

**THE POSEIDON PROJECT:
THE LAST DAYS OF FREEDOM OF THE SEAS**

CHAPTER 1

On April 8, 2012, a patrol plane from the Philippines spotted several Chinese fishing boats anchored in the shallow waters off the Scarborough Shoal. Situated in the South China Sea, the shoal is a triangular collection of reefs and rocks about 120 miles from the Philippine island of Luzon. At high tide, much of the feature is submerged, and its highest point is a mere six feet above the water. Because the shoals are within 200 miles of its main islands, the Philippine government claims the authority to regulate fishing and other activities in the area. The government in Manila accordingly dispatched the pride of its small navy, the *Gregorio del Pilar* to investigate the Chinese fishing. When the ship arrived, navy personnel boarded the Chinese boats and found fish, giant clams, live sharks, and coral—the fruits of what the Philippines considered illegal fishing. As the sailors returned to their ship to prepare paperwork for arrests, however, the fishermen made a distress call with a satellite phone. Two Chinese coast guard vessels steamed into the area and stationed themselves between the fishing boats and the *Gregorio del Rosario*.

The Chinese brought with them a very different interpretation of rights in the area; their government viewed the shoal as part of the broad swathe of the South China Sea whose features have belonged to China since at least the 13th century. A tense standoff began that would continue for several weeks, as Filipino and Chinese vessels performed pirouettes around the area, sometimes withdrawing and then being replaced by others. In Beijing and Manila, senior officials defended what they viewed as their sovereign rights. The shoal, declared the Philippine foreign minister, “is an integral part of Philippine territory.”¹ A

¹ “Tension rises in S. China Sea over Chinese actions in Philippine waters,” Japan Economic Newswire (April 11, 2012).

Chinese general warned that the Philippines was underestimating “the strength and willpower of China to defend its territorial integrity.”² Ominously, by late April, the number of Chinese vessels at the shoals increased dramatically, and their maneuvers became increasingly dangerous; a Chinese cutter reportedly raced toward two Filipino vessels at more than twenty knots before veering away at the last moment.³

Hopeful that the world would be sympathetic as it confronted a much more powerful state, the Philippines called for international action to help resolve the standoff. China began to employ its enormous economic leverage. In early May, shipments of fruit from the Philippines were held up at Chinese ports, ostensibly because they had failed inspections. Most observers saw the move as a signal to the Philippines about the dangers of its policy at Scarborough. Behind the scenes, American diplomats struggled to resolve a crisis they feared might spark open conflict. In that, they succeeded. Under pressure from Washington, the Philippines withdrew its vessels from the area in mid-June, apparently with an understanding that the Chinese would reciprocate. But by the time the standoff ended, the Chinese were in effective control of the shoal—a chain hung across the entrance to its inner lagoon, and a Chinese vessel remained stationed in the area. Filipino fishing boats that attempted to enter were chased away, sometimes with water cannons.⁴

The Scarborough Shoal incident highlighted the volatile mix of concerns involved in contemporary attempts to manage the oceans. The most obvious and explosive layer was the competing claims of two states to the shoal. But beneath that sovereignty question were other issues. The sovereignty dispute—and the fishing restrictions that followed from it—

² “China and Philippines in Standoff Over Resource-Rich Islands,” *International Business Times News*, April 11, 2012.

³ Asia Maritime Transparency Initiative, “Counter-Coercion Series: Scarborough Shoal Standoff” (May 22, 2017), <https://amti.csis.org/counter-co-scarborough-standoff/>

⁴ For accounts of the standoff, see Alan Dupont and Christopher G. Baker. “East Asia's maritime disputes: fishing in troubled waters.” *The Washington Quarterly* 37, no. 1 (2014): 79-98.

implicated the livelihoods of Filipino and Chinese fishermen. For years, nationals from both countries had traveled to the shoal to engage in mostly small-scale fishing. The marine environment, too, was at issue. The Philippines charged that Chinese fishermen were despoiling the environment by using blast fishing and cyanide at the shoal, violating an international treaty protecting wild flora and fauna.⁵ And while there are no known gas or oil deposits close to Scarborough Shoal, the possibility of future discoveries keeps states in the region intently focused.

