Ocean and Coastal Law Journal

Volume 13 | Number 2 Article 7

2007

Freedom And Servitude In The Public Order Of The Oceans A Review Of Navigational Servitudes: Sources, Applications, Paradigms by Ralph J. Gillis

Charles H. Norchi
University of Maine School of Law

FREEDOM AND SERVITUDE IN THE PUBLIC ORDER OF THE OCEANS
A REVIEW OF NAVIGATIONAL SERVITUDES: SOURCES, APPLICATIONS, PARADIGMS BY RALPH J. GILLIS

Charles H. Norchi[*]

American jurists would be familiar with navigational servitudes[1] beginning with the case of *Gibbons v. Ogden*[2] in which the U.S. Supreme Court established that the power of Congress to regulate interstate commerce under Article I, Section 8 of the Constitution[3] also comprises the power to regulate navigable waterways. Coastal and riparian property owners (and their attorneys) may be familiar with the principle in condemnation cases. The doctrine has been invoked as a government defense to takings claims and can limit a private landowner's title, subjecting it to a governmental interest in maintaining water-based navigation.[4] The

---

* Associate Professor of Law and Advisor to the *Ocean and Coastal Law Journal*, University of Maine School of Law, Research Fellow, Ash Institute for Democratic Governance and Innovation, John F. Kennedy School of Government, Harvard University.

1. A servitude is "a charge or burden resting upon one estate for the benefit or advantage of another." BLACK'S LAW DICTIONARY 712 (5th ed. 1983). Servitude is "the term of the civil law for an easement." BALLANTINE'S LAW DICTIONARY 1166 (3d ed. 1969).

2. 22 U.S. (9 Wheat.) 1 (1824).

3. U.S. CONST. art. I, § 8.

4. In *United States v. Rand,* 389 U.S. 121 (1967), the navigational servitude doctrine was held to apply to land adjoining navigable water which the federal government takes or affects and limiting the government's Fifth Amendment obligation to compensate landowners. The Court noted:

> The Commerce Clause confers a unique position upon the Government in connection with navigable waters. . . . [T]hey are the public property of the nation, and subject to all the requisite legislation by Congress. This power to regulate navigation confers upon the United States a "dominant servitude" . . . . The proper exercise of this power is not an invasion of any property rights . . . for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. . . . Thus, without being obligated to pay

principle has earned an especially bad rap with riparian owners who worry that if their property adjoins waters that could float a rubber duck, the government may successfully invoke navigational servitude in defense of a taking. However, the doctrine also occupies a pivotal role in the world public order of the oceans and in the waterway needs of the American republic. Navigation is a public right, held for the greater common interest. Thus the doctrine of navigational servitude has more to do with freedoms than burdens. It expresses the basic policy of freedom of navigation. Through the history of human interaction with the sea, the doctrine has emerged from a complex process of claims and has been defended from intrusions of special interests. Ralph J. Gillis describes how and why in his eminently thorough work, NAVIGATIONAL SERVITUDES: SOURCES, APPLICATIONS, PARADIGMS.

The book is not merely about a legal doctrine. A doctrine is like a rule, it is an artifact that is relevant within the broader authoritative decision process that it serves. This book is about much more than a socio-legal artifact. It is about the policy goals of freedom of navigation, the trends that have shaped those goals, the factors including conflicting claims that have shaped the trends, the role of the doctrine in the future of navigational freedoms, and the alternative future of the oceans if navigational servitudes were curtailed. Dr. Gillis has written about the role of navigational servitudes within a complex process across time, conveying the reality that "the process of decision-making is, indeed, one of continual redefinition of doctrine in the formation and application of policy to rapidly ever-changing facts."[5]

The book is a major contribution to the little understood broad context and historical processes that shaped navigational freedoms and the corollary servitude doctrine. This work is the fruit of thirty years of research, reflection, the author's broad legal practice and his public policy service devoted to navigable water issues. The long experience and authorial insight come through in this erudite volume that begins the navigational servitude story with the seventeenth century oceans debate between Grotius and Seldon.[6] The book then moves on to discuss

---

> compensation, the United States may . . . impair or destroy a riparian owner's access to navigable waters . . . even though the market value of the riparian owner's land is substantially diminished.

Id. at 122-123.

5. Myres S. McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, *in* MCDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 947, 955 (New Haven Press 1987) (1960).

