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The Free Sea: The American Fight for Freedom of Navigation

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to the field as the material can offer the foundation for further reflections on "the regional institutional phenomenon" (p. 323).

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At the start of this book, the authors observe that "as a colony, the United States operated a large commercial fleet but next to no navy. . . . During the American War of Independence, American leaders adopted a maximalist view of the doctrine of 'free ships make free goods,' using law as a weapon in lieu of naval power" (p. 9). The authors manifestly prefer both weapons—as one might expect from well-informed former Navy lawyers with substantial operational and policy experience in advising on international law capped by distinguished appointments in international law at the Naval War College.

In order to protect freedoms of navigation and overflight, the authors call for "continued American naval presence, and if needed application of military power to safeguard" those freedoms around the world (p. 282), and call for the United States to become party to the United Nations Convention on the Law of the Sea[1] "to strengthen its hand" (p. 283). The respective rationales can be succinctly stated. As for the former: "Left unused, navigational rights and freedoms atrophy over time" (p. 282). As for the latter: "The rule of law in the oceans has been a source of security, prosperity and stability for the United States and the world" (p. 283).

This may suggest a symbiotic relationship between the two. A widely accepted platform of principle helps to render credible the assertion that one is engaged in the exercise and protection of rights under international law when acting in contravention of unlawful claims. As several case studies in the book demonstrate, the less certain that platform of principle, the greater the internal and external resistance to exercising asserted rights, and the greater the risks and costs. At the same time, the continuing relevance and vitality of the platform of principle itself is enhanced by its implementation in practice.

The legal literature is replete with analyses of the efforts to codify the law of navigational rights and freedoms by treaty and the outcome of those efforts. Less attention has been devoted to comprehensive retrospective analysis of the reactions to particular challenges to those rights and freedoms. This book helps to remedy that. Its focus is on the direct political and military response by the United States to physical interference with its navigational freedoms at sea in specific circumstances. The authors analyze each challenge, and the response to that challenge, in chapters arranged in chronological order. Many readers will have heard of at least some of these events. But few may have had the opportunity to reexamine them in light of the contextual detail and informed perspectives reflected in those chapters.

The authors begin with the Quasi-War with France (1798–1800), notably including the politically fraught context in which the United States ultimately responded in kind to seizure of U.S. merchant ships (p. 7). They continue with the Barbary Wars in North Africa (1801–16), including but not limited to the U.S. naval responses to the seizure of U.S. merchant ships and their cargoes and the mistreatment of those on board (p. 29). This is followed by the War of 1812 with Great Britain (1812–14), when the United States finally abandoned its struggle to maintain its neutrality in the Napoleonic Wars in the face of British impressment of U.S. sailors and attempts to restrict U.S. maritime commerce (p. 52). Documenting the eight-fold expansion of the U.S. merchant fleet between 1789 and 1810 and its significant role in commerce with British and French dependencies in the Western Hemisphere, the authors helpfully stress the importance to the United States of shipping and trading freedoms (in Grotius's terms,

[1] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3 (hereinafter UNCLOS).

commeandi commercandique libertas) in the face of British and French attempts to restrict each other's trade (pp. 53–56). In effect, the principal challenge to U.S. freedom of navigation at the time was the assertion of belligerent rights against neutral shipping and trade.

The chapter on the two world wars and the interwar years (1914–45) resumes the preoccupation with neutral rights during the periods preceding U.S. entry into those wars. The basic problems posed for the United States in the early years of World War I were attacks on shipping in the northeast Atlantic by German submarines that failed to comply with prior practices regarding protections for interdicted merchant shipping. In the authors' view, "[t]he American position was steadfastly maximalist, insistent on neutral rights for American ships as well as for American citizens and property on belligerent ships" (p. 85).[2] The German attacks ultimately provoked the U.S. decision to enter World War I. The immediate provocation for U.S. entry into World War II was the attack by Japanese naval and air forces on U.S. naval ships, military aircraft, and facilities at Pearl Harbor and elsewhere in the Pacific.

The chapter on the world wars addresses events that occurred a century or more after the prior chapter on the War of 1812. During the intervening period, there were U.S. disputes with the UK that are well known to international lawyers, including those concerning the *Caroline* and the *Alabama*, as well as fur sealing in the Bering Sea. All three disputes involved destruction or detention of ships. Their omission from the book was unquestionably intentional; it underscores what appears to be the main object of the book, namely a close examination of the contexts in which claims or actions by foreign states in derogation of navigational rights and freedoms provoked tangible and at times forcible naval and military reactions by the United States.