The disputes in this region, where Scarborough Shoal is only one of several points of friction, have attracted worldwide attention. Rocks and reefs that might otherwise appear to be of little significance have been repeatedly identified as a possible trigger for future major-power conflict. What is at issue in these areas are less the maritime features themselves, but influence over commerce, military maneuvers, fishing, the environment, and (potentially) oil and gas extraction in the waters around them. The South China Sea's fractious outcroppings are a manifestation of a very old question in human affairs: who controls the oceans?

That question is arising in urgent ways across the globe. International observers worry that critical fish stocks are in precipitous, and perhaps terminal, decline. In the Arctic, melting sea ice is opening new shipping routes and reviving latent competition for territory and resources. Recent naval operations have made clear the vulnerability of vital undersea communications cables.⁶ Meanwhile, a group of states are quietly laying claim to thousands of square miles of undersea territory. Some of the largest continental shelf claims are in the Arctic, but others are scattered around the globe, and many of them are controversial. One of

⁵ See, e.g., Tim Stephens, "The Collateral Damage from China's 'Great Wall of Sand'—The Environmental Dimensions of the South China Sea Case" (January 16, 2017). *Australian Yearbook of International Law*, Vol. 34, pp. 41-52, 2017; Sydney Law School Research Paper No. 17/06. Available at SSRN: <https://ssrn.com/abstract=2900567>

⁶ Michael Birnbaum, "Russian submarines are prowling around vital undersea cables," *Washington Post*, Dec. 22, 2017.

the reasons that states are keen to secure these undersea realms is the prospect of a windfall from precious minerals. Thousands of feet beneath the surface, mining companies are seeking to make that windfall possible by testing new devices for harvesting minerals. In so doing, they are raising fraught questions of whether and how humans should use the resources of the deep. Not all of today's maritime challenges are of new vintage. In the crowded Straits of Malacca and off the coasts of Africa, the age-old phenomenon of piracy remains a threat, as modern marauders in Zodiac boats waylay tankers, siphon off some of their liquid cargo, and then disappear into the night. Responding to this array of diverse challenges is forcing policymakers and publics to adopt new tactics, design new instruments, and think in new ways about the oceans.

The Free Sea

The most powerful and enduring conceptual framework for the oceans is freedom. The idea that the seas should be owned by nobody and free for all to use was advanced most famously early in the 17th century. The young jurist Hugo Grotius and the powerful Dutch corporation that he represented had particular political and economic reasons for making that argument. But his case for *Mare Liberum*—a “free sea”—was powerful enough that it transcended the specifics of the dispute he was addressing. Grotius leaned heavily on what he saw as the distinctive nature of the oceans in making his case for freedom. The seas were fluid and could not be occupied in the way that land could. Their resources were, at least to Grotius's eye, abundant and likely inexhaustible, and so there was no need to divvy them up and apportion ownership. Finally, the oceans were natural highways between different lands, almost purpose-built for facilitating commerce across long distances.⁷

Grotius's polemic inspired plenty of opposition, but the principle of free use of the oceans that he championed has exercised a powerful influence on international lawyers,

politicians, and the general public ever since. Freedom of the seas has resonated particularly in the United States, the leading maritime power since the Second World War. More than three hundred years after Grotius wrote, the American president Woodrow Wilson described freedom of the seas as “sacred.” On the eve of America’s entry into the Second World War, Franklin D. Roosevelt was even more expansive:

All freedom—meaning freedom to live, and not freedom to conquer and subjugate other peoples—depends on freedom of the seas. All of American history—North, Central, and South American history—has been inevitably tied up with those words, “freedom of the seas.”⁸

Since then, American leaders from both parties have routinely emphasized the importance of ocean freedom, and President Trump’s first National Security Strategy reaffirmed what it described as the national “commitment to freedom of the seas.”⁹

This book’s central argument is that the era of freedom of the seas, which reached its fullest extent in the late 19th century, is ending. In making this argument, I do not contend that this process is a negative one. There are important—and, in some areas, vital—reasons for curtailing maritime freedoms. There are also some dangers to doing so. But debating these advantages and disadvantages requires a more open discussion about the paradigm shift that is already well underway on the oceans. Conceiving of the oceans as a free space no longer accurately depicts reality. The extent to which the oceans are falling under either state control or some form of supranational control has not been fully recognized in public debate. The shift has often been overlooked in part because it is incomplete. Greater state and international control has not always implied effective governance. Vessels and aircraft can still sometimes disappear in the oceans without a trace. Crimes at sea are often unpunished.