6. RALPH J. GILLIS, NAVIGATIONAL SERVITUDES: SOURCES, APPLICATIONS, PARADIGMS 6 (2007).

navigation as a juridical right for the benefit of the citizens under the United States Constitution,[7] and the current U.S. Senate debate over ratification of the United Nations Convention on the Law of the Sea (UNCLOS).[8] Along the way, we learn how the principle evolved through colonial charters,[9] British and U.S. coastal protective jurisdictions,[10] the 1958 Geneva Law of the Sea Convention,[11] UNCLOS' Common Heritage of Mankind doctrine[12] and Marginal Sea Delimitations,[13] the principle of historic waters,[14] the writings of publicists,[15] and American domestic and foreign interstate commerce.[16] Additionally, Dr. Gillis examines the current state of the doctrine at the core of a "public trust of the oceans."[17] The lessons in this book are many, but fundamentally "[t]he 'public trust' and the public right of navigation as protected and preserved in accordance with the common navigational freedom principle are . . . the point of this volume."[18]

Dr. Gillis masterly parses and configures concepts of municipal and international legal navigational rights. For example, he demonstrates the common underlying principle of navigational freedom as a public right held in *both* municipal and international public trusts. He states that "[t]here is an evolved principle of public trust which obligates governments, both singularly and in combination, to protect and preserve the common public right of navigation within waters subject to their respective jurisdictions or juridical regimes."[19]

The book is rich in the history essential to understanding how the doctrine is treated in contemporary U.S. federal law and the international law of the sea. Dr. Gillis appraises trends in the public right to navigation through the application of navigational servitude superiority in both U.S. and international law:

> While there is a jurisdictional balance of competing navigational servitudes in maritime areas, under the municipal law of the United

---

7. *Id.* at 84.
8. *Id.* at 352.
9. *Id.* at 50.
10. *Id.* at 66-84.
11. *Id*. at 150.
12. *Id.* at 168.
13. *Id*. at 178.
14. *Id*. at 226.
15. *Id*. at 239.
16. *Id*. at 288.
17. *Id.* at 321.
18. *Id*. at 2.
19. *Id.*

> States the navigation servitude is federal and is exercised by the Federal Government as superior to the governmental rights of member states and to the individual property rights of littoral and riparian property owners. That navigation servitude superiority also may be said to be present under international law where the high seas regime navigation rights remain dominant over littoral State territorial sea ownership rights. In both circumstances, the dominant servitude protects the broadest public navigational right, which is in fact the Grotius/Selden balance achieved as the outcome of the maritime jurisdictional disputes between England and her Continental neighbors in the 17th Century.[20]

He explains that through history, "the juridical servitudes preserve navigational freedom as an interdependent non-divisible public right; that is, a common principle, a right not to be lessoned by the particular interests of States under international law, nor by those of political subdivisions or of individuals under municipal law."[21]

In the earliest moments of American constitutional law, the navigational freedom principle was transformed from Royal Prerogative *jus publicum* to constitutional public trust by the constitutive process of the period.[22]

> Among the governmental rights delegated by the people of the United States under the Constitution is the power to regulate interstate and foreign commerce. The administration of the public navigation and fishing rights has been determined to be within the scope of this power. But, whereas the rights remain in the public, the Federal Government is charged by that commerce power to be the governmental trustee over the public trust much as the King had been under the Royal Pregrogative *jus publicum*.[23]

As the American constitutive process developed, key participants played pivotal roles in navigational freedom. One such participant was Justice Joseph Story. Dr. Gillis describes how this giant of early American constitutional law convincingly connected constitutional power over commerce and the navigational servitude within the context of the navigational freedom principle.[24]

---

20. *Id.* at 9.
21. *Id.* at 15.
22. *Id.* at 97.
23. *Id.* at 127.
24. *Id.* at 132-33.

With the many demands and claims (among them waterfront property rights, boating, commercial fishing, environmental interests) for competing uses of a limited resource, a balance must be secured in the common interest. Thus the:

> [O]perative general law formulation is that competing uses of navigable waters are restrained the *a priori* public right to navigation held in public trust over those waters, so that the navigation servitude remains the ultimate arbiter of such competing uses. 'Navigational servitudes as public rights' is a critical concept for both United States municipal law and international law of the sea, as now developing in parallel consistently with the common navigational freedom principle.[25]

Dr. Gillis explains that the doctrine of navigational servitudes helps mediate between exclusive and inclusive claims to the seas:

> To secure, preserve, and accommodate . . . opposing sets of coastal and noncoastal interests in all their variety and in all their modalities of conflict, a body of complementary, highly flexible prescriptions has evolved through centuries of interaction among claimants and responding authoritative decision-makers. Thus, the special exclusive interests of the coastal state are expressed in such familiar concepts as "internal waters," "territorial sea," "contiguous zone," "continental shelf," "hot pursuit" and so forth; while the more general inclusive interests of all other states find expression in such generalizations as "freedom of navigation and fishing," "innocent passage," "freedom of flight" and so on.[26]

The doctrine is now applied as a prescription that favors inclusive over exclusive interests.

Dr. Gillis describes and appraises the role of the doctrine in favoring inclusive interests in the conventional law of the sea beginning with the 1930 Hague Codification Conference, the 1958 Geneva Conventions including the Convention of the High Seas and the Convention on the Continental Shelf, and the 1982 UNCLOS.[27] By the 1982 Convention, key outcomes were the common heritage of mankind which "vested right in all States to participate in the high seas regime *res communis* public trust, and

---

25. *Id.* at 95.