The absence of express treatment of the *Caroline* dispute[3] does not mean that the authors ignore questions of self-defense. Quite to the contrary, they stress the importance of the right of self-defense in the context of the exercise of navigational rights and freedoms by warships and military aircraft (pp. 198–99).[4]

Both the *Alabama* and the fur seal disputes were effectively resolved by arbitral decisions respectively ordering compensation for the destruction of ships and upholding high seas freedoms.[5] While the authors decided not to address either case, they do emphasize the award rendered in the more recent *South China Sea* arbitration (pp. 265, 276–80).[6] The object of their discussion, including their call for compliance

[2] The authors assert that "peacetime freedom of the seas and wartime neutral rights were, for the first time, intermixed" in President Wilson's speech on January 22, 1917 calling for freedom of the seas (p. 85). It is not entirely clear what the intended import of this statement is. The authors readily acknowledge that the principle of the freedom of the seas took root centuries earlier (pp. 4, 272). The Barbary Wars were an effort to defend peacetime freedom of navigation from predation.

[3] *See* CRAIG FORCESE, DESTROYING THE *CAROLINE*: THE FRONTIER RAID THAT RESHAPED THE RIGHT TO WAR (2018), *reviewed by* Tom Dannenbaum at 113 AJIL 862 (2019).

[4] Their citations are to basic Navy and Defense Department guidance that sets forth and elaborates on the classic self-defense requirements of necessity and proportionality (p. 334 nn. 81–82). *See* U.S. NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1–14M, at 4–3, para. 4.4.1 (2007); Chairman of the Joint Chiefs of Staff Instruction, Standing Rules of Engagement for US Forces, CJCSI 3121.01B, Enclosure A, at 1–3, para. 4(a) (June 13, 2005).

[5] Alabama Claims (U.S./Gr. Brit.), Award (Sept. 14, 1872), 29 RIAA 125 (2012); Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals (U.S./U.K.), Award (Aug. 15, 1893), 28 RIAA 263 (2007). The fact that the fur seal arbitration was not about navigation may in itself account for its exclusion, although the law of the sea at the time did not make the kinds of distinctions between classic high seas freedoms that characterize the mixture of coastal state jurisdiction over resource activities and high seas freedoms of navigation and overflight in the modern regime of the exclusive economic zone.

[6] The South China Sea Arbitration (Phil. v. China), PCA Case No. 2013–19, Award (July 12, 2016) (hereinafter *South China Sea* Award). *See* Lucy Reed & Kenneth Wong, *Marine Entitlements in the South China Sea: The Arbitration Between the Philippines and China*, 110 AJIL 746 (2016); *Symposium on the South China Sea Arbitration*, 110 AJIL UNBOUND 263 (2016); *see also Agora: The South China Sea*, 107 AJIL 95 (2013).

by China, is the award's rejection of Chinese claims and actions in conflict with UNCLOS, rather than the dispute settlement process itself (pp. 276–77).

While the authors urge other states with maritime interests to support the exercise of navigational rights and freedoms in the face of claims inconsistent with UNCLOS (p. 282), they do not expressly explore the option of resort to arbitration or adjudication under UNCLOS in this context.[7] Be that as it may, that option is one weapon in the arsenal of responses to an unlawful coastal state claim or exercise of sovereignty or jurisdiction, at least for the many parties to UNCLOS.

As the authors note, the book's seven post-World War II case studies[8] largely reflect a shift from the question of actions by a belligerent against neutral shipping to the modern problem of coastal state peacetime assertions of sovereignty and jurisdiction over offshore areas, and in particular navigation, overflight, and related activities in those areas.[9] The carefully selected case studies document the political, economic, and military constraints relevant to shaping a response to unlawful coastal state claims or actions and maintaining a program of routine exercise of navigation rights and freedoms in the claimed areas. The case studies amply demonstrate why it is important to maximize the types of options available for an effective response by the United States or others to unlawful coastal state claims, which in turn may help to dissuade coastal states from making questionable claims in the first place.[10] No one who reads the case studies closely is likely to conclude that a decision to challenge any given foreign coastal state claim at any particular time by sending warships and military aircraft to exercise navigational rights and freedoms in claimed areas is either easy or inevitable or free of risk and cost. There is ample reason for the authors to press the point that freedom of navigation is not a "cost-free public good that will persevere on the strength of its own logic" (p. 283).

While much of the book is devoted to the question of exercising and enforcing rights and freedoms, the last of the case studies, dealing with navigation and overflight issues with China since 2001, shifts more of the focus to analysis of current legal issues. This of course invites some quibbling. One issue concerns certain arguments deployed in support of the proposition that there is at present no valid territorial sea claim around any of the Spratly Islands precluding overflight without consent and limiting navigation to innocent passage (pp. 270–71).