⁷ Hugo Grotius, *The Free Sea* (Liberty Fund, 2012).

⁸ Franklin D. Roosevelt: “Radio Address Announcing an Unlimited National Emergency,” May 27, 1941. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=16120>.

⁹ Donald J. Trump, *The National Security Strategy of the United States of America* (December 2017).

Drawing on events like these, popular contemporary accounts of the ocean have often described them as anarchic, lawless, and little changed from centuries ago in terms of governance.¹⁰ “Few places on the planet are as lawless as the high seas, where egregious crimes are routinely committed with impunity,” one recent account argued. “[T]oday’s maritime laws have hardly more teeth than they did centuries ago when history’s great empires first explored the oceans’ farthest reaches.”¹¹ These accounts point to important truths, but the focus on the gaps in ocean governance has often obscured the broader trajectory toward greater sovereign control. (And the two phenomena—poor governance and greater sovereign control—are not necessarily inconsistent. When states without the capacity or intent to regulate their waters or their fleets acquire more control of ocean space, the result may be less effective governance at sea.)

Before advancing too far with the argument, some specificity about what freedom of the seas means is important. The term has been used as a slogan for centuries, and for a variety of agendas. For much of its history, Americans embraced the concept to preserve their ability to remain neutral in European conflicts and, as a result, trade lucratively with all sides. As European powers struggled repeatedly for primacy in the 19th and early 20th century, French and then German leaders used the idea of ocean freedom as a way of assailing Britain’s maritime supremacy. Landlocked states have seen the idea as a guarantee of their right to access the oceans and its resources and to fly their flag on vessels. The term has been used to sell products and services as well as policies. Companies keen on accessing ocean resources have often enlisted the notion of freedom of the seas to bolster their case. In 2006,

¹⁰ See, e.g., the superb series by Ian Urbina on the “Outlaw Ocean,” published in the *New York Times* in 2015, available at <https://www.nytimes.com/interactive/2015/07/24/world/the-outlaw-ocean.html>. Other notable examples include William Langewiesche, *The Outlaw Sea* (North Point Press, 2004).

¹¹ Ian Urbina, “Stowaways and Crimes Aboard a Scofflaw Ship,” *New York Times*, July 17, 2015.

Royal Caribbean Cruise Lines christened its newest vessel *The Freedom of the Seas*. Equipped with a theater, ice rink, and multiple pools and spas, the 1100-foot vessel transports thousands of passengers on pleasure cruises around the globe. A company spokesperson described the ship as “really all about freedom of choice. Freedom to explore. Freedom to relax. Freedom to make one’s own vacation plans reflective of one’s own tastes and interests.”¹²

Scholarly treatments of the concept have sometimes been little more precise than that offered by commercial actors. One book-length exposition on freedom of the seas began by acknowledging that the term “has always meant many things to many men” and ended almost tautologically by defining the terms as the “measure of liberty in the use of the sea accorded by international law.”¹³ I elaborate below what I view as the core components of the traditional doctrine of freedom of the seas. To some degree, these elements have all been reflected in international legal instruments over the years, but they cohere into a doctrine that is broader than and in some ways distinct from the current state of international maritime law.

