higher estimates for lieutenant commanders ($2000 to $3000 each) and lieutenants ($1100 to $1500 each). Dewey's Men Will Divide $370,335, The Press (Phila.), June 28, 1904, at 7; Manila Bay Prize Checks Going Out, The Press (Phila.), Sept. 9, 1904, at 5; see also The Manila Prize Cases, 188 U.S. 254, 281-83 (1903) (confirming there were seven U.S. ships entitled to share). At Santiago, the total award for the whole fleet was initially $166,700, for the destruction of five ships. Sampson v. United States, 35 Ct. Cl. 578, 580 (1900). This figure excludes one Spanish ship that was later added to the bounty total, see The Infanta Maria Teresa, 188 U.S. 283, 289 (1903), but whose number of sailors is not revealed by the sources. Assuming generously that this last ship had as many sailors as the largest of its five fellows (543), see Sampson, 35 Ct. Cl. at 580, and multiplying this number by the applicable bounty rate ($100), and adding the product to the initial total award of $166,700, we get an estimated final total award of $221,000 for the battle of Santiago. Of this, the rear admiral would take five percent (see § 10, 13 Stat. at 309, codified in Revised Statutes of the United States § 4631 (2d ed. 1878), i.e., $11,050. As for the other officers at Santiago, their awards have not been published, but given that the estimated total ($221,000) was little more than half that of Manila Bay ($370,335) and that the number of U.S. ships entitled to share (13), see Sampson, 35 Ct. Cl. at 584, was nearly double that of Manila Bay (7), the awards for each officer must have been, on average, about one-third to one-fourth what they were at Manila Bay. Taking the two battles together, it seems likely that the majority of officers received awards well under a year's salary, and only seven (the commodore, the fleet captain, and four of the ship captains at Manila Bay, plus the rear admiral at Santiago) enjoyed awards exceeding that benchmark, with the highest earner by far (the commodore at Manila Bay) enjoying nearly four times salary. By comparison, the War of 1812 yielded many more and larger prizes. See supra text at notes 100-105.

To be sure, the popular press reported a range of expectations about prospective awards, from sensationaly high, e.g., Prize Money Awards, Army and Navy Journal, Sept. 17, 1898, at 67 (citing the speculation of "gossips" that the fleet commander at Santiago would receive $500,000, though more recently speculation has fallen to $100,000), to much lower than the actual awards turned out to be, e.g., Sampson Vexes M'Kinley, Chi. Daily Trib., Feb. 20, 1899, at 1, 3, (stating a "prominent officer" says that "not [one] officer expected to receive prize money which would amount in all to a month's pay"). In light of this variation, the actual awards seem a reasonable guess as to expectations ex ante.

1 Navy Report (1889), supra note 483, at 5. The brief Spanish-American War confirmed this conventional wisdom. No ship participated in the rewards of more than one fleet battle; there is no overlap between the ships listed in Manila Prize Cases, 188 U.S. at 281-83, and those listed in Sampson, 35 Ct. Cl. at 584.

32 Cong. Rec. 660 (1899).
tremendous incentives to win in battle and were already under tight central control to ensure that they did so, making it unlikely that such a generalized "victory bonus" would have much effect. And since enjoyment of such a bonus would depend upon assignment to the fleet that ended up winning the victory, officers ex ante—as with blockade—might well prefer a simple salary increase, which they got.

Overall, the politically charged transition from the guerre de course to the guerre d'escadre not only foreclosed the possibility of privateering but also reduced the attraction of prize and bounty for naval officers in a way that may have been decisive in getting the awards abolished. Combat

575. See A.T. Mahan, Letter to the Editor of the New York Sun, reprinted in ARMY AND NAVY REGISTER, Aug. 13, 1898, at 102 (arguing that, although the U.S. fleet commander was personally absent from the battle of Santiago, the coordinated plan that he had created for the fleet was responsible for the victory, which would have occurred regardless of which individual officers happened to execute the plan).