The authors agree with the conclusions in the *South China Sea* award, which rejected China's assertions of historic rights within its "dashed line"; affirmed that low-tide elevations outside the territorial sea, whether or not artificially enhanced, are subject to the regime applicable under UNCLOS to the part of the seabed in which they are found, are not subject to appropriation, and generate no entitlements to maritime

[7] This may in part reflect the authors' negative reaction to certain decisions of the International Court of Justice (ICJ) addressing the use of force, including the Oil Platforms case (p. 222). Oil Platforms (Iran v. U.S.), Judgment, 2003 ICJ Rep. 161 (Nov. 6). UNCLOS was not the basis for the ICJ's jurisdiction in those cases. UNCLOS was however the basis for jurisdiction in the South China Sea arbitration; the award rejected jurisdiction over one of the claims on grounds of the military activities exception to jurisdiction in UNCLOS Article 298. *South China Sea* Award, *supra* note 6, para. 1161. *See* Lori Fisler Damrosch, *Military Activities in the UNCLOS Compulsory Dispute Settlement System: Implications of the South China Sea Arbitration for U.S. Ratification of UNCLOS*, 110 AJIL UNBOUND 273 (2016).

[8] As identified in the chapter headings: The Gulf of Tonkin Incident (1964), The USS *Pueblo* Incident (1968), The SS *Mayaguez* Incident (1975), Gulf of Sidra (1941–89), The Persian Gulf (1980–88), The Black Sea Bumping Incident (1988), and Freedom of Navigation with Chinese Characteristics (2001–Present).

[9] Actions taken by the parties in naval war zones declared during the armed conflict that followed Iraq's invasion of Iran in 1980 might be viewed as an exception in some respects (*see* p. 201).

[10] The utility of such an additional option was a significant factor in the decision of the United States to press from the outset for inclusion of compulsory jurisdiction as an integral part of UNCLOS. *See* John R. Stevenson & Bernard H. Oxman, *The Preparations for the Law of the Sea Conference*, 68 AJIL 1, 31 (1974).

sovereignty or sovereign rights; and found the Spratly islands to be rocks that do not generate an exclusive economic zone (EEZ) or continental shelf under Article 121 of UNCLOS. Each island may, however, generate a territorial sea, which may extend up to twelve nautical miles around the island. This is no small matter.[11] The islands are tiny; none is larger than one square kilometer. But the combined area of a twelve-mile territorial sea around each island is by no means trivial. Indeed, because of the proximity of the islands, it is possible that the combined effect yields a right of transit passage for ships and aircraft through straits connecting two parts of the high seas or EEZ under Article 38 of UNCLOS—a question the authors might wish to explore.

The authors suggest that an express declaration of both a territorial sea and of baselines in the Spratlys is required to generate a territorial sea (pp. 268, 271). This is puzzling. As for the former, adequate public notice of a general statute or decree establishing the breadth of a state's territorial sea should ordinarily suffice. As for the latter, in the absence of an affirmative establishment of baselines, the result under Article 5 of UNCLOS is that the baseline from which the breadth of the territorial sea is measured is the low-water line around each island.[12] The requirement that the baseline be specifically drawn on charts or identified by coordinates relates to baselines that depart from the low-water line.[13] The authors cannot be understood as wishing to encourage China or anyone else to consider that in the Spratlys.

There is a major legal problem with any suggestion that the waters within the Spratlys may be enclosed by baselines. The arbitral tribunal in the *South China Sea* case found that the drawing of straight baselines or archipelagic baselines around the Spratlys would not be consistent with UNCLOS.[14] The United States has communicated the same position to China not only with respect to the Spratlys but with respect to other islands groups in the South China Sea, including the Paracel and Pratas Islands.[15] The authors rightly do not suggest that this is a technical problem that could readily be remedied by formally publishing such baselines.

While different claimants have built structures or established a physical presence on different islands in the Spratlys, all of the islands are claimed by China and Vietnam, most by the Philippines, and some by others. The United States "takes no position on the legal merits of the competing claims to sovereignty over the various islands."[16] The authors are on thin ice (as it were) in conflating that position with the one in Antarctica (*see* p. 268).[17]

[11] The area of a circle with a radius of twelve nautical miles is 452 square nautical miles, 599 square statute miles, or 1,552 square kilometers. That is nearly twice the total land area of the five boroughs comprising New York City. *See* U.S. Census Bureau, *Quick Facts: New York City, NY, at* https://www.census.gov/quickfacts/fact/table/newyorkcitynewyork,US/PST045219.

[12] Article 5 of UNCLOS states, "Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." The markings to which Article 5 refers are part of the nautical chart itself, which depicts physical features important for mariners. These markings serve to illustrate the location of a legal baseline where the latter is coterminous with the physical feature shown on the chart.

[13] The list of legal baselines that Article 16 of UNCLOS requires be drawn as such on charts of adequate scale or identified by coordinates refers only to straight lines drawn between points on the low-water line. Article 5 is not included in the list.