The narrowest definition of freedom of the seas is the principle that *vessels (and aircraft) from all states should have unimpeded access to the world’s oceans*. “The use of the sea and air is common to all,” Queen Elizabeth told a vexed Spanish envoy who was protesting the voyages of Sir Francis Drake in the 1580s. The freedom to navigate that she defended includes merchant ships and military vessels alike (although the distinction between the two has not always been easy to make, as Drake’s voyage demonstrated). During conflict, it has long been understood that belligerents may impose some restrictions on shipping, but they should avoid interfering with most neutral shipping and most goods. (This understanding has often been breached; in the 17th and 18th centuries, the Royal Navy

¹² “Royal Caribbean-International Names Much Anticipated Ultra-Voyager,” PR Newswire (Nov. 9, 2004).

infuriated generations of foreign diplomats and merchants by engaging in searches and seizures well beyond these limits.) Maintaining ample freedom of navigation, even during conflict, emphasizes the ocean's value as a highway between societies and an open channel for commerce. And that value has grown exponentially since Grotius's time. Every day, hundreds of enormous container ships carrying everything from new automobiles to recycled cardboard cross the world's oceans. In all, more than eighty percent of the world's trade, at least 10 billion tons annually, is carried at sea.¹⁴

The seas are much more than just a conduit, however; they are themselves a source of sustenance and even wealth. *Freedom to fish and to exploit the open ocean's resources is another element of traditional freedom of the seas*, one that Grotius emphasized and that is still recognized in existing international treaties. Fish and other sea creatures caught on the open ocean belong to those who catch it. Operating on that basis, ever more efficient and powerful oceangoing fishing fleets seek profit from the world's oceans. In 2016, nearly 80 million tons of fish were harvested on the world's oceans by an industry that uses more than four million vessels and employs about 40 million people.¹⁵ The last half century has made clear that there are many valuable resources in the sea other than fish. Oil and gas drilling operations have moved steadily seaward. Researchers and entrepreneurs have expanded our understanding of the mineral resources that lie on the deep seabed and have developed new means to harvest them. The exploitation of other categories of marine resources is of even more recent vintage; researchers have recently managed to extract genetic material from marine environments and then develop it for commercial applications. The categories of

¹³ Pittman B. Potter, *The Freedom of the Seas in History, Law, and Politics* (Longmans Green, 1924).

¹⁴ United Nations Conference on Trade and Development, *Review of Maritime Transport 2017*.

¹⁵ Food and Agriculture Organization, *State of the World's Fisheries 2018*.

resources that the oceans host has thus expanded over time, but the doctrine of freedom of the seas implies that all people have a right to exploit those resources.

To this point, the foundations of ocean freedom have been negative in character; states can maintain that freedom by *inaction*: not interfering with navigation, not preventing others from fishing and, not impeding drilling, mining, and other open ocean activities. Absent meddling from jealous sovereigns, the theory runs, peaceful maritime commerce and activities will flourish. But there is another aspect of freedom of the seas that requires action rather than restraint from rulers on land. Since maritime commerce began several thousand years ago, shipping routes have been plagued by violence, and suppressing it has always required powerful players to employ resources; an ocean on which vessels may be attacked and robbed at any time is not free in any meaningful sense. At times, the merchants who benefit most from ocean commerce have taken care of themselves, but for most of history they have required assistance from rulers. History's roster of pirate-hunters is long, and includes Rome's Pompey, a frustrated Korean merchant named Jang Bogo in the ninth century, Ottoman functionaries in Istanbul, and the commanders of modern NATO warships off the Somali coast.

Beginning in the 19th century, the need for sovereign powers to suppress piracy and disorder on the seas acquired a new dimension. For centuries if not millennia, the trade in enslaved human beings had been an accepted part of ocean commerce. The leading maritime states, very much including Britain in the 18th century, partook enthusiastically. But by 1805, anti-slavery activists in Britain achieved a change in policy and eventually made combatting the oceanic slave trade part of the Royal Navy's mission. In the ensuing years, British military might and diplomatic energy helped make a prohibition on slave-trading part of the modern conception of ocean freedom; for the oceans to be free, they could not be conduits for slavery. Modern international law instruments reflect these two active elements of freedom of

the seas by giving vessels from any state leave to board and search vessels suspected of engaging in piracy or slave-trading.