26. Myres S. McDougal & William T. Burke, *Crisis in the Law of the Sea: Community Perspective versus National Egoism*, *in* STUDIES IN WORLD PUBLIC ORDER, *supra* note 5, at 844, 852.

27. GILLIS, *supra* note 6, at 149-67.

to enjoy the beneficial interests of that trust."[28] Thus UNCLOS created the Authority with trustee responsibility and jurisdiction over seabed resources, and it underscored the right of access by landlocked states to the high seas.[29] Significantly, Article 125 of the Convention "imposes a navigation servitude on 'transit States' in favor of 'land-locked States,' for the purpose of exercising rights provided in this Convention including those relating to freedom of the high seas and the common heritage of mankind."[30]

Navigational servitudes occupy a special place in maritime boundary disputes and delimitations. Dr. Gillis explains:

> [B]oundary delimitations effect regional assignments for certain exclusive jurisdictional applications with the marginal sea area as well as for protection and preservation of the navigation freedom principle within high seas regime servitudes. Where States cannot agree on delimitations according to the conventional rules, delimitations are achieved or to be achieved through the application of equitable principles without inequitable usurpations causing discriminatory limitations on navigational freedom. Boundary delimitation is a process of balancing governmental protective jurisdictions and high seas regime navigational freedom . . . . [S]uch equitable principles are derived from the protection and preservation of the interdependent interests of all littoral States under the high seas regime *re communis* public trust.[31]

This is clarified by appraising landmark maritime boundary delimitation outcomes including the Gulf of Maine Case[32] in which the author represented the United States government in an advisory capacity.

Deftly moving between the common navigational freedom interests of the world community and the *jus publicum* interests of the United States, Dr. Gillis devotes an entire chapter to U.S. practice pertaining to commerce and navigable waterways. He writes, "[c]ommerce has become the defining purpose for the navigational freedom principle in all navigable waters. . . . The juridical seat of United States navigation servitude public trust

---

28. *Id.* at 167.

29. *Id.* at 166-67.

30. *Id.* at 167. Dr. Gillis asks "whether United States constitutional law would require full Congressional action rather than simple Senate ratification for such a servitude to be implemented over its territory." *Id.*

31. *Id.* at 179-80.

32. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.) 1984 I.C.J. 246 (Oct. 12).

responsibility is the Commerce Clause of the United States Constitution."[33] He underscores the critical point that this is a public trust because:

> [U]nder United States municipal law the rights to navigation and fishing remain in the American People as public rights reserved to the public under the Ninth Amendment of the Constitution. These public rights are not and have not been delegated to the Federal Government by the provisions of the Constitution, nor could they be; they are not governmental rights.[34]

Thus we come full circle, from the Grotius-Selden dialectic in the origins of the law of the sea, to the government takings fears of American littoral and riparian property owners. The contemporary outcome is a trust for the benefit of the public preserved in the common interest of the greater community.

In some sense, everyone on the planet is a potential steward of the oceans. A framework for realizing that potential is the Oceans Public Trust.[35] It includes the conventional mechanisms and the international organization structures such as the International Maritime Organization (IMO) and the United Nations Environment Program (UNEP) The World Bank, the United Nations Education, Scientific and Cultural Organization (UNESCO) and others. The Oceans Public Trust, in Dr. Gillis' view, "remains the ultimate objective for conventional law of the sea protection and reservation of the non-discriminatory navigation freedom principle and its application consistent with equitable principles."[36] Dr. Gillis acknowledges that this concept of public trust echoes the postulate of a common interest of the oceans developed by Professors Myres S. McDougal and William T. Burke[37] In their work, McDougal and Burke wrote of "protecting and balancing common interests, inclusive and exclusive, of all peoples in the use and enjoyment of the oceans, while rejecting all egocentric assertions of special interests in contravention of general community interest."[38] Thus, "[t]he law of the sea, like all international law, serves only the function of protecting the common interest against the dissentient powerful and lawless. It's only ultimate sanction, in a

---

33. GILLIS, *supra* note 6, at 288-89.

34. *Id.* at 292.

35. *Id.* at 321.

36. *Id.* at 365.

37. *See* MYRES S. MCDOUGAL & WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA (New Haven Press 1987) (1962).

38. *Id.* at 1.

decentralized world, is in the mutual restraint and tolerance which inhere in a recognition of common interest."[39] From the seventeenth century to the present, this explains the continuing viability of navigational servitudes in municipal and international law. In this erudite work Dr. Gillis has placed it all in context, and clarified a public trust framework to preserve the future of common navigational freedom. Ralph J. Gillis has rendered an important scholarly contribution to the world public order of the oceans.

39. McDougal & Burke, *supra* note 26, at 910-11.