[14] *South China Sea* Award, *supra* note 6, paras. 573–76.

[15] 2016 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 520, 522 (diplomatic note to China, Dec. 28), *available at* https://www.state.gov/wp-content/uploads/2019/05/2016-Digest-United-States.pdf (hereinafter 2016 Digest); U.S. Department of State, Straight Baseline Claim: China, Limits in the Seas, No. 117, at 8 (1996) (appended to note), *available at* https://2009-2017.state.gov/documents/organization/57692.pdf.

[16] *See* U.S. Department of State, China: Maritime Claims in the South China Sea, Limits in the Seas, No. 143, at 11, n. 25 (1996), *available at* https://www.state.gov/wp-content/uploads/2019/10/LIS-143.pdf; *see also* 2016 Digest, *supra* note 15, at 522.

[17] In response to Australia's submission to the Commission on the Limits of the Continental Shelf, the United States transmitted a diplomatic note to the UN secretary-general on December 3, 2004 recalling Article IV of the Antarctic Treaty and stating that "the United States does not recognize any State's claim to territory in Antarctica and consequently does not recognize any State's rights over the seabed and subsoil

The authors explain their view that intelligence collection by foreign ships and aircraft navigating in the EEZ is lawful (pp. 248, 261–63).[18] They point out that China has yet to reconcile the inconsistency between its conduct of such activities in the EEZs of other states, including the United States, and its efforts to restrict such activities in its own EEZ (p. 275). The authors propose that the United States take countermeasures against China for its incursions on the navigational rights and freedoms of the United States (pp. 275–76). This would be a step beyond the current freedom of navigation program, especially to the extent that it entails action that would not otherwise be lawful.

In particular, the authors suggest that one might impose, by way of a countermeasure, the same constraints on China in the U.S. territorial sea and EEZ as China seeks to impose on the United States in China's territorial sea and EEZ (pp. 274–75). Whatever the surface appeal of such a proposition, not only its bilateral effects but its potentially adverse effect on the U.S. position regarding navigational rights and freedoms require additional reflection. Such a proposition could be understood to imply that freedoms and rights of navigation and related uses are, or may be made to be, contingent on reciprocity.[19] Few coastal states would be interested in a reciprocal right to conduct activities off the U.S. coast that the United States might wish to retain the option to conduct off theirs.[20] And some might even welcome an open season on targeting navigation rights and freedoms under the rubric of countermeasures (which, one might recall, are not limited to replicating the unlawful acts to which they are responding). One might also risk legitimating actions against shipping and aviation by nonstate actors.

None of these questions derogate from the authors' basic and important point, namely that, as in the past, effective means must be found to deal with incursions on navigational rights and freedoms. We are in the authors' debt for their useful, accessible, and nicely documented assemblage and analysis of significant episodes in the American experience not just for policymakers and those who study international law and the law of the sea, but for aviators, diplomats, historians, political scientists, sailors, and others more generally.

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Emerging Legal Orders in the Arctic: The Role of Non-Arctic Actors. Edited by Akiho Shibata, Leilei Zou, Nikolas Sellheim, and Marzia Scopelliti. New York: Routledge, 2019. Pp. xvi, 286. Index.

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In recent years, as the Arctic sea ice recedes, interest in the Arctic region has increased tremendously—by those wanting to exploit increasing

of the submarine areas beyond and adjacent to the continent of Antarctica." *See* United States Mission to the United Nations, New York, Diplomatic Note, Dec. 3, 2004, *available at* https://www.un.org/Depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_usatext.pdf; Antarctic Treaty Art. 4, Dec. 1, 1959, 12 UST 794, TIAS No. 4780, 402 UNTS 71.

[18] *Accord* Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 845–47 (1984).

[19] President Reagan's 1983 statement on U.S. oceans policy specifies that within the U.S. EEZ "all nations will continue to enjoy the high seas rights and freedoms that are not resource related, including the freedoms of navigation and overflight." The statement does not, as the authors might be understood to suggest (p. 276), condition U.S. recognition of foreign states' navigation rights and freedoms off the U.S. coast on their recognition of U.S. rights and freedoms off their coasts. The statement, quoted in the book, asserts that "the United States will recognize the rights of other states *in the waters off their coasts*, as reflected in [UNCLOS], so long as the rights and freedoms of the United States and others are recognized by such coastal states" (p. 274) (emphasis added). Statement by the President, United States Oceans Policy, 19 WEEKLY COMP. PRES. DOCS. 383 (Mar. 10, 1983).

[20] *See* John R. Stevenson & Bernard H. Oxman, *The Future of the United Nations Convention on the Law of the Sea*, 88 AJIL 488, 492 n. 7 (1994) ("Geography alone determines that few foreign states need to navigate past the U.S. coast to reach destinations outside the United States.").