The negative and positive dimensions of freedom of the seas exist in some tension with each other. The powerful navies and coastal security forces that can most effectively suppress maritime violence and the use of the oceans for the slave trade also have the means to disrupt shipping when they choose and assert national control in other ways. Missions to maintain order on the oceans can easily slide into naked assertions of maritime power and influence. One of the fundamental challenges facing an ocean regime that prizes freedom of access is keeping the forces that maintain order from asserting dominion.

The final element of the traditional understanding of freedom of the seas directs itself to that concern. It insists *that the open ocean should not be claimed as territory by states*. Grotius and most other thinkers have distinguished between the areas of the waters close to the coast, which can legitimately fall under state control, and the open ocean. Generations of negotiators have wrestled with the question of where the dividing line should be between state-controlled waters and the open ocean. But the principle of restricting state control and maintaining a substantial open ocean has rarely been contested. And its logic is powerful: if too much of the ocean becomes state territory, or something akin to it, then the seas are not really free anymore. Coastal states might choose to let them be free, but that freedom can be revoked at any time, just as it can be on the land.

In no historical period have all these elements been present continuously and consistently. I argue nonetheless that the period between the British victory in the Napoleonic Wars and the outbreak of the First World War represents the high point of the freedom of the seas. British leaders abandoned their own claims to own substantial ocean space and consistently resisted the claims of other states to broader control of the ocean. Britain also used its maritime power to suppress piracy and, more inconsistently, the oceanic slave trade.

That coercive power, joined with a number of other factors, produced a substantial decline in private maritime violence in many parts of the world. The British embrace of freedom of the seas was far from complete. During this period, London clung to an expansive view of its rights of wartime search and seizure, but by the 1850s, and under pressure from other maritime states, it had relaxed that position and acquiesced to a more restrictive view of what the Royal Navy could do in wartime.

Grotius in Retreat

There is nothing surprising in the desire of sovereign states to expand their writ over the oceans. After all, Grotius's elaboration of the free sea doctrine on behalf of the Dutch came in response to just that kind of claim by the Spanish and Portuguese. And history provides ample additional precedent for kingdoms, empires, and national governments eager to control more of the oceans. Asserting control of ocean space, at least temporarily, has been a preoccupation of military commanders, strategists, and economic actors. When it reached peace with the Persians in the fourth century B.C.E., the Delian League of Greek city-states tried to exclude their foe from the Aegean Sea. Roman fleets dominated the Mediterranean for several centuries. Venice imposed tolls on vessels transiting the Adriatic in the 12th and 13th centuries. In the seventeenth century, the British demanded—often under threat of hostilities—that other ships lower their flags and dip their sails to signal British control of the English Channel. But these claims were almost always contested and, as a result, they have been ephemeral.

Since 1945, the dynamic has changed dramatically. The percentage of the oceans that is under some form of internationally recognized state control has increased dramatically. Not long after the Second World War ended, coastal states began making expansive unilateral claims to areas of the oceans, with the United States and several Latin American countries in the lead. With a variety of motives, other countries soon followed their example. Those

moves set in motion several rounds of multilateral diplomacy designed in large part to control national expansion into ocean space, a process that culminated in 1982 with the creation of the United Nations Convention on the Law of the Sea. One of the most complex and ambitious international agreements ever, often dubbed a “constitution for the oceans,” the Convention remains to this day the clearest answer the international community has provided to the question of who controls the ocean and how it should be used. In key respects, the Convention acquiesced to the unilateral state moves for greater control of the oceans; it accorded all coastal states a larger territorial sea and a new “Exclusive Economic Zone” (EEZ) extending 200 miles from shore. But it did so as part of a broader effort by leading maritime powers to stabilize maritime law by ending national appropriation.

The Convention notwithstanding, the expansion of state control into ocean space has continued in several different ways. Dozens of states—more than negotiators had expected—have seized upon a provision in the Convention allowing additional claims to the ocean floor. In 2007, a small Russian deep sea submersible planted a titanium Russian flag on the bottom of the Arctic Ocean. That act was unusually theatrical but it was an accurate representation of what is happening with areas of the seabed around the globe. Dozens of states have filed claims to take ownership of what is called the “extended continental shelf,” which can extend up to 350 miles from the coastline. Experts at the United Nations are dutifully reviewing those claims, many of which will be perfected in the years to come.

