

Frontier justice: navigating the future legal landscape for private actors in space law

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At the dawn of the Space Age, then President-elect John F. Kennedy spoke to the American people of “a new frontier” of unknown opportunities and perils, unfulfilled hopes and unfilled threats, uncharted science and unsolved problems. Six years later, Star Trek expanded on President Kennedy’s new frontier premise with tales of the starship Enterprise boldly going where no man had gone before – into the vast expanse of space.

In the intervening decades, many men (and not a few women) have journeyed into space, and space technologies have become deeply intertwined with everyday terrestrial life. The private space industry is booming – with the World Economic Forum reporting that the global space economy will grow from \$630 billion in 2023 to \$1.7 trillion by 2035.

For all this rapid development, space remains in many ways a frontier – a wild, wild west whose opportunities and perils, hopes and threats, problems and possibilities are just as unknown and uncharted today as they were when President Kennedy first described them 65 years ago. And because so much remains uncharted, undiscovered and unsolved, space remains largely unregulated. Coherent, consistent and enforceable principles applicable across nations, industries and actors are vital if we are to make the most of space.

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The current legal landscape for the private space industry has two major pitfalls. International efforts to govern space in a coordinated and cooperative way are largely aimed at government actors, not private players, and what regulations exist are mostly non-binding. National rules have more teeth – but create the risk of a patchwork of uneven and possibly contradictory regulations and incentives.

History provides insight into the very real risks created by the lack of regulations to govern commercial activities in outer space. These insights can be distilled into three overarching lessons.

Lesson 1: If there is no authority in place, people resort to self-help and resource grabs are inevitable

In the American West, statutory law was weakly enforced, populations were thinly spread across vast swaths of country, the validity of land titles and cattle brands were hotly contested and the courts were far away. Rivalry for resources was strong. Competing economic interests, coupled with the lack of any authorities capable of enforcing the laws, led to vigilantism and land grabs that only died out when effective statutory law came to the frontier. In other words, the absence of clear regulations and effective enforcement mechanisms creates a risk of chaos.

How might this manifest in the final frontier? Consider the moon. A PwC report issued in 2021 concluded that “the markets for lunar goods and services” could reach a cumulative \$170 billion by 2040. More recently, President Trump issued an Executive Order that calls for returning Americans to the Moon by 2028 to lay the foundations for lunar economic development. Other actors – both sovereign and corporate – share similar goals. Multiple private missions are underway, with Intuitive Machines, Firefly Aerospace and ispace among those vying to reach the moon aboard SpaceX rockets – and all with different ideas for what to do once they get there.

The conditions are thus ripe for a land grab, with competing industries clashing over the same lunar landscape, all far from the watchful eye of terrestrial law enforcement. That land grab may be less dramatic than the often-violent exploitation of the American frontier. But in the absence of any clear regulatory framework, both public and private actors may resort to self-help to stake their claims.

Lesson 2: The absence of regulation increases costs and decreases innovation

Unsurprisingly, the lack of legal certainty and the presence of private justice failed to pacify the frontier. The feuds incited by uncertain and unenforceable property titles and the absence of government control impeded settlement and adversely impacted business. The January 17, 1842, issue of the *Red Lander*, a Texas frontier newspaper, is illustrative. The journal reported that “land is now worth only ten cents an acre in Shelby County, where formerly it was valued at more than twenty times that sum; the tide of emigration has completely turned from that country, which is shunned by the emigrant as another Sodom.”

Of course, the risk in space is not that land will become worthless – but that a lack of regulation will increase costs for aspiring market entrants and for current market players, decreasing innovation, opportunity and value. Clear legal rules and background norms coupled with real accountability are foundational for thriving markets and economic growth. Legal uncertainty, in contrast, disincentivizes investment and innovation.

Lesson 3: To be effective, regulations must be tailored to their environment

Weak enforcement in the American frontier was partially driven by insufficient police presence. But the lack of enforcement was also the product of regulations ill-suited to the frontier environment. Statutory rules adopted from more established jurisdictions did not domesticate well. Rules that worked in one setting could be unmanageable and inappropriate in the other. The frontier experience thus reinforces that regulations cannot be meaningfully followed or enforced unless they are tailored to their environment.

The celestial implications of this terrestrial lesson are obvious: regulators cannot simply transpose regulations that govern earthbound industries onto entities operating in space. This is not to imply that existing rules cannot provide inspiration or guidance for New Space activities. Rather, the point is that existing rules must be thoughtfully adapted, not simply superimposed.

Consider, for example, questions of tort liability. American tort law generally requires a plaintiff to prove the existence of a duty of care, breach, damage and causation to prevail. The existence of a duty of care may arise in regulation or in the common law, but either way, it is the product of a particular set of circumstances that confronted either the regulator or the courts. And, generally, that duty does not encompass a duty to rescue or return lost objects.

The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, which entered into force in 1968, imposes a duty to rescue and to return; it applies only to states. But its terms suggest that there should be a duty to rescue and return. Who should bear that duty? What are the consequences of breaching it? What, if any, exceptions exist? And who should answer those questions? For now, no one is.

Drawing on the past to develop a framework for the future

These lessons provide useful guideposts in developing a workable framework for regulating space activities.

Guidepost 1: Industry should self-regulate. The lack of coherent and enforceable regulations for space industries creates a critical opportunity for private actors to set terms that make sense – and create independent mechanisms for enforcing them. Consider examples from the legal and medical professions. Each provides ethical rules and standards for their members – and each takes steps to enforce those rules when a member violates the terms. State regulations largely build off and reinforce these industry guidelines. Space industry insiders can, and should, do the same by coming together to establish rules and internal enforcement mechanisms. Such industry-driven regulations can then provide a framework for government actors and set the parameters for meaningful, sensible, legal regimes.

These guidelines and principles could include, for example, licensing requirements, ethical guidelines, standards of practice and model contract clauses, complaint mechanisms, review processes and consequences for a failure to comply with industry-established norms. Industry actors could form associations, like state bar associations or trade associations, to advocate for common-sense legislation, establish best practices and provide a forum for identifying and proactively addressing problems. These associations could

include review boards, mediation panels and even arbitral tribunals to hear and resolve disputes within a system that understands the unique context confronting entities operating in space.

Guidepost 2: Adapting existing frameworks. The frontier experience teaches that regulations cannot be imposed without understanding the environment in which they will operate. But that does not mean existing regulations are irrelevant. Quite the contrary, existing frameworks can provide a helpful starting point to tailor principles that will make sense for space industries. For example, the United Nations Convention on the International Sale of Goods and the International Chamber of Commerce's International Commercial Terms both reinforce the importance of international standards for cross-border transactions and provide established, near-universally accepted principles that can be adapted for a celestial setting. Rather than start from scratch, industry players and regulators should look at such principles and see how to adjust them for a new context.

Guidepost 3: Sensible self-help. We know from the frontier that self-help is inevitable in a sparsely regulated space. But self-help does not have to devolve into vigilantism. Private actors should include protections in their private contracts that address issues of jurisdiction, liability, choice-of-law and damages in a way that minimizes disputes and disruption. Entities should, in particular, think about including dispute resolution provisions that call for arbitration of disputes to streamline the resolution process, enable the selection of decisionmakers with industry expertise to decide novel questions, and ensure a neutral forum.

Those who ignore history are doomed to repeat its mistakes – but those who learn from the past have the potential to replicate its successes. Drawing from the frontier experience can help develop sensible regulations that ensure certainty, minimize risk and maximize the possibilities for innovation and creativity as we continue to explore this last frontier.