576. Scholars have noted that the British government continued to grant prize money to its officers and crews until 1948. HERMAN, supra note 137, at 557; PETRIE, supra note 15, at 142. Given that the guerre d'escadre had already dominated British naval strategy for generations prior to that late date, the British experience may seem, at first glance, inconsistent with my suggested explanation of the U.S. case. Upon closer examination, however, my theory fits the British case fairly well. Whereas the U.S. transition from the guerre de course to the guerre d'escadre in the 1890s was rapid and total, the British story was different. While fleet action was central to British strategy from at least the eighteenth century onward, independent cruising continued to play a role for a quite long time. Throughout the eighteenth century and through the Napoleonic Wars, the British navy itself engaged in some degree of commerce raiding, BAUGH, supra note 68, at 115; HERMAN, supra note 137, at 239, 400-01; STARKEY, supra note 11, at 260, and Britain commissioned privateers in large numbers, id. at 323. And throughout the nineteenth century, in which actual full-scale fleet warfare turned out to be rare, the British navy's actual combat missions consisted largely of chasing down slave-traders, pirates, smugglers, and the like. HERMAN, supra note 137, at 419-70; RAYMOND HOWELL, THE ROYAL NAVY AND THE SLAVE TRADE, at v-vi (1987). A vessel doing this kind of police work often operated in isolation and with much autonomy, even when (as commonly occurred) it was assigned by the central authorities to cover a given geographic zone. HERMAN, supra note 137, at 420-21; HOWELL, supra, at 30-31, 45-46, 53-55, 73, 81-82, 124-25, 135, 192-95, 218-19; CHRISTOPHER LLOYD, THE NAVY AND THE SLAVE TRADE: THE SUPPRESSION OF THE AFRICAN SLAVE TRADE IN THE NINETEENTH CENTURY 91-96, 119-23, 143-45, 166-67, 250-53 (1949). Such vessels collected bounties, shares of captures, or both when they succeeded. HOWELL, supra, at 35 (slavers); LLOYD, supra, 79-84, 251, 254-55 (slavers); PETER PADFIELD, RULE BRITANNIA: THE VICTORIAN AND EDWARDIAN NAVY 106 (1981) (pirates); Priz Money in the Persian Gulf, THE ECONOMIST, Oct. 25, 1913, at 889 (arms runners). It is often difficult for an employer to offer lucrative incentive compensation to some of its agents but not others. PAUL MILGROM & JOHN ROBERTS, ECONOMICS, ORGANIZATION, AND MANAGEMENT 193-94, 418-19 (1992). Thus, so long as solo cruising played a major role in actual maritime combat and thereby justified prize and bounty money (as a policy matter) for some of the nation's maritime forces, it was likely to remain available for all of them. Cf. BAUGH, supra note 88, at 113-15 (stating that British naval officers in the eighteenth century would not stand for the abolition of their right to prize money so long as privateers enjoyed a similar right). It was only on the eve of World War I—which would entail actual fleet combat on an unprecedented scale—that the British admiral proposed to abolish individual awards of prize money; ultimately all the war's merchant captures went into a national fund and were disbursed uniformly (by rank) throughout the entire service. On the ultimate scheme, see 30 HALSBURY'S LAWS OF ENGLAND 639 (3d ed. 1959); on the initial proposals, see Naval Armaments and Prize Money, THE ECONOMIST, Mar. 21, 1914, at 692; Prize Money, THE ECONOMIST, Nov. 22, 1913, at 1130; and Prize Money—New Regulations, THE ECONOMIST, Sept. 5, 1914, at 421. Admittedly, the British government throughout World War I maintained the tradition of individual bounty awards for destroying or capturing enemy warships. 30 HALSBURY'S LAWS OF ENGLAND 656 (3d ed. 1959). But in the case of major coordinated fleet operations, parties and courts apparently understood that these awards should be pooled and distributed uniformly by rank throughout the fleet: after the biggest fleet battle of World War I, the officers and sea-
for profit was dead, for the time being.

men involved universally agreed that it would be "impossible ... to contend that any one ship or squadron was responsible for the destruction of any particular enemy ship," and the court approved their agreement, holding that the battle was "the common engagement and enterprise" of the whole fleet. In the Matter of the Battle of Jutland, [1920] P. 408, 412-13 (U.K.). In World War II, the British government extended its collectivist treatment of prize money to bounties, as well. 30 HALSBURY'S LAWS OF ENGLAND 656 (1959). Thus, by the time Parliament formally abolished prize and bounty awards, 12 & 13 Geo. 6, c. 9, § 9 (1948) (Eng.), they had long since become so collectivized as to have very limited incentive effects.