Other forms of appropriation have been more subtle. For example, the Convention left unclear whether the EEZ should be considered part of the open ocean or whether it was more like territorial waters. In practice, many coastal states, including major powers such as Brazil, China and India, have tried to tip the balance toward territoriality by enacting regulations forbidding military and research vessels from operating within that zone, at least without explicit permission. States have used other tactics to extend their control. A few countries

with large bays or networks of offshore islands have drawn their ocean boundaries in such a way that large areas of what used to be considered open ocean have been converted into internal waters. Libya's Moammar Gaddafi attempted that by declaring the entire Bay of Sidra as internal waters, prompting armed action by the United States. But other moves have been more subtle—and more successful. In the 1980s, for example, Canada issued new maritime baselines that placed most of the famous Northwest Passage under its sovereign control.

China's sweeping (although still somewhat ambiguous) position on the South China Sea may pose an even more fundamental threat to the Convention structure. Beijing's "nine-dash line" has generated controversy throughout the region, but it remains unclear whether China sees the waters encircled by the line as sovereign territory, or whether the boundary implies only ownership of the islands, rocks and reefs within the enclosed area. The latter would remain unsettling to most states in the region, but the former would challenge the Convention's basic framework and open the door to similar claims by other states.

Given the success they have had thus far, unilateral assertions of state control over the oceans could well continue. The world's leading maritime power, the United States, has repeatedly refused to join the Convention, and its stance is a reminder of the persistent gap between sovereign authority and international ocean rules. That gap may be widening. The Philippines backed off its claims at the Scarborough Shoal not because its view of the law was wrong—in fact, much the Philippines's position was later vindicated by an international tribunal—but because it was weak and China was strong. Maritime history provides abundant evidence that unilateralism has played a key role in shaping modern rules, and it is far from certain that, over the long term, the Convention will displace or extinguish this dynamic. Thus, as this book charts the narrowing of the freedom of the seas, it will also assess the strength and viability of the world's relatively new and still fragile ocean constitution.

While the decades long process of national appropriation of formerly open waters has unfolded, other pillars of freedom of the seas have started to crumble as well. The world wars of the 20th century shattered the existing rules protecting maritime commerce during wartime. Belligerent states—including the United States—declared vast and unprecedented ocean zones in an effort to advance their war aims; some neutral states tried a similar approach to shelter themselves from the voracious conflict. The absence of sustained major-power conflict since those wars means that those kinds of maritime restrictions have mostly been forgotten, but there is no reason to believe they would not reemerge quickly in the context of renewed conflict between maritime powers. The traditional freedom to fish and exploit the ocean’s resources has also come under significant pressure. As states have cemented new ocean rights, they have often excluded foreigners from fishing in these waters—and even beyond. States, sometimes working alone and other times in combination, have recently developed the category of “marine protected areas” that further restrict the right to fish, even on parts of the open ocean.¹⁶

Why should this process of expanding state control not continue to its logical conclusion? With the lonely exception of Antarctica, just about every square mile of dry land has now been parceled out to some sovereign state or another. There are disputes—occasionally bloody—about exactly where these lines should be, but there’s little argument that land should belong to some state or another. Grotius notwithstanding, it is not obvious that the oceans should be different.¹⁷ Technological change has made the idea of controlling

¹⁶ Bethan O’Leary *et al.*, “The first network of marine protected areas (MPAs) in the high seas: the process, the challenges and where next,” *Marine Policy* 36, no. 3 (2012): 598-605; Marta Chantal Ribiero, “The ‘Rainbow’: the first national marine protected area proposed under the high seas,” *International Journal of Marine and Coastal Law* 25, no. 2 (2010): 183-207.

¹⁷ For an illuminating discussion of the expanded continental shelf and EEZ issues, in particular, see Scott Shackelford, “Was Selden Right? The Expansion of Closed Seas and its Consequences for Oceanic and Internet Governance” in *Governing New Frontiers in the Information Age: Toward Cyber Peace* (Cambridge University Press, 2019).

or occupying ocean space much less fanciful than in the past. And divvying up the oceans between states has the great advantage of simplifying their management. State ownership means that the relevant national government has primary responsibility for managing the space, conserving its resources, and ensuring basic security. Of course, national governments have very different capacities for those tasks—all of which require resources and political will. But modern, well-functioning states have resources for maritime control that earlier generations could scarcely imagine. From drones to orbiting satellites and underwater sensors, many of today’s governments know a great deal about who is using their waters and have mechanisms for preventing activity they do not countenance.

Everything in Common?

In November 1967, a diplomat from the Mediterranean island state of Malta named Arvid Pardo delivered a remarkable speech at the United Nations. Brimming with data and drawing on a wealth of sources, Pardo declared the Grotian conception of ocean freedom outdated and called for the oceans to be treated in the future as the “common heritage of mankind.” In Pardo’s mind, this concept would not eliminate ocean freedoms but preserve them for a world very different from the one Grotius inhabited.¹⁸ A year after Pardo’s speech, and with no reference to it, a microbiologist named Garret Hardin published an article in *Science* describing the “tragedy of the commons.”¹⁹ Using the analogy of a shared grazing pasture, Hardin argued that valuable but common spaces will inevitably be overused and ultimately destroyed. “Ruin is the destination toward which all men rush,” he wrote, “each pursuing his own best interest in a society that believes in the freedom of the commons.” Hardin’s particular preoccupation was overpopulation (he ended up arguing for restrictions on the right

¹⁸ Arvid Pardo, “United Nations Speech.” *The Common Heritage: Selected Papers on Oceans and World Order* (Malta University Press, 1975).

¹⁹ Garrett Hardin, “The Tragedy of the Commons,” *Science* 162 (1968): 1243-1248.

to procreate) and he only referenced the oceans tangentially. But his insights have exerted a strong influence over subsequent studies related to common resources, very much including the oceans.

Despairing of the possibility of maintaining a common resource, Hardin envisioned two practical alternatives. The first was to convert the commons into private property. In the context of modern international relations, where states are the best analogues to the individuals sharing the common pasture, privatization would mean sovereign states assuming control of the oceans, just as they control (or at least purport to control) the 29 percent of the earth's surface not covered by water. As we have seen, that process of ocean "privatization" has in fact advanced quite far and continues to this day. Hardin's first alternative to the tragedy of the commons, then, was the very dynamic that Pardo desperately wanted to avoid.

Hardin's only alternative to private control was "coercive regulation" imposed by a central authority. Transplanting that notion to the international realm suggests the need for some kind of strong supranational structure. A mere agreement or a set of agreements between states to answer pressing questions about the common space would not be enough. Myriad treaties already exist that try to do just that, and more are on the way. But as even casual observers of international law know, enforcement of international agreements is usually lacking. States rarely give international agreements the kind of bite afforded to domestic legislation. There are more international courts and tribunals than ever, including one specifically devoted to maritime issues, but there is no consistent enforcement authority that backs their decisions. The Philippines received a vivid reminder of international law's limits when China boycotted the case that Manila had brought and then rejected outright the tribunal's ruling. At least thus far, the international ruling has changed little at the Scarborough Shoal or other areas of the South China Sea.

There is one area, however, where the idea of supranational control of the ocean and its uses has moved much closer to reality: the deep seabed. What galvanized Pardo's UN speech was the possibility that lucrative seabed mining would spur a scramble by states to claim undersea territory. In one of its most controversial sections, the UN Convention eventually addressed that concern by creating an International Seabed Authority (ISA). U.S. objections to the supranational body and its powers galvanized opposition to ratification of the Convention and remain to this day the most significant obstacle to American accession. The ISA is a remarkable creation; it has the power to manage an area of approximately 150 million square miles and to grant licenses for any mining activity in it. At least in theory, international officials working in a modest headquarters building in Jamaica exercise authority over more territory than any sovereign on land. Because technological and economic obstacles to mining remain significant, however, the seabed authority's real work has barely begun, and this important innovation remains very much at the experimental stage.

In the decades after the adoption of the Convention and the creation of the seabed authority, thinking on the global commons has advanced considerably. Scholars from several fields have expanded upon, tested, and modified the logic of the tragedy of the commons. Several have contended that Hardin's despair is premature, or at least overly broad. These scholars, with Elinor Ostrom as the most prominent, have demonstrated that, given the right set of conditions, societies can manage common resources without resorting either to full privatization or to coercive central control.²⁰ Testing that theory, a major treaty negotiation is underway at the United Nations that could significantly restrict high seas activities and

²⁰ See, e.g., Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990).

become an important experiment for governance of ocean resources without coercive authority.²¹

Whether future governance of the oceans more closely tracks the stark paths that Hardin laid out or the more nuanced possibilities that Ostrom and others have proffered, the traditional conception of freedom of the seas will almost certainly succumb. At the very least, the different elements of that concept will be disaggregated, with some lasting and others fading away. To some who specialize in understanding the global commons, this dynamic is all but inevitable.

The last of the open access regimes [including the high seas] are being changed to common pool resource regimes. Soon, and for the first time in history, there will be no place on earth that is not governed under a management regime. There will be no more final frontier.²²

But the continuing resonance of the freedom of the seas, particularly for the world's leading maritime power, suggests that the way forward will be uneven and likely turbulent.

Plan of the Book

This book is an attempt to distill and analyze the history of international governance of the oceans and to assess current realities, with a focus on the emergence and evolution of ocean freedom. It is not a general maritime history, of which there are many impressive examples.²³

The first three chapters, however, will provide context by sketching the history of maritime governance and the doctrine of freedom of the seas in particular. Along the way, these chapters highlight not merely formal agreements and negotiations, but also scientific

²¹ See Crow White and Christopher Costello. "Close the high seas to fishing?" *PLoS Biology* 12, no. 3 (2014): e1001826; U. Rashid Sumaila, *et al.* "Winners and losers in a world where the high seas is closed to fishing," *Scientific Reports* 5 (2015): 8481.

²² Susan J. Buck, *The Global Commons: An Introduction*. Routledge, 2017, ____.

²³ One of the most impressive is Lincoln Paine, *The Sea and Civilization: A Maritime History of the World* (Vintage: 2015).

discoveries, technological breakthroughs, and military struggles that created the underpinnings for diplomacy and governance efforts.

In asserting that the narrowing of freedom of the seas is the most salient theme in ocean governance, I try to avoid imposing a too simplified pattern onto the confusing and complex record of the past. The history of ocean governance is full of crosscurrents and complexities that resist a simple narrative arc. Expanding state control is undeniable, but private actors have for almost a century figured out how to evade some of that sovereign power through a variety of mechanisms, including “flags of convenience.” The United States and several other important actors are resisting many state assertions of ocean control and have had some success. Moreover, the structures for international ocean control highlighted above are fragile and could easily break in the face of pressure from powerful states.

The first of the historical chapters examines early trends and key debates before the emergence of most formal international governance structures. In particular, I consider some early ocean governance experiences and chart the emergence of the Grotian freedom of the seas as a guiding, if always contested, principle. With that background, the next chapter surveys ocean governance efforts beginning in the early 19th century as Britain became the dominant maritime power. Chapter 4 examines how the massive interstate conflicts of the 20th century and the emergence of a global shipping industry eager to evade national regulation shaped today’s governance environment. I examine the unilateral American assertion of control after the Second World War and chain of events it set in motion. The chapter also reviews shifting diplomatic alignments—including a rare convergence of views between the United States and Soviet Union—that led to the negotiation of the Convention. The negotiating dynamics that produced the Convention’s key provisions are the focus of Chapter 5. The next chapter considers the consequential decade between the Convention’s adoption and its coming into force, which featured a critical renegotiation of the

Convention's seabed mining arrangements. The final chapters turn to the Convention's twenty-five years in operation and examine the strains that it faces, including from America's continued refusal to join, Chinese claims in Asian waters, and mounting environmental pressure to regulate the high seas more stringently.